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1933

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CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE CALCUTTA HIGH COURT

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1933

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TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

CALCUTTA HIGH COURT

1933

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192	"	"	192	399	"	"	614	622	"	"	662	810	"	"	879	982	1933	"	582				
195	"	"	124	401	"	PC	61	626	"	"	483	812	"	"	798	990	"	"	458				
201	"	"	182	405	"	"	58	629	"	PC	122	815	"	"	780	992	"	"	695				
210	"	PO	1	412	"	"	64	638	"	"	143	818	1934	"	181	993	"	PC	178				
225	"	C	180	417	"	"	87	637	"	"	141	820	1933	"	814	998	1934	C	58				
227	"	"	546	420	"	"	55	641	"	C	715	821	"	"	752	1001	1933	"	900				
231	"	"	511	424	"	C	588	643	"	"	682	823	"	"	790	1009	"	"	590				
234	"	"	495	426	"	"	608	649	"	"	695	825	"	PO	150	1015	1934	"	145				
235	"	"	5	430	"	"	777	652	"	"	424	835	1934	C	71	1018	1933	"	892				
237	"	PO	20	435	"	"	571	655	"	"	406	838	"	"	1	1018	1933	"	892				
249	"	C	388	439	"	"	879	657	"	PO	87	841	"	"	27	1020	1934	"	48				
255	"	"	524	442	"	"	616	663	"	C	409	843	"	"	23	1021	1933	PO	103				
258	"	"	687	445	"	"	686	666	"	"	412	846	"	"	4	1029	"	C	443				

Comparative Tables

37 Calcutta Weekly Notes=All India Reporter--(Concd.)

OWN A. I. R.	OWN A. I. R.	OWN A. I. R.	OWN A. I. R.	OWN A. I. R.
1088 1984 O 80	1081 1984 C 169	1098 1984 O 109	11'9 1984 C 175	1161 1984 C 201
1096 1983 " 708	1086 " " 124	1'98 19'8 " 800	1141 1988 " 813	1167 19'8 " 806
1088 1984 " 119	1071 " " 85	1'02 1984 " 77	1144 1984 " 82	1170 1984 " 818
1073 " " 104	1074 1988 " 676	1105 " " 259	1149 1988 " 928	1174 " " 68
1045 " " 116	1078 1984 " 83	1109 " " 151	1151 " " 898	1180 1988 " 685
1048 " " 256	1081 " " 91	1122 " " 105	1159 1984 " 68	1185 " " 667
1050 1988 " 701	1084 1988 " 416	1181 1988 " 722	1169 1984 " 149	1186 1984 " 183
1064 1984 " 205	1087 1984 " 78	1188 " PO 198	1183 " " 149	

19 & 20 All India Criminal Reports=All India Reporter

Please refer to COMPARATIVE TABLE NO. I in A I R 1933 Allahabad.

34 Criminal Law Journal and 141 to 146 Indian Cases=All India Reporter

Please refer to COMPARATIVE TABLE NO. I in A I R 1933 Lahore.

1933 Criminal Cases=All India Reporter

Please refer to COMPARATIVE TABLE NO. I in A I R 1933 Nagpur.

TABLE No. II

Showing serialism the pages of the ALL INDIA REPORTER, 1933 CALCUTTA, with corresponding references of OTHER REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER 1933 CALCUTTA.

Column No. 2 denotes corresponding references of OTHER JOURNALS.

A I R 1933 Calcutta=Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	140 I C 80	24	36 C W N 847	68	60 Cal 24	96	141 I C 713
FB	34 Cr L J 837		141 I C 627		142 I C 54	98	86 C W N 1012
	1938Cr C 21	25	59 Cal 921	65	36 C W N 1127		57 O L J 1
8	66 C W N 877		141 I C 673		1938Cr C 103		141 I C 709
	66 O L J 15	27	59 Cal 838		142 I C 57	102	81 C W N 972
	1938Cr C 23		141 I C 689		60, Cal 341		140 I C 799
	60 Cal 181	36	36 C W N 722		84 Cr L J 288		58 C L J 289
	141 I C 647		56, C L J 281		19 A I Cr R 416	109	36 C W N 1108
	84 Cr L J 195		140 I C 550	66	141 I C 849		60 Cal 111
	19 A I Cr R 830		1938Cr C 71	69	59 Cal 513		142 I C 475
5	87 C W N 69		34 Cr L J 36		141 I C 858	115	59 Cal 1161
	1938Cr C 56		19 A I Cr R 118	72	84 C W N 1015		56 O L J 152
	143 I C 682	39	86 C W N 955		142 I C 95		26 C W N 545
	84 Cr L J 622		59 Cal 1461	73	58 C L J 12		141 I C 863
6	85 C W N 874		142 I C 15		142 I C 86	116	36 C W N 786
	140 I C 879	44	36 C W N 899	74	36 C W N 1010		56 O L J 77
	1938Cr C 26		142 I C 105		142 I C 89		189 I C 886
	84 Cr L J 23	47	37 C W N 91		58 O L J 818	117	86 C W N 132
	19 A I Cr R 145		1938Cr C 61	76	36 C W N 741		141 I C 804
8	87 C W N 24		141 I C 578		59 Cal 1898		19 Cr C 141
	1938Cr C 28		84 Cr L J 164		58 O L J 307		84 Cr L J 250
	141 I C 598		60 Cal 427		142 I C 72	118	1938Cr C 134
	84 Cr L J 168		19 A I Cr R 358	78	36 C W N 905		87 C W N 276
	19 A I Cr R 352	49	86 C W N 844		142 I C 66		60 Cal 608
11	86 C W N 1071		142 I C 88	81	36 C W N 78		143 I C 790
	1938Cr C 31	51	86 C W N 838		59 Cal 691		84 Cr L J 662
	141 I C 605		56 O L J 258		141 I C 871	124	87 C W N 195
	84 Cr L J 178		141 I C 86	88	36 C W N 693		1938Cr C 140
	19 A I Cr R 828	52	86 C W N 908		141 I C 87		60 Cal 571
12	59 Cal 945		60 Cal 162	85	36 C W N 1120		143 I C 802
	141 I C 598		142 I C 79		60 Cal 191		84 Cr L J 683
17	86 C W N 871		57 O L J 408		142 I C 60	128	34 C W N 1032
	140 I C 376	54	86 C W N 888		57 O L J 890		141 I C 82
19	59 Cal 1358		142 I C 897	90	36 C W N 878	129	59 Cal 1436
	142 I C 76	61	86 C W N 1007		141 I C 116		141 I C 860
20	36 C W N 869		56 O L J 865	94	86 C W N 1018	180	87 C W N 255
	110 I C 878		142 I C 60		57 O L J 26		1938Cr C 205
21	86 C W N 866	68	86 C W N 841		141 I C 782		142 I C 260
	140 I C 885		1938Cr C 106	96	56 O L J 140		

A. I. R. 1933 Calcutta=Other Journals—(Contd.)

A.I.R. Other Journals	A.I.R. Other Journals	A.I.R. Other Journals	A.I.R. Other Journals
182 34 C W N 201	186 60 Cal 351	246 36 C W N 955	818 34 Cr L J 532
1933Cr C 193	142 IC 351	60 Cal 8	819 56 C N J 246
142 IC 280	84 Cr L J 845	143 IC 381	143 IC 507
34 Cr L J 209	1933Cr C 233	60 Cal 19	56 C L J 380
60 Cal 618	142 IC 639	143 IC 679	143 IC 117
185 1933Cr C 197	34 Cr L J 869	36 C W N 758	822 36 C W N 1085
142 IC 274	87 C W N 258	55 C L J 430	60 Cal 296
34 Cr L J 294	1933Cr C 235	143 IC 402	143 IC 304
189 1933Cr C 200	142 IC 479	36 C W N 918	825 36 C W N 1188
142 IC 293	34 Cr L J 347	141 IC 888	60 Cal 87
84 Cr L J 305	1933Cr C 236	36 C W N 631	143 IC 315
140 1933Cr C 201	142 IC 658	143 IC 475	58 C L J 422
142 IC 292	34 Cr L J 490	36 C W N 89	329 36 C W N 495
84 Cr L J 309	37 C W N 192	143 IC 465	143 IC 457
141 142 IC 298	1933Cr C 243	55 C L J 89	60 Cal 794
1933Cr C 202	67 Cal 596	36 C W N 121	332 56 C L J 539
84 Cr L J 310	143 IC 703	143 IC 471	143 IC 118
142 142 IC 297	34 Cr L J 628	86 C W N 117	1933Cr C 411
1933Cr C 203	1933Cr C 245	143 IC 472	34 Cr L J 518
34 Cr L J 308	145 IC 925	60 Cal 145	383 1933Cr C 412
144 (1) 142 IC 150	84 Cr L J 1107	143 IC 654	146 IC 174
1933Cr C 205	56 C L J 418	58 C L J 154	34 Cr L J 1189
34 Cr L J 290	142 IC 520	36 C W N 112	335 36 C W N 666
19 A I Cr L 427	86 C W N 788	143 IC 327	143 IC 512
144 (2) 142 IC 182	55 C L J 671	60 Cal 98	887 56 C L J 586
145 60 Cal 44	142 IC 517	143 IC 710	143 IC 322
1933Cr C 222	56 C L J 263	142 IC 225	339 56 C L J 570
143 IC 774	142 IC 525	84 Cr L J 316	143 IC 284
34 Cr L J 681	56 C L J 172	1933Cr C 359	841 56 C L J 578
146 1933Cr C 223	141 IC 225	132 IC 204	1933Cr C 414
143 IC 797	36 C W N 861	37 C W N 368	143 IC 122
34 Cr L J 638	59 Cal 1475	84 Cr L J 291	34 Cr L J 521
147 1933Cr C 224	141 IC 358	1933Cr C 861	843 56 C L J 576
144 IC 88	36 C W N 733	60 Cal 742	143 IC 356
34 Cr L J 684	59 Cal 1176	86 C W N 924	344 56 C L J 595
148 1933Cr C 225	142 IC 452	141 IC 842	1933Cr C 416
144 IC 74	56 C L J 274	60 Cal 289	143 IC 359
34 Cr L J 676	142 IC 468	58 C L J 484	847 56 C L J 583
1933Cr C 226	37 C W N 93	36 C W N 119	1933Cr C 419
144 IC 78	60 Cal 445	143 IC 110	34 Cr L J 549
34 Cr L J 676	142 IC 522	36 C W N 922	143 IC 285
150 1933Cr C 227	1933Cr C 299	141 IC 839	343 142 IC 319
144 IC 75	84 Cr L J 303	60 Cal 80	34 Cr L J 834
34 Cr L J 679	37 C W N 81	36 C W N 1134	1933Cr C 420
151 56 C L J 440	60 Cal 421	60 Cal 247	853 1933Cr C 429
143 IC 484	142 IC 472	143 IC 30	144 IC 185
154 59 Cal 1372	1933Cr C 301	57 C L J 403	34 Cr L J 698
143 IC 193	56 C L J 359	36 C W N 790	864 37 C W N 312
165 56 C L J 285	143 IC 179	143 IC 141	1933Cr C 490
143 IC 377	36 C W N 1034	36 C W N 880	60 Cal 643
170 36 C W N 1101	56 C L J 250	1933Cr C 891	143 IC 598
60 Cal 332	141 IC 100	143 IC 14	84 Cr L J 611
142 IC 505	59 Cal 911	34 Cr L J 524	858(1) 1933Cr C 494
175 60 Cal 138	142 IC 747	20 A I Cr R 10	143 IC 88
56 C L J 279	85 C W N 1085	60 Cal 54	37 C W N 712
142 IC 518	56 C L J 148	144 IC 792	84 Cr L J 498
178 36 C W N 1147	141 IC 135	56 C L J 78	358(2) 87 C W N 453
141 IC 248	56 C L J 185	1933Cr C 408	1933Cr C 494
181 145 IC 575	141 IC 114	143 IC 120	143 IC 154
182 145 IC 598	1933Cr C 825	34 Cr L J 580	60 Cal 820
183 144 IC 929	60 Cal 676	56 C L J 580	361 1933Cr C 497
184 1933Cr C 230	143 IC 892	147 IC 881	144 IC 691
144 IC 930	34 Cr L J 671	55 C L J 558	34 Cr L J 814
34 Cr L J 868	1933Cr C 821	143 IC 367	862 37 C W N 317
20 A I Cr R 341	143 IC 899	56 C L J 228	142 IC 308
185 1933Cr C 231	34 Cr L J 668	143 IC 366	1933Cr C 498
144 IC 935	37 C W N 844	56 C L J 221	84 Cr L 341
34 Cr L J 865	1933Cr C 822	143 IC 370	87 C W N 481
20 A I Cr R 830	60 Cal 689	56 C L J 249	804 142 IC 310
186 86 C W N 1168	144 IC 198	1933Cr C 401	84 Cr L J 320
1933Cr C 232	34 Cr L J 693	143 IC 178	

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A. I. R. 1933 Calcutta=Other Journals--(Contd.)

A I R.	Other Journals	A I R.	Other Journals	A I R.	Other Journals	A I R.	Other Journals
364	1933Cr C 500	424	87 C W N 652	477	87 C W N 9	532	87 C W N 388
	60 Cal 814	426	87 C W N 595		144 I C 889		60 Cal 653
366	60 Cal 262	SB	143 I C 178	481	143 I C 15		1933Cr C 891
	1933Cr C 503		1933Cr C 624		84 Cr L J 593		145 I C 680
373	60 Cal 302		84 Cr L J 533		1933Cr C 794		84 Cr L J 1069
	144 I C 125		20 A I Cr R 30	482	87 C W N 113	584	87 C W N 889
377	60 Cal 219	429	60 Cal 394		145 I C 295		60 Cal 685
	144 I C 181		144 I C 137	486	87 C W N 146		145 I C 682
379	37 C W N 439	483 (1)	87 C W N 636		144 I C 779	585	60 Cal 701
	57 C L J 305		84 Cr L J 554	488	87 C W N 149		145 I C 665
	143 I C 785		143 I C 279		143 I C 757	587	60 Cal 651
	60 Cal 782		1933Cr C 705	490	87 C W N 4		1933Cr C 893
381	60 Cal 167	483 (2)	1933Cr C 705		145 I C 243		145 I C 658
	144 I C 230		87 C W N 932	492	87 C W N 132		84 Cr L J 1023
386	60 Cal 259		143 I C 795		60 Cal 438	539	87 C W N 13
	144 I C 214		84 Cr L J 640		145 I C 243		145 I C 427
387	60 Cal 313	435	143 I C 164	495 (1)	87 C W N 234	543	144 I C 92
	144 I C 216	SB	37 C W N 689		1933Cr C 770		60 Cal 1091
588	60 Cal 318		57 C L J 477		145 I C 177	544	143 I C 582
	37 C W N 249		60 Cal 1037		84 Cr L J 913	546	87 C W N 227
	144 I C 804	440	145 I C 884	495 (2)	87 C W N 139		60 Cal 530
391	60 Cal 254	441	87 C W N 720		145 I C 185		145 I C 123
	57 C L J 123		143 I C 766	496	87 C W N 190	547	87 C W N 298
	144 I C 823		60 Cal 975		145 I C 183		60 Cal 533
393	144 I C 593	443	143 I C 602	498	87 C W N 138		145 I C 265
397	60 Cal 292		87 C W N 1029		145 I C 170	549	87 C W N 309
	144 I C 193		60 Cal 1008	501	87 C W N 275		57 C L J 21
398	60 Cal 225	447	57 C L J 259		144 I C 740		60 Cal 630
	144 I C 193		37 C W N 709	502	60 Cal 691		145 I C 602
401	143 I C 233		143 I C 606		145 I C 313	551	144 I C 90
	1933Cr C 579		84 Cr L J 604	504	60 Cal 506		37 C W N 906
	34 Cr L J 579		1933Cr C 766		145 I C 313		1933Cr C 911
	60 Cal 851		60 Cal 1051	506	87 C W N 272		84 Cr L J 684
402	37 C W N 537	449	57 C L J 8		57 C L J 387	552	1933Cr C 912
	143 I C 31		145 I C 338		144 I C 764		37 C W N 319
	1933Cr C 580	454	87 C W N 708	508	37 C W N 284		145 I C 700
	84 Cr L J 503		143 I C 575		144 I C 768		84 Cr L J 1063
	20 A I Cr R 30	456	37 C W N 767	500	37 C W N 390		20 A I Cr R 893
	60 Cal 932		143 I C 567		1933Cr C 814	553	1933Cr C 906
404	37 C W N 341		1933Cr C 727		144 I C 879		87 C W N 802
	1933Cr C 582		84 Cr L J 603		84 Cr L J 841		145 I C 692
	143 I C 600	458	143 I C 612	511	37 C W N 231		84 Cr L J 1068
	84 Cr L J 608		1933Cr C 726		60 Cal 581	554	58 C L J 8
406	37 C W N 655		84 Cr L J 619		144 I C 892		147 I C 466
	1933Cr C 584		37 C W N 990		58 C L J 213	559	57 C L J 127
	143 I C 296		60 Cal 1089	513	87 C W N 186		145 I C 446
	34 Cr L J 590	459	57 C L J 37		1933Cr C 867	560	144 I C 892
407	37 C W N 447	480	37 C W N 89		144 I C 701	561	37 C W N 392
	143 I C 723		145 I C 121	515	37 C W N 285		57 C L J 881
	60 Cal 767	461	57 C L J 46		1933Cr C 859		60 Cal 695
409	37 C W N 663		145 I C 123		144 I C 704		145 I C 597
	143 I C 637	462	57 C L J 39		84 Cr L J 812	563	144 I C 93
	60 Cal 909		145 I C 116	516	60 Cal 545		84 Cr L J 682
411	60 Cal 384	464	37 C W N 84		1933Cr C 800		1933Cr C 940
	144 I C 155		144 I C 814		144 I C 957	564	57 C L J 148
412	37 C W N 686	467	60 Cal 379		84 Cr L J 879		37 C W N 535
	144 I C 462		87 C W N 119	519	60 Cal 538		145 I C 429
	58 C L J 460		144 I C 812		87 C W N 181	566	37 C W N 301
414	60 Cal 404	469	57 C L J 41		144 I C 894		146 I C 398
	144 I C 177		1933Cr C 749	522	60 Cal 281	571	37 C W N 435
416	143 I C 823		144 I C 817		37 C W N 14		145 I C 684
	37 C W N 1084		84 Cr L J 828		144 I C 743	574	57 C L J 71
417	60 Cal 345	472	37 C W N 591	524	60 Cal 601		146 I C 414
	144 I C 142		1933Cr C 752	SB	37 C W N 255	578	57 C L J 67
419	37 C W N 618		145 I C 363		144 I C 827		145 I C 522
	143 I C 254		84 Cr L J 965	526	144 I C 85	580	37 C W N 397
	60 Cal 1056		20 A I Cr R 386	527	60 Cal 587		145 I C 881
422	144 I C 150	474	87 C W N 112		57 C L J 120	581	37 C W N 395
424	1933Cr C 622		144 I C 863		144 I C 678		60 Cal 790
	144 I C 708	475	37 C W N 143	529	60 Cal 706		145 I C 638
	34 Cr L J 810		144 I C 870		146 I C 312		

A. I. R. 1933 Calcutta=Other Journals—(Contd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
582	37 <i>OW N</i> 982	627	146 <i>IO</i>	658	679	147 <i>IO</i>	827
	1938 <i>Cr O</i> 958	680	57 <i>OL J</i>	106	680	37 <i>OW N</i>	671
	34 <i>Cr L J</i> 958		145 <i>IO</i>	828		60 <i>Cal</i>	882
	145 <i>IO</i> 416	681	37 <i>OW N</i>	177	682	37 <i>OW N</i>	648
	60 <i>Cal</i> 1816		145 <i>IO</i>	894	684	37 <i>OW N</i>	679
588	37 <i>OW N</i> 424	682	60 <i>Cal</i>	788	687	37 <i>OW N</i>	256
	145 <i>IO</i> 657		37 <i>OW N</i>	504	689	37 <i>OW N</i>	675
590	37 <i>OW N</i> 1009		146 <i>IO</i>	671		147 <i>IO</i>	449
	144 <i>IO</i> 808	686 (1)	60 <i>Cal</i>	787	692	1938 <i>Cr O</i>	1154
	60 <i>Cal</i> 1287		145 <i>IO</i>	886		85 <i>Cr L J</i>	125
	59 <i>CL J</i> 23	686 (2)	37 <i>OW N</i>	445		146 <i>IO</i>	645
594	37 <i>OL J</i> 57		146 <i>IO</i>	608		60 <i>Cal</i>	1482
	1938 <i>Cr O</i> 958	688	60 <i>Cal</i>	725	695 (1)	145 <i>IO</i>	240
	146 <i>IO</i> 1051		1938 <i>Cr C</i>	1037		37 <i>OW N</i>	992
598	144 <i>IO</i> 877		145 <i>IO</i>	889		1938 <i>Cr O</i>	1162
	1938 <i>Cr O</i> 962		84 <i>Cr L J</i>	1098		84 <i>Cr L J</i>	925
	84 <i>Cr L J</i> 876	689	60 <i>Cal</i>	751	695 (2)	37 <i>OW N</i>	819
599	37 <i>OW N</i> 860		1938 <i>Cr C</i>	1088		60 <i>Cal</i>	906
	1938 <i>Cr O</i> 968		145 <i>IO</i>	816		147 <i>IO</i>	177
	145 <i>IO</i> 589		84 <i>Cr L J</i>	1072	696	60 <i>Cal</i>	940
	34 <i>Cr L J</i> 1015	640	60 <i>Cal</i>	729		147 <i>IO</i>	779
	20 <i>AI Cr R</i> 412		1938 <i>Cr O</i>	1058	699	37 <i>OW N</i>	718
600	1938 <i>Cr O</i> 964		145 <i>IO</i>	861		57 <i>OL J</i>	467
	37 <i>OW N</i> 1098		84 <i>Cr L J</i>	1084		60 <i>Cal</i>	986
	146 <i>IO</i> 878	641	60 <i>Cal</i>	761		147 <i>IO</i>	191
	60 <i>Cal</i> 1861		146 <i>IO</i>	868	701	37 <i>OW N</i>	1050
	35 <i>Cr L J</i> 23	642	37 <i>OW N</i>	471		60 <i>Cal</i>	926
603	37 <i>OW N</i> 426		58 <i>OL J</i>	226		147 <i>IO</i>	422
	1938 <i>Cr O</i> 967		146 <i>IO</i>	540	708	57 <i>OL J</i>	371
	145 <i>IO</i> 814	644	60 <i>Cal</i>	719		37 <i>OW N</i>	1096
	84 <i>Cr L J</i> 1078		1938 <i>Cr O</i>	1054		60 <i>Cal</i>	897
606 (1)	37 <i>OW N</i> 484		145 <i>IO</i>	962		147 <i>IO</i>	216
	1938 <i>Cr O</i> 970		84 <i>Cr L J</i>	1187	704	37 <i>OW N</i>	708
	145 <i>IO</i> 928	647 (1)	1938 <i>Cr O</i>	1057		146 <i>IO</i>	676
	84 <i>Cr L J</i> 1161		58 <i>OL J</i>	116	706	60 <i>Cal</i>	918
606 (2)	144 <i>IO</i> 846		37 <i>OW N</i>	1185		38 <i>OW N</i>	170
	1938 <i>Cr O</i> 970		146 <i>IO</i>	893		147 <i>IO</i>	455
	84 <i>Cr L J</i> 873		85 <i>Cr L J</i>	25	708	60 <i>Cal</i>	955
609	60 <i>Cal</i> 681	647 (2)	1938 <i>Cr O</i>	1057	715	37 <i>OW N</i>	641
	37 <i>OW N</i> 885		146 <i>IO</i>	366		60 <i>Cal</i>	914
	146 <i>IO</i> 55		85 <i>Cr L J</i>	29		147 <i>IO</i>	369
610	37 <i>OW N</i> 338	651	37 <i>OW N</i>	135	716	37 <i>OW N</i>	741
	146 <i>IO</i> 216		146 <i>IO</i>	597		60 <i>Cal</i>	901
612	37 <i>OW N</i> 478	652	37 <i>OW N</i>	586		147 <i>IO</i>	196
	145 <i>IO</i> 892		60 <i>Cal</i>	990	718	1938 <i>Cr O</i>	1258
	58 <i>OL J</i> 325		145 <i>IO</i>	885		38 <i>OW N</i>	71
614	37 <i>OW N</i> 399	656	37 <i>OW N</i>	261		147 <i>IO</i>	79
	1938 <i>Cr O</i> 1000		1938 <i>Cr O</i>	1102		60 <i>Cal</i>	1487
	145 <i>IO</i> 824		145 <i>IO</i>	821	722	37 <i>OW N</i>	1181
	84 <i>Cr L J</i> 1077		84 <i>Cr L J</i>	1078		1938 <i>Cr O</i>	1272
615	37 <i>OW N</i> 442	658	60 <i>Cal</i>	714		146 <i>IO</i>	937
	146 <i>IO</i> 409		37 <i>OW N</i>	826		84 <i>Cr L J</i>	1281
617	37 <i>OW N</i> 450		146 <i>IO</i>	884	724	1938 <i>Cr O</i>	1274
	60 <i>Cal</i> 434	660	37 <i>OW N</i>	296		146 <i>IO</i>	169
	145 <i>IO</i> 856		146 <i>IO</i>	928		84 <i>Cr L J</i>	1192
619	37 <i>OW N</i> 511	662	37 <i>OW N</i>	622		38 <i>OW N</i>	115
	57 <i>OL J</i> 429	665	145 <i>IO</i>	296	725	57 <i>OL J</i>	202
	1938 <i>Cr O</i> 998	SB	37 <i>OW N</i>	1180		146 <i>IO</i>	594
	145 <i>IO</i> 541		1938 <i>Cr O</i>	1104	727(1)	37 <i>OW N</i>	705
	84 <i>Cr L J</i> 1081		84 <i>Cr L J</i>	918		146 <i>IO</i>	570
621	37 <i>OW N</i> 478	668	60 <i>Cal</i>	801		60 <i>Cal</i>	847
	60 <i>Cal</i> 777	673	37 <i>OW N</i>	390	727(2)	145 <i>IO</i>	204
	146 <i>IO</i> 259	675	37 <i>OW N</i>	588	728	37 <i>OW N</i>	897
622	37 <i>OW N</i> 39		1938 <i>Cr O</i>	1157		60 <i>Cal</i>	948
	60 <i>Cal</i> 686	676	37 <i>OW N</i>	1074	731	145 <i>IO</i>	816
	146 <i>IO</i> 641		1938 <i>Cr O</i>	1158		1938 <i>Cr O</i>	1296
625	37 <i>OW N</i> 475		146 <i>IO</i>	805		38 <i>OW N</i>	278
	145 <i>IO</i> 526		60 <i>Cal</i>	1894		60 <i>Cal</i>	1458
	58 <i>OL J</i> 272		84 <i>Cr L J</i>	1219	732	37 <i>OW N</i>	787
627	60 <i>Cal</i> 758	679	37 <i>OW N</i>	569		60 <i>Cal</i>	892
	37 <i>OW N</i> 800		1938 <i>Cr O</i>	1161		1938 <i>Cr O</i>	1300

Comparative Tables

A. I. R. 1933 Calcutta=Other Journals—(Conold.)

A I R	Other Journals	A I R	Other Journals	A I R	Other Journals	A I R	Other Journals
791	57 O L J 211	814	37 C W N 820	861	37 C W N 732	893	37 C W N 1151
	1933 r O 1253		146 I O 791		147 I O 1007		1933 Cr O 2
	146 I O 354	815	37 C W N 766		1933 Cr O 1478		146 I O 590
	35 Cr L J 27		146 I O 879	864	37 C W N 906		35 Cr L J 97
792	37 C W N 821	816	37 C W N 583		147 I O 740	898	37 C W N 1069
	1933 Cr O 1459		147 I O 206	865	37 C W N 758		38 C W N 61
	60 Cal 1103	817	37 C W N 749	870	146 I O 937	900	60 Cal 1159
	146 I O 484		147 I O 492		38 C W N 25		37 C W N 1001
	35 Cr L J 84	820	37 C W N 581		34 Cr L J 1100		38 C L J 121
793	57 O L J 306		147 I O 484		1933 Cr O 1481	903	60 Cal 1176
	143 I O 878	822	59 C L J 5	875	37 C W N 791		37 C W N 1167
794	37 C W N 921		147 I O 209		60 Cal 1043		38 C L J 192
	146 I O 824	824	57 O L J 287		58 C L J 161	936	60 Cal 1115
796	37 C W N 179		147 I O 481	879	37 C W N 810		38 C W N 96
	146 I O 351	826	147 I O 459		147 I O 719		147 I O 727
797	37 C W N 920	831	37 C W N 730	880	146 I O 874	909	60 Cal 1022
	146 I O 395		146 I O 351		1933 Cr O 1890	912	60 Cal 1193
799	37 C W N 812	838	1933 Cr O 1493		34 Cr L J 1091		147 I O 908
800	1933 Cr O 1875		38 C W N 52		38 C W N 119	914	60 Cal 1139
	143 I O 767		147 I O 999	882	60 Cal 1072	919	60 Cal 1141
	35 Cr L J 156	835	146 I O 863	884	60 Cal 1003		37 C W N 901
	59 C L J 405	SB	34 Cr L J 1087		147 I O 811	923	60 Cal 1171
	38 C W N 137		1933 Cr O 1495	886	60 Cal 1106		37 C L J 549
809	37 C W N 909	841	37 C W N 769		147 I O 797		37 C W N 1148
	146 I O 502		60 Cal 1135	887	60 Cal 1096		147 I O 747
812	57 O L J 899	855	37 C W N 752	890	60 Cal 1110	924	60 Cal 1016
	37 C W N 1141	858	37 C W N 613	892	60 Cal 1078		147 I O 48
	143 I O 1010		60 Cal 1061		37 C W N 1018	926	60 Cal 1189
813	37 C W N 744		147 I O 478		58 C L J 822		147 I O 507
	146 I O 895						

CASE OVERRULED

in

A. I. R. 1933 Calcutta

Mrinmoyee Debsa v. Bhoobun Moyee Overruled in A. I. R. 1933 P. C. 202,
Debsa, (1875), 15 Beng. L. R. 1=23
W. R. 42.

THE ALL INDIA REPORTER 1933

CALCUTTA HIGH COURT

* A. 1 R. 1933 Calcutta 1 Full Bench

C. C. GHOSE, JACK AND M. C. GHOSH, JJ.

Prodyot Kumar Bhattacharjya —
Accused—Appellant.

v.

Emperor—Opposite Party.

Death Ref. No. 12 of 1932 and Criminal Appeal No. 597 of 1932, Decided on 22nd August 1932.

***(a) Bengal Criminal Law Amendment Act (1925), S. 3 (2)—Reference by District Magistrate and not by Commissioner is not incompetent.**

A reference under S. 3 (2) is not incompetent merely because the records were submitted by the District Magistrate and not by the Commissioners. [P 2 C 1]

***(b) Bengal Criminal Law Amendment Act (1925)—Judgment must be one by whole tribunal—Commissioner disagreeing cannot write separate judgment.**

In a trial under the Bengal Criminal Law Amendment Act, 1925, the Commissioners are bound to follow the directions contained in the Act. It is not a trial under the Criminal Procedure Code simpliciter before a tribunal of three Judges and there cannot be as many as two or three judgments. The judgment that has to be pronounced is a judgment of the Tribunal, i. e., one single judgment embodying the findings and the views of the Commissioners who composed the tribunal. If any Commissioner does not agree with the other two Commissioners as regards the sentence to be imposed on the accused the only course that is open to him is to intimate to the other two Commissioners his views on the question of sentence and to leave it to the Tribunal to embody his views on the question of sentence in the course of the judgment which is to be pronounced by the Tribunal. He has no right whatsoever to write a separate judgment of his own. [P 2 C 2]

(c) Criminal Trial—Sentence—Tender age by itself is not sufficient to mitigate punishment—It should be considered with other circumstances—Penal Code, S. 53.

There is no hard and fast rule that because the murderer is of what is called tender age he

must necessarily escape the normal penalty prescribed by the law. Age is no doubt a circumstance to be taken into consideration, but this has got to be taken into consideration along with various other circumstances present on the record and to which attention may be drawn either by the prosecution or by the defence. [P 2 C 2]

N. C. Sen, Hiralal Ganguli, J. C. Gupta
and *Jnananath Berah*—for the Accused.

N. N. Sircar and Satindra Nath Mukherji—for the Crown.

Judgment.—The accused Prodyot Kumar Bhattacharji was tried by three Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925 on charges under Ss. 302/120-B, 302/34 and 302/114, I. P. C., and also under S. 19 (f), Arms Act. The Commissioners unanimously found him guilty under S. 302/120-B, I. P. C., and also under S. 302-34, I. P. C., and convicted him accordingly under the said two sections. As regards the charge under S. 302/114, I. P. C., the Commissioners stated that having regard to their finding on the said other two charges they did not convict him under this charge and the accused was thereupon acquitted of the charge under S. 302/114, I. P. C. As regards the charge under S. 19 (f), Arms Act, the accused was found guilty and convicted accordingly. So far as the sentence on the accused was concerned two of the Commissioners were of opinion that having regard to the circumstances disclosed on the evidence on record nothing could be said in mitigation of the sentence of death and they accordingly directed that the accused should be hanged by the neck until he was dead. The other Commissioner Mr. J. Do was of opinion that the ends of justice would be sufficiently met by the accused being sentenced to transportation for life. The dissenting Commissioner has purported to write a judg-

ment differing from the majority of the Commissioners on the question of sentence and a question has been raised whether, having regard to the language of the Bengal Criminal Law Amendment Act 1925, and the rules made thereunder, the dissenting Commissioner was competent to write a separate judgment of his own. On this question we shall have something to say later on.

After the conclusion of the trial before the Commissioners the records of the proceedings were submitted to this Court by Mr. Burge, Deputy Magistrate, Midnapore and it has been argued before us by learned counsel on behalf of the accused that Mr. Burge was incompetent to submit the records of the proceedings to the High Court and that the proper persons who could have submitted the records were the Commissioners and not the District Magistrate. It has been argued by learned counsel for the accused that the reference is incompetent and that we cannot legally go into the question of the confirmation of the sentence of death passed on the accused and that the only course open to us is to re-transmit the records to the place wherefrom they were sent. This contention, in our opinion, has absolutely no substance and in this connexion we would content ourselves by drawing attention to S. 3 (2), Bengal Criminal Law Amendment (Supplementary) Act, 1925, which runs as follows:

"When the Commissioners pass a sentence of death the record of the proceedings before them shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court which shall exercise, in respect of such proceedings, all the powers conferred on the High Court by Chap. 27 of the Code."

(After considering the facts and discussing evidence the judgement proceeded). As stated above, we have examined the entire record from cover to cover with a single desire to find out the truth and we are bound to state that the prosecution has satisfactorily brought home to the accused his guilt in this matter. We are therefore in agreement with the Commissioners in holding that the accused has been rightly convicted under the sections referred to above including the section relating to the offence under the Arms Act. In coming to this conclusion we have not overlooked the significance of the medical evidence and

the case for the prosecution that the bullets which killed Mr. Douglas were of 380 bore and that these were apparently not fired by the accused.

The only question that now remains for our consideration is the question of the sentence to be passed on the accused. Our attention has been drawn to what has been written by Mr. De— one of the Commissioners—in what he calls a dissenting judgment. We desire to make it plain that the trial being one under the Bengal Criminal Law Amendment Act, 1925, the Commissioners were bound to follow the directions contained in the Act. It was not a trial under the Criminal Procedure Code simpliciter before a tribunal of three Judges; it was a trial before a Special Tribunal under a Special Act and there is no room for the contention that there can be as many as two or three judgments in the case. The judgment that had to be pronounced was a judgment of the Tribunal, i. e. one single judgment embodying the findings and the views of the Commissioners who composed the Tribunal. If Mr. De did not agree with the other two Commissioners as regards the sentence to be imposed on the accused the only course that was open to him was to intimate to the other two Commissioners his views on the question of sentence and to leave it to the Tribunal to embody his views on the question of sentence in the course of the judgment which was to be pronounced by the Tribunal. He had no right whatsoever to write a separate judgment of his own, and what he did was clearly not contemplated by the law and was in every way irregular. But, be that as it may, we have allowed the learned counsel for the defence to adopt what Mr. De has said as part of his argument and it need not be stated that we have considered the matter fully and with much anxious care.

The assessment of sentence in cases of this description is always beset with difficulties, but we desire to make it plain that there is no hard and fast rule that because the murderer is of what is called tender age he must necessarily escape the normal penalty prescribed by the law. Age is no doubt a circumstance to be taken into consideration, but this has got to be taken into consideration along with various other circumstances present on the record and to which attention

may be drawn either by the prosecution or by the defence. The murder in this case was of an extremely cowardly character. The murdered man had not even a sporting chance. He was felled down and done to death while he was engaged in doing the duties imposed on him by virtue of his office as District Magistrate of Midnapore. He had done, as far as the present record goes, no injury to any human being and there was no earthly reason whatsoever as to why he should have been done to death unless it be that he was of alien origin and that therefore vengeance was to be wreaked on him on account of some vague, unknown, unsubstantial and indefinable grievance: see in this connection Exs. 1, 19, 14-22, 19, 21, 16 and 15. Remember also that this is not the first case of its kind. We are bound to take notice of the recrudescence of murders of this description. There is nothing on the record which can be urged in mitigation of sentence, although we have explored the whole of the record in our endeavours to find something or other in favour of the accused. We are of opinion that we should be failing in our duty if we refrained from confirming the sentence of death passed by the Commissioners.

The result therefore is that the sentence of death passed by the Commissioners is confirmed and the appeal preferred by the accused is dismissed.

R.K. *Appeal dismissed.*

A. I. R. 1933 Calcutta 3

PANCKRIDGE, J.

Hatu Naik and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 268 of 1932, Decided on 23rd May 1932.

Bengal Embankment Act (1882), S. 76 (b)—“Existing embankment”, Meaning of explained.

By “existing embankment” is meant the embankment as it existed at the date when the additions were made, that is to say, that permission of the Collector is necessary even for repairs, if those repairs involve additions to the embankment in the state that it is in, when these repairs begin. It does not mean the embankment as it existed at the date of the notification under S. 6: 38 Cal 413 and 111 R 1919 Cal 669, Ref. [114 C 23]

Narendra Kumar Bose and Saroj Kumar Maity—for Petitioners.

D. N. Bhattacharji—for the Crown.

Judgment.—A point of some importance is raised by this Rule. That point is indicated by ground 3 which is in the following terms:

“For that in the absence of any evidence as to the original height of the bund the conviction is bad in law.”

It appears that petitioner 23, Pulin Behari Dutt is one of the owners of an embankment called the Taladiha zamindari embankment which is situated in an area in respect of which a notification has been made under S. 6, Bengal Embankment Act, 1882. The date of this notification is 11th March 1901. In 1926 there were floods of exceptional gravity in the District of Midnapur; as a result of these floods the embankment was breached at several places. Petitioner 23 and also some of his tenants applied to the Collector for permission to repair the bund up to the old level. The Collector on 5th April 1928, gave permission to repair the breaches up to the level of 19'. A further application was made on 4th January 1929 to the Collector asking him to give permission to raise the bund to the original level which was alleged to be more than 19'. On 23rd April, the Collector gave permission for the bund to be repaired to a level of 19' for the 1st mile, 20' for the 2nd mile, and 21' for the 3rd mile and 22' for the 4th mile. There is evidence to the effect that all the petitioners with the exception of petitioner 23 were seen working on the bund with the result that it was raised to levels in excess of those prescribed by the Collector's order. There is also evidence that persons working on the bund refused to obey the Irrigation Department Officer who called upon them to desist.

Further there is the evidence of a P.W. D. Surveyor that various sections of the bund have been raised to heights exceeding those for which the Collector has granted permission. On these materials the petitioners were served with notices alleging that they had raised the embankment above the original level. The notices further informed them that unless they levelled down the embankment by a certain date they would be prosecuted. Nothing was done by the petitioners and in due course they were prosecuted and convicted by the

learned Magistrate of an offence punishable under S. 76 (b), Bengal Embankment Act, namely, of having without previous permission of the Collector added to an existing embankment and petitioner 23 was ordered to pay a fine of Rs. 30 or in default to suffer rigorous imprisonment for one month and the other petitioners were ordered to pay a fine of Rs. 15 each or in default to suffer rigorous imprisonment for a fortnight. The Magistrate further made an order under S. 79 directing the petitioners to remove the addition made to the zamindari embankment 'beyond the permissive level sanctioned by the Collector within one month from the date of the order. The petitioners then moved the High Court and it appeared that the proceedings before the Magistrate had been vitiated by certain irregularities of procedure. The High Court accordingly set aside the convictions and ordered the petitioners to be retried, the retrial to begin from the stage immediately preceding the examination of the accused persons under S. 342, Criminal P. C. The petitioners were retried and were again convicted. The learned Magistrate sentenced petitioner 23 to pay a fine of Rs. 40 or in default to suffer rigorous imprisonment for one month and the other petitioners to pay a fine of Rs. 20 each or in default to undergo rigorous imprisonment for one week. It is against these convictions and sentences that this Rule has been obtained.

Now Mr. Basu maintains that there is no evidence to prove what the original level of the bund was. There certainly is evidence to show what the level of the bund was in 1926 and the trying Court has arrived at a finding on the matter, namely, that it was below 19'5" for the 1st mile and below 22' for the 2nd, 3rd and 4th miles. These levels have been exceeded in consequence of the work which is said to have been done by the petitioners. Mr. Basu argues that this is not enough and he says that "existing embankment" must be taken to mean an embankment as it existed at the date of the notification, that is to say in 1901. There is admittedly no evidence on the record as to the state of things in that year. I find myself unable to agree with this construction of the section. Authority is against Mr. Basu. In the case of *Ram Nath Pandit*

v. *Emperor* (1), Holmwood and Sharfuddin, JJ., held that "existing embankment" in Cl. (b), S. 76 bears the same interpretation as "existing embankment" in Cl. (a), that is an embankment existing at the time the addition is made. Following that case Richardson and Shamsul Huda, JJ., in the case of *Emperor v. Lakshi Kanta Hazra* (2), expressly laid down that "existing embankment" means the embankment existing when the addition is made and not the embankment as it existed at the date of the notification under S. 6. As against these authorities Mr. Basu has relied on the judgment of M. N. Mukerji, J., in dealing with two unreported cases: References Nos. 48 and 49 of 1929. In those cases Mukerji, J., sitting singly accepted the references made by the learned Sessions Judge of Midnapur and set aside the convictions under S. 76 (b).

No reasons however are given for the decision and the letter of reference raises several points any one of which, if accepted would justify the Court in setting aside the conviction. The only relevant paragraph in the letter of reference is para. (c) where the learned Judge submits that unless there be evidence as to what the height was before the additions and the height after the additions there can be no conviction under S. 76 (b), Act 2. That does not imply that the learned Sessions Judge is putting forward a submission that the state of things to be considered is the state of things at the date of the notification. Nor does the judgment of the Court imply that it accepted the view for which Mr. Basu has been arguing. On this point it is really sufficient if I say I cannot accede to the petitioners argument, namely, that the petitioners were entitled to raise the bund to the height to which it was in 1901 and there being no evidence of its height in that year there is nothing to show that that height has been exceeded. I think I should add that although the view put forward by Mr. Bhattacharji for the Crown may lead to certain difficulties, it appears to me to be the right one, namely, by "existing embankment" is meant the embankment as it existed at the date when the

(1) [1911] 33 Cal 418=12 Cr L J 65=9 I C 360.

(2) A I R 1919 Cal 669=50 I C 669=46 Cal 825.

additions were made, that is to say, that permission of the Collector is necessary even for repairs if these repairs involve additions to the embankment in the state that it is in when these repairs begin: whether the department would ever commence proceedings against persons who have merely restored the bund to the state it was in before it was damaged is a question on which I do not feel called to express an opinion. But having regard to the language of S. 76 (b) and the authorities I feel constrained to hold that Mr. Bhattacharji's construction is the correct one.

I do not think that there is any substance in any other of the grounds raised by the petitioners. I think there is ample material on the record from which the Court could infer that petitioner 23 was a party to the illegal raising of the level of the bund even though none of the witnesses called could swear to having seen him working on the site. Similarly I see no reason why the order made under S. 79 of the Act should be set aside. In these circumstances the Rule must be discharged and the convictions and sentences affirmed.

K.N./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 5

MALLIK AND PATTERSON, JJ.

Miajan Biswas and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 55 of 1932, Decided on 20th July 1932.

(a) Evidence Act (1872), S. 126—Muktear in possession of draft of incomplete statement but not meant to be filed can claim privilege.

Where it is not shown that a certain petition in the possession of a muktear which was sought to be produced was the document meant to be filed in Court but it was only a draft of some statements made by the complainant and the petition had not been completed the muktear is entitled to privilege under S. 126: 5 *Bom L R* 122, *Dist.* [P 6 C 1]

(b) Criminal P. C. (1893), S. 297—Non-direction—Evidence against all accused not same—Evidence against each should be dealt with separately.

In a case before the jury there were three accused. The evidence against accused 3 was not the same as the evidence against the other two but was less.

Held: that the charge which did not deal with the evidence against accused 3, separately was bad for non-direction vitiating the conviction of accused 3. [P 6 C 1, 2]

Joy Gopal Ghose—for Appellants.

Jitendra Mohan Bannerjee—for the Crown.

Mallik, J.—The three appellants Miajan Biswas, Afser alias Afseruddin Molla and Samsil alias Samseluddin Molla with two other men Mokshoa Shaikh and Ismail Shaikh were put on their trial under Ss. 366, 458, 147 and 148, I. P. C. The trial was held by a jury. The jury unanimously found Mokshoa Shaikh and Ismail Shaikh not guilty but Afser and Miajan guilty under Ss. 147, 148, 366 and 458, I. P. C., and Samsil guilty under Ss. 147, 366 and 458, I. P. C. The learned Judge accepted this verdict of the jury and sentenced Miajan and Afser to rigorous imprisonment for five years each under Ss. 366 and 458, I. P. C., no separate sentence being passed under Ss. 147 and 148 and the direction being that the sentences under Ss. 366 and 458 were to run concurrently. The learned Judge sentenced Samsil to five years' rigorous imprisonment under each of the Ss. 366 and 458 (the sentences to run concurrently) no separate sentence being passed under S. 147, I. P. C. The facts of the case for the prosecution were very briefly these:

The accused Afser and Miajan one day came to the house of Bhim Mandal, the husband of Shama Dasi during Bhim Mandal's absence and made immoral proposals to Shama Dasi which Shama Dasi rejected. Afser and Miajan went away threatening her. When Bhim returned home, Shama Dasi told him what had happened whereupon Bhim took her to the house of one Jagnessar and kept her there for safety. On the night of 29th April 1931, the accused men with four or five other persons came to Jagessar's house, broke open the walls of the ghar in which Shama Dasi was sleeping and forcibly dragged her away. Shama Dasi thereafter was taken from one place to another until she was recovered on 17th May 1931 from the akra of one Ramananda Goswami by her husband Bhim Mandal. The appellants with two others were thereupon put on their trial with the result that has been stated before.

On behalf of the appellants it was first contended that the learned Judge in his charge to the jury had not given full direction as to the effect of non-

examination of material witnesses in the case. (After overruling this contention the judgment proceeded). It appears that the defence wanted a muktear to produce in Court a petition of complaint which, according to the accused, the complainant wanted to file in Court. The muktear refused to produce this document seeking privilege under S. 126, Evidence Act, and this claim of privilege was allowed by the learned Judge. It was said that here the learned Judge was wrong in law and it was contended that on that account the trial was vitiated. In support of this contention our attention was drawn to the decision in the case of *Emperor v. Mariane G. Rodrigues* (1), the argument being that the petition was meant to be filed in Court and there could not therefore be anything confidential in it. The argument, so far as it goes, seems to be all right. But facts were not established in the case which would make the decision in the case, *Emperor v. Mariane G. Rodrigues* (1), applicable to the case before us. It could not be elicited from the muktear that the document which was sought to be produced was the document meant to be filed in Court. The evidence shows that it was only a draft of some statements made by the complainant and that the petition had not been completed. It might very well be that there were some statements in that draft which were not to be incorporated in the petition of complaint when it would be finally prepared for presentation to the Court. If in these circumstances the learned Judge uphold the claim of privilege I do not think he did anything that was wrong in law.

There was another ground on which the learned Judge's charge was assailed before us. The ground was that the learned Judge in his charge did not deal with the evidence in the case as it stood against the accused persons separately. This contention, in my opinion, is not without foundation. There can be no doubt that the evidence against appellant 3, Samsil, was not the same as the evidence against the other two appellants Miajan and Afser. To mention only one or two such instances, Samsil had not been identified by Shama Dasi in the lower Court whereas she had experienced no such difficulty in the case

of Miajan and Afser. P. W. 7, Tarak Pramanik, could say something against Miajan and Afser but not against appellant 3 Samsil. To the same effect is the deposition of P.W. 14 Ramananda Das, Bairagi. There is no doubt therefore that the evidence as it stood against Samsil was different from that as it stood against the other two appellants, Miajan and Afser which alone the learned Judge discussed and put before the jury without telling them that the evidence against Samsil was less than that against the other two men Miajan and Afser. In these circumstances the omission on the part of the learned Judge to deal with and discuss the case against Samsil individually and separately from that of the other two men was, in my opinion, a serious non-direction so far as Samsil was concerned, making his conviction untenable.

As regards the other two appellants the severity of sentence passed on them was another point urged before us. Having regard to the facts of the case and remembering that the accused broke open the house of Jajnessar, forcibly entered that house and from there dragged the woman away after having assaulted Jajnessar the sentence of five years' rigorous imprisonment does not seem to me to be unduly severe.

The result is that the appeal of Miajan and Afser is dismissed and that of Samsil allowed. The conviction and sentence of Samsil are set aside. Samsil will be set at liberty immediately.

Patterson, J.—I agree.

M.N.

Order accordingly.

A. I. R. 1933 Calcutta 6

MALLIK AND REMFRY, JJ.

Kashem Ali and another—Appellants.
v.

Emperor—Opposito Party.

Criminal Appeal No. 902 of 1931, Decided on 12th May 1932.

(a) Evidence Act (1872), Ss. 30, 133 and 114, III. (b)—Corroboration of retracted confession—Corroboration must come from independent witness and not from evidence of accomplices.

Before there can be a conviction on a retracted confession of a co-accused, there must be corroboration on material particulars. This corroboration must come from independent witnesses and it would not do if the corroboration comes from evidence which in itself is tainted, being evidence by an accomplice. [P 8 C 1]

(b) **Criminal P. C. (1898), S. 297**—Circumstances under which conviction can be based on retracted confession of co-accused not given—Omission amounts to serious non-direction.

The omission by the Judge to give a full and sufficient warning to the jury as to the circumstances under which a conviction can be based on a retracted confession of a co-accused amounts to a serious non-direction. [P 8 C 2]

Sudhansu Sekhar Mukherji—for Appellants.

Nirmal Kumar Sen—for the Crown.

Mallik, J.—The two appellants Kashemali and Maidan Parmanik with seven other men were put on their trial on a charge of dacoity under S. 395 and also under S. 412, I. P. C. The trial was held with the aid of a jury. The jury found two of the accused men not guilty and the remaining seven persons were found by them to be guilty. Kashemali and Maidan the two appellants before us were among those seven. As regards Maidan the verdict of the jury was unanimous. As regards Kashemali however it was divided—three jurors being of opinion that the man was guilty while the remaining two being of opinion that he was not guilty. The learned Judge accepted this verdict of the jury and sentenced Kashemali under Ss. 395 and 412, I. P. C., to five years' rigorous imprisonment and he sentenced the other appellant Maidan also to five years' rigorous imprisonment under S. 395, I. P. C.

On the night of 15th January 1931 there was a dacoity in the house of one Yusuf, doctor. A pretty large number of men broke into his house, assaulted Yusuf, his wife and son, broke open the chest and an almirah and took away a considerable amount of money about Rs. 7,000 altogether from inside the chests. The occurrence took place at about 3 in the morning of 15th January and an information was lodged at the thana by one Serajul Huq, a nephew of Yusuf, doctor, on the same day at 9-30 a. m., the thana being six miles from the place of occurrence. In the first information report the name of one of the dacoits Sekandar was mentioned. An investigation followed and a number of arrests were made and as many as nine men were put on their trial with the result I have stated before. The evidence against the appellant Maidan consisted of the retracted confession of one of the dacoits Naimuddin by name and the test identification at which Maidan was

identified. The evidence against the other appellant Kashemali consisted of the retracted confession of Naimuddin and the evidence of two men Ramproshad and Makbulali.

On behalf of the appellants the Judge's charge to the jury has been assailed before us on more than one ground. So far as the appellant Maidan is concerned the charge was attacked on three grounds. It was said that although according to the evidence of Serajul Huq (the man who lodged the first information report at the thana) Serajul Huq knew Maidan as a man of Dukhibari, in the first information report he did not say that any man of Dukhibari had been among the dacoits. But this fact was, as the learned Judge's charge to the jury would show, actually put before the jury. It was said that although according to the first information report, P. W. 3, Yusuf's wife, would be able to identify the man who had inflicted injuries on her, Yusuf's wife in her evidence in Court identified not only the man who had inflicted injuries on her but another man and the contention before us was that this fact was not put before the jury. Here again the charge would show that the learned Judge did tell the jury what evidence Yusuf's wife had given in Court, and he did tell the jury also that in the first information report Serajul Huq had stated that Yusuf's wife would be able to identify the person who had inflicted injuries on her.

As regards Maidan the third contention before us was that the learned Judge did not tell the jury that although one Aziz knew Maidan and although Aziz had seen the chowkidar who had accompanied Serajul Huq to the thana before Serajul Huq went there, Maidan's name found no mention in the first information report. This argument would have some force in it if there had been any evidence to show that there had been some conversation between Aziz and Serajul Huq in connexion with Maidan. But the learned advocate for the appellants had to admit that there was no such evidence on the record of the case. All the three points taken on behalf of the appellant Maidan must therefore fail.

The case of the other appellant Kashemali stands however on a different footing. The evidence against this man, as I have stated before, consisted of the

retracted confession of Naimuddin and the evidence of the two persons Ramproshad and Makbulali by name. Ramproshad was the person who by an appointment had met the dacoits before the dacoity took place at a place called Raipur and when on arrival there he found out what the object of the men was, he came away. According to him, Kashemali on the next day told him that on the previous night he (Kashemali) had committed a dacoity. Makbul was the man to whom Naimuddin admitted having with others committed dacoity in Yusuf's house and complained that his companions had given him no share of the booty whereupon Makbul took down the names of the persons who according to Naimuddin had committed the dacoity on a slip of paper and this slip of paper contained the name of Kashemali as one of the dacoits. The slip of paper was seized from Makbul after his arrest during the police investigation. Ramproshad in his statement recorded under S. 104, Criminal P. C., had not mentioned Kashemali as the person who had come to him and admitted having committed a dacoity on the previous night. According to that statement it was one Kumar who had come and made that statement to him.

This fact the learned Judge did not put to the jury, a fact which in our opinion, was a very important one, in considering whether Ramproshad was a truthful witness or not. The learned Judge told the jury in a way that both Ramproshad and Makbul were no better than accomplices. But the learned Judge although when telling the jury that before there could be a conviction on a retracted confession of a co-accused there must be corroboration on material particulars, he pointed out to the jury that the retracted confession of Naimuddin had been corroborated by the evidence of Ramproshad and Makbul omitted to tell them, that this corroboration must come from independent witnesses and that it would not do if that corroboration would come from evidence which in itself was tainted as the evidence by an accomplice undoubtedly is. The evidence against Kashemali as I have stated more than once before consisted of the retracted confession of Naimuddin and the statements of the accomplices Ramproshad and Makbul and that being so, the

omission of the learned Judge to give a full and sufficient warning to the jury as to the circumstances under which a conviction can be based on a retracted confession of a co-accused amounted, in my opinion, so far as Kashemali is concerned, to a serious nondirection. We would therefore dismiss the appeal of the appellant Maidan Pramanik and allow the appeal of Kashemali. Kashemali's conviction and sentence are set aside. He is acquitted and directed to be set at liberty at once.

Remfry, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1933 Calcutta 8

COSTELLO, J.

Saligram Khetry — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 263 of 1932, Decided on 4th August 1932.

(a) Calcutta Police Act (1866), S. 50-A—“Mere” does not mean pure — Sufficiently expert person having complete control over result—No external circumstances intervening—Game is of mere skill—Whether skill or chance predominates is not material.

The word “mere” in S. 50-A does not mean pure. A game of mere skill should be taken to mean one in which a person playing it, as far as possible in any human affairs, has complete control over the result which he sets out to attain, provided he is sufficiently expert in performance. The real test is: Is there any external thing or fortuitous circumstance which may interpose between the action of the player and the result to be attained and are the media or instruments of the operation all ascertained the moment the game begins. The criterion of whether skill or chance is the predominant or governing element cannot be applied: *A I R 1929 Cal 769, Disc.*

[P 10 C 2; P 11 C 1]

(b) Calcutta Police Act (1866), S. 50-A—Whether game is of mere skill is question of fact.

The question of whether or not the game is one of mere skill for the purpose of invoking the protection of S. 50-A is a question of fact.

[P 11 C 2]

S. N. Banerji, Santosh Kumar Basu and Parimal Mukherji—for Petitioner.

Khundkar and Nirmal Chandra Chakraborty—for the Crown.

Judgment.—In this case three accused persons Saligram Khetry, N. H. Balakani and R. N. Swinton were charged under S. 44, Calcutta Police Act (Bengal Act 4 of 1866). Khetry was the proprietor of a show known as The Grand Variety Show and Balakani and Swinton

were his assistants who helped him in running that show. On 14th January 1932 an application was made to the police authorities by the manager of that show for permission to carry it on at 124, Bow Bazar Street, for a period of three months and to conduct various side shows and games of skill including a game known as the "dart game." The permission asked for was granted by the police on 19th January 1932. But on 16th February 1932 an order was issued by the police authorities countermanning the sanction as regards the particular game known as the dart game on the ground that it did not belong to the classes of game which are predominantly games of skill. This order was duly communicated by a police officer on the following day to the accused Saligram Khetry at about three o'clock in the afternoon. Another police officer was sent out at 5 p. m. to ascertain whether the game was still being carried on and upon his reporting that it was still in operation, another police officer who was the first witness for the prosecution in the Court below, went to the show ground and found that the game was in progress in one of the stalls and he took possession of the apparatus and arrested all the persons found in the stall. As the outcome of that the three persons, whose names I have given, were charged under S. 44 as already stated. That section provides as follows:

"Whoever, being the owner, occupier or having the use of any house, room or place, opens, keeps or uses the same as a common gaming house; and whoever, being the owner or occupier of any house or room, knowingly and wilfully permits the same to be opened, kept or used by any other person as a common gaming-house; and whoever has the care or management of or in any manner assists in conducting the business of any house, room or place so opened, kept or used; and whoever advances or furnishes money for the purpose of gaming with persons frequenting such house, room or place, shall be liable, on summary conviction before a Magistrate to a fine not exceeding Rs. 500 or to imprisonment, with or without hard labour, for any term not exceeding three months."

The learned Chief Presidency Magistrate found all the accused persons guilty under S. 44. In making the order he said:

"It is not disputed that Saligram is the manager and the other two accused persons are his assistants. The accused Saligram is fined Rs. 50 in default two weeks rigorous imprisonment. The accused Balakani and Swinton are fined

Rs. 5 each, in default five days rigorous imprisonment each. The instruments of gaming and the money that have been seized are confiscated under S. 48 of the said Act."

The only question before the learned Chief Presidency Magistrate was whether or not the accused could avail themselves of the exception provided in S. 50-A, Calcutta Police Act. That section was inserted into the Calcutta Police Act by the Bengal Public Gambling (Amending) Act No. 4 of 1913. S. 50-A reads as follows: "Nothing in S. 44 to S. 50 shall apply to any game of mere skill, wherever played." The learned Magistrate in his judgment said:

"The only point for determination is whether this dart game constituted gaming or not. It is not in dispute that the game was being played."

The learned Magistrate rightly took the view that the other conditions named in S. 44 were undoubtedly present. The ground on which this matter came before this Court in revision, is stated in the petition in these words:

"For that in view of the reasons given by the learned Magistrate himself, the dart game ought to have been held to be a game of mere skill and not one of chance."

As described by the learned Magistrate the game was played in the following manner: "A square wooden board which has about a hundred squares, coloured red, blue, white and green, is fixed up above seven feet from the ground; the player stands twelve feet from this target; between him and the target is a table on which are placed card-board squares bearing coloured discs; the player chooses his colour and puts a rupee on it; he is given four darts; if the player places all four darts on squares of the pre-selected colour on the target he is paid four rupees; apparently he gets a rupee for every successful throw; total failure means loss of the stake." The learned Magistrate then proceeded as follows:

"The defence has called a witness who demonstrated in Court that he is an expert at this game; he was successful with two throws out of three; on a second attempt both throws were successful. It is urged that this is a game in which skill preponderates over chance and therefore it is not gaming. It is also urged that the game was allowed by the police and therefore no offence was committed."

The finding of the learned Magistrate was in these terms:

"On a careful consideration of the nature of the game and the manner of play I am satisfied that it is a form of gaming."

Then he says :

"The manner in which the game is played shows definitely that the element of chance preponderates. The ordinary person who has had no previous practice can only hit the mark, (that is, one of the numerous coloured squares according to the colour chosen) by sheer fluke or accident. The large number of squares of each colour, the small size of each of the squares, the distance at which the player stands from the target, are all factors which render a successful throw extremely unlikely and a matter of pure chance. The fact that some people can acquire or have acquired unusual skill does not alter the nature of the game so far as the general public is concerned."

The learned Magistrate then said :

"It has been laid down in *Emperor v. Arjun Singh* (1), that it is not necessary to consider whether the element of skill preponderates over the element of chance. All that is necessary to determine is whether the game is one of pure skill. It cannot for a moment be imagined that the dart game is one of pure skill. It is therefore a form of gaming. If it were a game of pure skill it would not be necessary to have so many squares of the same colour, in different parts of the target. If this were a game in which the player selected the very square on which he was going to throw his dart, it would be a game of pure skill."

For those reasons the learned Magistrate came to the finding that this dart game was not a game of "mere skill", the words used in S. 50-A, Calcutta Police Act, and therefore constituted an illegal game so as to bring the persons running it within the purview of S. 44. The only point I have to decide is whether or not I am in agreement with the view taken by the learned Magistrate. As I have indicated the learned Magistrate seems to have placed a considerable or at any rate some reliance upon the decision in *Emperor v. Arjun Singh* (1). That decision was given by Mukerji, J., in the case of *Emperor v. Arjun Singh* (1). In the course of his judgment at p. 523 of the report the learned Judge said :

"The question as to whether a game is one of pure chance or one in which the element of skill preponderates considerations which were thought important under the Act as it stood before are no longer pertinent. We have to see whether the game is covered by what is meant by gaming; if it is, it is hit by the Act, unless it is a game of mere skill."

Broadly speaking, with that proposition I agree. But I am bound to say that it seems a little difficult to think of any game which is absolutely devoid of all possibilities of some fortuitous element entering into the playing of it. The

element of chance may be small or even infinitesimal, but in practically in all pastimes which can rightly be described as games even though they are, undoubtedly, games of skill, some element of chance might creep in. I make these observations for the purpose of saying that in my opinion, it is very difficult to read the word "mere" as if it were synonymous with the word "pure" in the strict and scientific sense of the latter word. I am therefore of opinion that one must give a reasonable interpretation to the expression "mere skill" and should come to the conclusion that a game of "mere skill" should be taken to mean one in which a person playing it, as far as possible in any human affairs, has complete control over the result which he sets out to attain, provided he is sufficiently expert in performance. I agree with Mukerji, J., that having regard to the terms of S. 50-A the question is no longer one as to whether the element of skill or chance predominates. The real question as I have said, is whether the result sought to be obtained can be achieved by the person seeking to attain it if he has sufficient expertness to bring it about. It is obvious that in a large number of games there is definitely an element of chance. Games which are dependent upon the throw of dice or the turn of wheel or the fall of cards, necessarily have a decided element in the playing of them which is altogether outside the control of the person playing.

In the present case it is argued on behalf of the Crown that the likelihood of the player affixing the dart on a square of the particular colour nominated by him was so remote that it became a matter of pure luck, whether the dart struck a particular colour or not. It is argued because there are a number of squares of the same colour, the player might by chance hit any individual square of the colour selected by him, although he had in fact aimed at another square of the same colour; and it is therefore said that the difficulty of hitting the precise target selected is so great that success must necessarily be dependent on what is ordinarily called a fluke. In this connexion I may observe that no one would dispute that the game, of billiards is a game of the highest possible skill and yet even in this game if a player sets out to put a ball into a

(1) A I R 1929 Cal 769=(1929) Cr C 518=125
1 C 648=57 Cal 520.

particular pocket and he may by a fluke put that ball into some other pocket but he nevertheless scores his point. It seems to me therefore that any argument which is based upon the proposition, the greater the difficulty the greater the element of chance, is wholly unsound, one may equally well say, the greater the difficulty the higher the skill.

In this particular case there can be no doubt, I think, that the likelihood of success is well within the control of any particular player, provided he possesses the necessary skill. No doubt success would demand a high degree of skill or at any rate what is generally described as knack which is only another way of saying that the person playing must have an aptitude and must have a certain amount of experience and expertness in the play of the particular game. Here it is clearly possible for a person with sufficient expertness to hit any particular square or at any rate a line of squares. I say line of squares because the colours were arranged in lines drawn diagonally on the board which constituted the target. There is nothing in the playing of the game which could not be foreseen and anticipated. The players in the game so far as any outside circumstance or fortuitous factors are concerned, are masters of the situation. If one seeks a criterion upon the question whether the game is one of mere skill or not, I think one can only say that the real test is: Is there any external thing or fortuitous circumstance which may interpose between the action of the player and the result to be attained, and are the media, or instruments of the operation all ascertained the moment the game begins. As I have already said it is undoubtedly the case that in this particular game there was a possibility and indeed probability that a player might be unwillingly successful by hitting a line of the colour selected other than the particular line which he intended or was supposed to aim at. But on the other hand as I have already said it was undoubtedly possible for the person with the requisite skill to hit the actual point on the target selected by him beforehand. Accordingly giving the words "mere skill", a reasonable construction and not interpreting the qualifying adjective, the word "mere" as if it meant pure in the sense in which that word might be used in a scientific ex-

periment. I come to the conclusion that this case falls within the proviso of S. 50-A.

The English authorities are not of very much assistance in this country because undoubtedly the legislature here by the use of the word "mere" have sought to go even further than the English legislation relevant to a matter of this kind. As stated by Mukerji, J., (*ubi supra*) I am of opinion, that so far as this country is concerned, one can no longer apply the criterion of whether skill or chance is the predominant or governing element. In order to escape conviction under S. 44, it must be shown by the defence that to all intents and purposes on a broad and reasonable view of the matter the game was one of skill and nothing else. The question of whether or not the game is one of mere skill for the purpose of invoking the protection of S. 50-A is a question of fact. This Rule is made absolute. The conviction and sentence are set aside and the fine if paid will be refunded.

M.N.

Rule made absolute.

* A. I. R. 1933 Calcutta 11

PANCKRIDGE, J.

Ram Prasad Agarwalla and another—
Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 264 of 1932,
Decided on 23rd May 1932.

* Civil P. C. (1908), S. 135—Wide construction must be given to sub-S. (2)—Arrest after one hour of closing of Court at place not on way to person's residence—No explanation how hour was spent—Persons arresting cannot be convicted under Penal Code (1860), S. 342.

A reasonably wide construction must be given to S. 135, sub-S. (2), and it is not the intention of the legislature that a person holding a warrant of arrest on a civil Court process should be able to pounce upon a person against whom the warrant has been issued the moment the Court that the person had been attending rises for the day and a slight deviation for purpose of business or refreshment will not rob a party to a litigation of the protection under S. 135 (2). But where a person was arrested after one hour of the rising of the Court at a place, close to the Court, but which was not shown to be in his way to his residence and there was no explanation of how the intermediate hour was spent it cannot be held that he was attending the Court within the meaning of S. 135 and the persons arresting cannot be convicted under S. 342, Penal Code.

[P 12 C 4, 2]

Hemendra Kumar Dass — for Petitioners.

Judgment.—The question in this case is whether the complainant at the time he is said to have been wrongfully confined by the petitioners was protected from arrest by reason of S. 135, sub-S. 2, Civil P. C. It appears that the first petitioner had a civil Court decree outstanding against the complainant. On his application the Munsiff issued a warrant for the complainant's arrest and made over the warrant for execution to petitioner 2 who is a Court peon. It is a common ground that the petitioner was arrested on his way from the Munsif's Court at Tejpur to the Tejpur Local Board Office at 4 p. m. on 27th June 1931. It appears that on that day two civil suits to which the complainant was a party were on the list for hearing in the Munsiff's Court at Tejpur. The complainant had accordingly gone to the Court in connexion with the suits and had a consultation with his pleader. The 27th June was a Saturday and the latest hour at which it is suggested the Court was actually sitting was 3 p. m. It has been found as a fact that the complainant when he was arrested explained to the petitioners that he was going to the Court in connexion with two suits and that he could not be arrested on a civil Court process. Therefore no question can arise of the petitioners' having no notice of the business which had taken the complainant to Court on that date.

Although I consider that a reasonably wide construction must be given to S. 135, sub-S. 2, Civil P. C., and that it is not the intention of the legislature that a person holding a warrant of arrest on a civil Court process should be able to pounce upon a person against whom the warrant has been issued the moment the Court, that the person has been attending, rises for the day. I do not think, however, that it clearly appears that the complainant in this case is covered by the subsection. He certainly was not going to the tribunal when he was arrested; nor can it be that he was at the time attending such a tribunal for the purpose of a matter pending before it. To my mind when he was on his way from the tribunal to the Local Board Office at least an hour after the Munsif had concluded the business of the day he could not be said attending the tribunal at all. No explanation is furnished how he occupied himself in the interval

and simply from the facts that the Local Board Office is in the same compound as the Munsif's Court and he was on his way from the Munsif's Court an hour after the Munsif had risen I cannot draw the conclusion that he could at the time he described as attending the Court.

It is not said that he was returning from the tribunal and there is no evidence that the Local Board Office is on the way from the Court to his residence. As I have said I should be sorry to read S. 135 in a narrow fashion and to hold that the slightest deviation for the purpose of business or refreshment robs a party to a litigation of the protection which sub-S. 2 gives him. The facts here seem to me to be too meagre to admit of my holding that there is evidence on which it can be safely said that the complainant when he was arrested was attending the Munsif's Court for the purpose of a litigation to which he was a party.

In the circumstances the Rule is made absolute and the convictions and sentences are set aside, and the petitioners are acquitted. The fines, if paid, will be refunded.

M.N.

Rule made absolute.

A. I. R. 1933 Calcutta 12

COSTELLO, J.

Mrs. O. K. Smith—Petitioner.

v.

Mr. H. P. Smith—Opposite Party.

Matrimonial Suit No. 14 of 1931, Decided on 28th August 1931.

(a) **Divorce Act (1869), S. 10—Unnatural offence—Charge of—Some corroboration is necessary.**

In an application for dissolution of marriage by the wife where a charge of an attempt to have unnatural sexual intercourse is alleged the Court ought generally speaking, to require some corroboration of the petitioner's story because if she in any degree assents to what happened she becomes an accomplice to her husband in the matter. [P 13 C 2]

(b) **Divorce Act (1869), S. 10—Discretion of Court—When should be exercised—Principle stated—Discretion was exercised against dissolution.**

It is essential as a matter of practice, in matrimonial cases, that if a petitioner wishes the Court to exercise its discretion in his or her favour he or she should make a frank disclosure of all the circumstances of the case. In every exercise of discretion the interest of the community at large in maintaining the sanction of honest matrimony is a governing consideration; a strong affirmative case is necessary before a Judge is justified under the statutes in negativ-

ing their conditional prohibition; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality; if it is not unlikely to do so that is an argument against leniency. [P 14 C 1, 2]

Where there is no allegation by the wife against the husband that he at any time was unfaithful to her in the sense of having sexual relations with other women until after she herself, be the reason good or bad, had finally left him and on the contrary it is proved that she committed adultery at a time when she was actually residing with her husband and living with him as his wife, and that the adultery actually took place under the husband's roof, the interests of public morality and the interests of the children by the marriage require that the Court should refuse to give a decree to the wife for dissolution of marriage: *Stuart v. Stuart and Holden* (1930) P. 77 and *Apted v. Apted and Bliss* (1930) P. 246, Ref. [P 16 C 2]

R. C. Bonnerjee and Sikhar Basu—for Petitioner.

D. N. Mitra—for Opposite Party.

Judgment.—In this case the petitioner Olive Kathleen Smith prays for the dissolution of her marriage on the ground of the cruelty and adultery of her husband, Henry Percival Smith. The parties were married on 15th May 1918, at the Church of the Sacred Heart, Calcutta, and at that time the petitioner was a girl of about 18 years of age and the respondent was 23 years or thereabouts. The parties are of British Indian domicile and they both profess the Christian religion and accordingly this suit is brought under the Divorce Act of 1869. The petitioner makes a general allegation of cruelty against her husband, but in particular relies upon three specific instances which are set forth in para. 10 of the petition. In that paragraph the petitioner states that some time in August 1920, at No. 21, Sooterkins Lane, the respondent struck her at a time when she was pregnant and threw her on the bed thereby causing injuries to her mouth. Secondly, towards the end of the year 1926, the respondent struck the petitioner at No. 5, Alimuddin Street of Calcutta. Lastly, there is an allegation that the respondent, at No. 11, Turner Street, between 15th and 28th March 1928, frequently attempted to have unnatural sexual intercourse with the petitioner. With regard to this latter charge, I do not think I need say any more than that it has recently been laid down that where a charge of that nature is alleged the

Court ought, generally speaking, to require some corroboration of the petitioner's story because if she in any degree assents to what happened she becomes an accomplice to her husband in the matter. I accordingly disregard that charge altogether. I am however satisfied on the evidence of the petitioner and the witnesses who were called that the other two charges are established. I am also satisfied that the respondent did, in general, treat his wife in the way he should not have done, and that on various occasions he did use physical violence towards her.

With regard to the charge of adultery the petitioner's case is that after she had left her husband in March 1928, he brought to No. 11, Turner Street, where he was then living, a woman whom he had caused to be procured for him for the purpose of living with him as a substitute for his lawful wife, who at that time had left him. I have no doubt whatever that the evidence given by Mrs. Kiernan and her son John Kiernan is wholly accurate. I can see no reason whatever why John Kiernan should have done other than tell the whole truth and nothing but the truth in this matter. It is clear from his evidence that the respondent did have a woman, whose name was said to be Mary McCarthy, living with him at No. 11, Turner Street, for two or three months in the year 1928. I hold therefore as a fact that the respondent has been guilty of cruelty in the legal sense towards his wife and that he has committed adultery. It follows that had the matter rested there the petitioner would have been entitled to the relief which she seeks in this suit. But the petitioner has herself committed adultery and she has set forth in her petition some account of the circumstances in which the adultery was committed. She frankly admits in her petition that she has committed adultery with two persons: firstly with a man by the name of Pearson, and secondly, with Ambrose Lawrence Andree, with whom she has been living for the last two or three years and with whom she is still living.

The petitioner however asks the Court to exercise its discretion and to grant her a decree in spite of the fact that she herself has committed a matrimonial offence. The respondent by his answer

denied the cruelty and adultery alleged against him, and further set up, as a plea in bar, the facts which I have just mentioned and contended that the petitioner is not entitled in any event to succeed in the suit by reason of her own adultery. Having regard to the findings of fact to which I have arrived it is necessary that I should decide whether or not this is a case in which the Court ought to exercise the discretion, which it undoubtedly possesses, and grant a decree to the petitioner in spite of her own adultery. At the outset it may be said in the petitioner's favour that she has made a very full and frank avowal to the Court. It is essential, as a matter of practice, in matrimonial cases that if a petitioner wishes the Court to exercise its discretion in his or her favour he or she should make a frank disclosure of all the circumstances of the case. In a recent case, in England, *Stuart v. Stuart and Holden* (1), Hill, J., said:

"It is the condition upon which the Court can properly exercise its discretionary power that there should be complete frankness on the part of those who are asking for its discretion."

In that case as there had not been a complete and frank disclosure the decree was refused. Here however as I have said, the petitioner has made a frank disclosure of the whole of the circumstances as regards her own conduct. I have to ask myself whether this is a case where in spite of the facts and circumstances which the petitioner has revealed I ought to give her the relief which she seeks. The principles upon which this kind of discretion ought to be exercised are discussed by Lord Merivale, President of the Divorce Court in England, in a case tried before him last year, *Apted v. Apted and Bliss* (2). In that case the learned President considered all the leading cases bearing upon this point and summarised the effect of those cases in the passage in his judgment which appears on p. 259 of the report where he says:

"Reviewing the cases in question as a whole these principles appear: in every exercise of discretion the interest of the community at large in maintaining the sanction of honest matrimony is a governing consideration; a strong affirmative case is necessary before a Judge is

justified under the statutes in negating their conditional prohibition; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality; if it is not unlikely to do so that is an argument against leniency."

There is no doubt the more strict and early view of the principles on which discretion should be exercised has to some extent been departed from. Nowadays it is the duty of the Court to consider the whole of the circumstances bearing in mind the considerations referred to by the learned President. The Court has to take into consideration the position and interest of the parties themselves and of the children of the marriage, and possibly the conditions as regards the future of the children as well as the future of the guilty party. In the present case there were four children of the marriage, two sons and two daughters, all of them born between the years 1919 and 1923. The petitioner's case comes to this: that throughout her married life her husband did not treat her with proper consideration and kindness and that matters finally came to a head at the beginning of the year 1928, and that in consequence of her husband's attitude towards her she left him on the 3rd January of that year. She stayed away for something like three months, and then owing to her feelings towards her children and at the request of her husband she returned to him about the middle of March 1928. Thereupon the parties lived together for some two or three months. The petitioner says that prior to her leaving her husband at the beginning of January 1928 the position had become intolerable by reason of the fact that he was constantly nagging at her and abusing her because he had then recently discovered from certain letters of his wife which he extracted from an attache case belonging to Pearson—who was living in the house at the time—that she had had illicit relations with Pearson.

The petitioner's original story with regard to that was that she had not committed adultery with Pearson at that time. But it is quite clear, in my opinion, from the letters she herself had written to Pearson that she had had intercourse with him prior to the discovery of the letters by her husband, and in the

(1) [1930] P 77=99 L J P 17=142 L T 259=74 S J 88=46 T L R 192.

(2) [1930] P 246=99 L J P 78=148 L T 858=74 S J 336=46 T L R 456.

witness box she ultimately admitted that such was, in fact, the case and that on divers occasions during the temporary absence of her husband from the house she had misconducted herself with Pearson. In order to make the position clear it is necessary to refer to the fact that during the year 1920 the parties were in poor circumstances financially. It appears that the husband after he left his employment with the Eastern Bengal Railway in the year 1919 had never at any time earned more than a very small salary. The petitioner had supplemented the family resources from time to time by getting employment as a shorthand-typist. Towards the end of 1927 the petitioner apparently by accident came into contact with this man Pearson who she has said had been her "sweetheart" when she was a girl of some 14 years of age. It seems that more or less upon her suggestion, though no doubt the respondent was perfectly willing to have the advantage of the extra income which it would entail, in or about the month of October 1927, Pearson took up his abode with the respondent and the petitioner. At that time they were living at No. 5, Alimuddin Street. The accommodation they had available was extremely limited. They had a small bed-room, some kind of a living room and a very small verandah. The petitioner has sworn there was only one bed available and that that bed was occupied by herself and her husband and this man Pearson as well as the one child of the petitioner and the respondent. The petitioner has said that there were occasions when, the husband being out late, she and Pearson retired to this communal bedroom, so to describe it, to share this bed and that they there committed adultery in the absence of the husband.

The respondent has denied that all these three persons occupied the same bed, but I accept the evidence of the petitioner upon this point. It seems to me that the story is so deplorable and the situation so revolting to anyone with any sense of the common decencies of life that one can only come to the conclusion that it is true, for I do not believe the petitioner is of such an utter depravity of mind that she would have invented a story of this kind. It is not surprising therefore that living in such conditions, which were apparently ac-

quiesced in by the respondent, the petitioner committed adultery with this man Pearson. As I have said, the letters written by the petitioner to Pearson during his temporary absences from Calcutta disclose beyond all shadow of doubt that there was adulterous intercourse taking place between them. The petitioner further makes it plain in those letters that to all intents and purposes she was actually having sexual relations with her husband during the very period in which she was giving herself to Pearson. The position in fact was, not to mince matters, that the petitioner was carrying on adulterous intercourse actually in the marital bed. The whole of that part of the story reveals a state of things which, to say the least of it, is of a shocking description. I have no doubt at all but that the petitioner did leave the respondent on the 3rd January because he had abused her and possibly assaulted her, as a result of his discovery of her relations with Pearson.

Further, I have no doubt that the respondent made the petitioner write the note which was produced in the case, which seems to indicate that the petitioner left her husband's house of her own accord. No doubt the respondent more or less extorted it from his wife in order to protect himself from any proceedings on her part or proceedings on the part of possible creditors in respect of debts incurred by the wife. There is this to be said on behalf of the respondent that he did in fact shortly after his wife left him, take proceedings in the police Court charging the man Pearson with adultery with Mrs. Smith. Those proceedings were abandoned. The respondent's explanation of that is that his wife had expressed her willingness to return to him upon condition that he abandoned his proceedings against her lover. Whether that is so or not the proceedings were in fact abandoned, and as I have already mentioned, about the middle of March, Mrs. Smith returned to her husband and they resided together as husband and wife, at No. 11, Turner Street, until the end of that month. Now, it seems clear from the evidence not only of the petitioner herself but from that of Mrs. Kiernan and her son that during the time the parties were living at No. 11, Turner

Street, there were incessant quarrels between them and the respondent frequently assaulted the petitioner. She seems to have complained to Mrs. Kieran that the strain was intolerable and she told her that she proposed leaving her husband for that reason and she did, in fact, leave at the end of March. She then, according to the evidence of Mrs. Ogg, went back to reside in the house of that lady for some time, she having already lived in the same house during the time she was away or part of the time she was away from her husband in the months of January and February, previously. After a short interval Pearson came on the scene again; he had returned to Calcutta and thereupon the petitioner set up a joint menage with him and lived with him as his wife until he died on 8th August 1928. So after leaving her husband the petitioner resumed her previous relations with Pearson and continued them as long as he was alive.

So far as the events of the latter part of 1928 are concerned no doubt they were condoned by the respondent resuming conjugal relations with his wife in the subsequent March. Had the matter rested there, it would have been open to the petitioner to say that any matrimonial offences that she had committed had been obliterated by the fact that she had lived with the respondent as his wife at No. 11, Turner Street, but, as I have said, the petitioner apparently, as soon as she could, resumed her intercourse with Pearson. That action on her part was, of course, sufficient to remove the effect of the condonation and to revive the effect of the antecedent adultery, with Pearson.

After the death of Pearson the petitioner seems to have supported herself for a time until in the early part of 1929 or thereabouts she met, apparently at a dance, Ambrose Lawrence Andree. To his credit it may be said that he seems to have treated the petitioner with considerable kindness and during some months to have given his financial assistance without in terms asking for anything in return. But in the light of after-events one cannot help suspecting that all along Mr. Andree had it in mind to seduce the petitioner. At any rate, about the middle of 1929, the petitioner did consent to go and live with Mr.

Andree after the death of a sister of his who had been keeping house for him till that time, and from that time down to the present the petitioner and Andree have been living together as man and wife apparently quite openly.

The children of the marriage are, it appears, all of them being educated in good schools. It is said that the respondent is paying for the education of two boys, and the petitioner by means of money allowed to her by Andree is paying the necessary charges in respect of the two girls.

That is in brief an outline of the main facts and circumstances which I have to consider in deciding whether I ought to exercise a discretion in favour of the petitioner. There is however one other matter which has some importance in the case. The petitioner has said that she has delayed taking proceedings against her husband for two reasons: the first is that she herself had not the necessary means for the purpose, and secondly, she was anticipating and indeed hoping throughout that her husband would take proceedings against her. I am bound to say that in my opinion there seems to be no real reason why if the petitioner in fact felt herself to be the more aggrieved party she should not have instituted proceedings against her husband sooner than in fact she did.

As regards the position of the respondent it must be observed that there is no allegation against him on the part of his wife that he at any time was unfaithful to her in the sense of having sexual relations with other women until after she herself, be the reason good or bad, had in fact finally left him. On the other hand, I am faced with the fact that the wife undoubtedly committed adultery at a time when she was actually residing with her husband and living with him as his wife, and that the adultery actually took place under the husband's roof. It seems to me that if the wife as early as October or November 1927, had come to the conclusion that life with her husband was intolerable owing to his treatment of her, she should have left him at that time. It is obvious that she did not in fact leave him until after the discovery by the husband of her intrigue with Pearson. No doubt as a result of that discovery the respondent did make himself extremely

unpleasant to his wife. This is not one of that class of case where a wife has been driven from her husband's house by reason of his conduct and then finds herself in a destitute or desperate position. So far as I can see, but for the Pearson episode, there would have been no reason or at any rate no sufficient reason, for the petitioner to have left respondent at the time when she did. It therefore comes to this: that if, as she says, the wife was driven from the house by the husband's conduct that was brought about by reason of her own conduct as regards Pearson. That view of the matter seems to be emphasised by the fact that she did join Pearson and cast in her lot with his at the earliest possible opportunity.

In my view the petitioner's position would have been materially different if she had left her husband's house as an innocent woman to whom conditions of life had become intolerable or who had been actually driven out by her husband's ill-treatment. If that had been the case and afterwards she had found herself in difficulties and had become desperate and then given herself to another man who was prepared to be kind to her and look after her and support her, there would have been much to be said in extenuation and excuse of her conduct. Reluctant as I am as a matter of general principle to refuse to dissolve a union that has become impossible, in all the circumstances of this case I think I should be going far beyond any of the authorities and I should be ignoring altogether the paramount consideration applicable to these cases, namely, the interests of public morality, were I to follow that general principle. Giving careful consideration to the position of the parties and after taking into account the interests of the children of the marriage I can only come to the conclusion that in this case it is my duty to refuse a decree to the petitioner. In my opinion she has by her conduct disentitled herself to claim relief at the hands of the Court.

This petition must accordingly be dismissed. The respondent has been ordered to pay a certain sum toward his wife's costs and that sum he must pay.

K.N./R.K.

*Petition dismissed.***A. I. R. 1933 Calcutta 17**

GUHA AND M. O. GHOSH, JJ.

Bhabatarini Debi—Petitioner.

v.

Profulla Kumar Mukerjee and others—Opposite Parties.

Civil Rule No. 168 of 1932, Decided on 13th May 1932, against order of Dist. Judge, Birbhum, (Suri), D/- 27th January 1932.

(a) Succession Act (1925), S. 192—Title of opposite party and right of claimant to possession must be determined.

It is well settled that in order to meet the requirements of S. 192 it is necessary for the Court to consider whether the objector to the grant of the application has any title, and whether the claimant is really entitled to the property: 6 I C 630 and 84 Cal 999, *Ref.*; 11 M I A 487, *Expl.* [P 18 C 1]

(b) Succession Act (1925), S. 192—Order made without jurisdiction or with jurisdiction illegally exercised should only be interfered with in revision—Civil P. C. (1908), S. 115.

An order made by the District Judge under S. 192, Succession Act, cannot and should not be interfered with by the High Court in its revisional jurisdiction, unless it could be made out that there was no jurisdiction in the Court or that such jurisdiction was illegally exercised. [P 18 C 2]

(c) Succession Act (1925), S. 194—S. 194 is not controlled by Civil P. C., O. 32, R. 6.

The substantive provisions of the law as contained in S. 194, Succession Act, cannot in any way be controlled by O. 32, R. 6, Civil P. C., relating to the receipt of property by a guardian under a decree or order in favour of a minor. The application of the provisions in the Code might in cases defeat the object of the statutory provisions as contained in S. 194, Succession Act. [P 19 C 1]

A. N. Chaudhuri, Bankim Chandra Mukherjee, Nirmal Kumar Sen, Hari Prasanna Mukherjee and Baidyanath Banerjee—for Petitioner.

Atul Chandra Gupta and Satis Chandra Sinha—for Opposite Parties.

Judgment.—This Rule is directed against an order passed by the learned District Judge of Birbhum, on an application made by the petitioner Bhabatarini Debi under S. 192, Succession Act, 1925, in regard to certain moveable properties left by her mother Kiran Sasi Debi and claiming a right by succession to the same, as the heir. The petitioner's case was that she was the only heir of her mother and as such, was entitled to the possession of the properties left by her. The application under S. 192 was opposed by opposite party Profulla Kumar Mukerjee, who claimed the properties as belonging to

his two deceased wives, the sisters of the petitioner, who had predeceased their mother Kiran Sasi Debi, as also to his children by the two wives. The facts of the case giving rise to the application to this Court on which this rule was issued, have been set out in very great detail in the elaborate judgment recorded by the learned District Judge, and have been placed before us with great lucidity and clearness by Mr. A.N. Chaudhuri, the learned counsel for the petitioner. On the facts of the case, it has to be determined whether there has been any illegal exercise of jurisdiction by the Court, as it is sought to be made out, in the matter of the order passed by the Court. It is well settled that in order to meet the requirements of S. 192 it was necessary for the Court to consider whether the objector to the grant of the application had any title and whether the claimant was really entitled to the property: see *Phul Chand Lal v. Kismish Koer* (1) and *Sato Koer v. Gopal Sahu* (2). The statutory provisions themselves bearing upon the subject, speak of a person "claiming a right by succession" (S. 192) of the party in possession having "no lawful title," and of a person "really entitled" (S. 193), of the summary determination of "the right to possession" (S. 194), and of "the death of the proprietor whose property is claimed by right of succession" S. 205.

In view of the position as indicated above there can be no doubt that the learned Judge in the Court below directed himself rightly in stating in his judgment that he was "to decide the right of possession" of the properties which were the subject-matter of the claim made by the petitioner before him and that the Court was required to decide as to who amongst the rival claimants had a preferential claim. The learned Judge has given a decision upon the materials before him, keeping in view the scope of the inquiry, which was of a summary nature, and has held that the claim made by Profulla Kumar Mukerji in respect of some items of the moveables in dispute, was a preferential one: that he had a preferential right to claim them, and has given direction that those items of moveables should go to the possession of Profulla Kumar

Mukerji. The order as made by the District Judge is one which cannot, and should not be interfered with by this Court in its revisional jurisdiction, unless it could be made out that there was no jurisdiction in the Court or that such jurisdiction was illegally exercised. In the view we have expressed above there was jurisdiction in the Court and that jurisdiction has been rightly and properly exercised. The remedy still open to the petitioner is the one expressly provided by S. 208, Succession Act; and nothing contained in the judgment of the learned District Judge in the case before us, shall be an impediment to the petitioner to the establishment of her title, if any, under the law to the properties, the possession of which has been ordered to be delivered to Profulla Kumar Mukerji, by a regular suit.

Reliance has been placed on behalf of the petitioner on the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Bhugwandeen Dohay v. Myna Bacc* (3) that a Judge had, in a case of the present nature, no jurisdiction to determine questions of title, and could only deal with the right to possession. It is only necessary to state that the obvious meaning of the observation so made was that there could be no final decision so far as the question of title was concerned in a summary proceeding by the Judge, in which the scope of inquiry was restricted to the right of possession subject to a regular suit in which the question of title as between rival claimants was to be finally decided. The observations mentioned above can therefore lend no support to the case of the petitioner before us, as the learned District Judge has strictly complied with the provisions of the law and has decided nothing beyond right to possession, as between the claimants, to the moveable properties, in respect of which the application was made by the petitioner under S. 192, Succession Act. A point has been made before us that in view of the provisions contained in O. 32, R. 6, Civil P. C., the order for delivery of possession of moveables to Profulla Kumar Mukerji, without demanding any security from him was illegal. The special provisions of the Succession

(1) [1910] 6 I C 680.

(2) [1907] 84 Cal 1929=12 C W N 65.

(3) [1868] 11 M I A 487=9 W R 23=2 Scrh 124=2 Sar 327 (P C).

sion Act, 1925, under which the District Judge exercised jurisdiction in the case before us, contains no provision for demanding security from the person to whom property is ordered to be delivered under S. 194, and no question of demanding any security appears to have been raised before the District Judge, when the proceedings were pending before him. We are not prepared to hold that the substantive provisions of the law as contained in S. 194, Succession Act, could in any way be controlled by O. 32, R. 6, Civil P. C., relating to the receipt of property by a guardian under a decree or order in favour of a minor. In our opinion the application of the provision in the Code of Civil Procedure, might, in cases, defeat the object of the statutory provision as contained in S. 194, Succession Act.

Some minor matters of detail such as the delivery of keys, etc., were brought to our notice, during the course of argument of the case before us on behalf of the petitioner. It is not possible for us to deal with such matters; it will be open to the parties concerned to apply to the District Judge for necessary directions if any further direction is really necessary in the matter of delivery of possession of properties, in pursuance of his order. In the result, the order of the learned District Judge passed on 27th January 1932, is affirmed, and this rule is discharged with costs. The hearing fee in the rule is assessed at 3 gold mohurs.

Let the record be sent down as early as possible.

K.N./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 19

LORT-WILLIAMS, J.

Daulatraj—Plaintiff.

v.

Kalicharan Ghosh—Defendant.

Application in Original Civil Suit No. 2401 of 1930, Decided on 21st March 1932.

Calcutta High Court (Original Side) Rules, Ch. 36, R. 20—Cost on interlocutory applications should be taxed after final disposal of suit.

No doubt a person to whom costs of an interlocutory application or hearing have been awarded has a choice between proceeding with taxation and execution at once and leaving both taxation and execution until after the final determination of the suit. But ordinarily such costs are not to be taxed or executed before the

final determination of the suit unless a special direction is given to that effect. Except in special cases, there ought to be only one taxation in a suit: *A I R 1930 Cal 465* and *Phillips v. Phillips*, (1879) 5 Q B D 60, *Rel on*. [P 1902; P 2001]

*S. C. Ghose—*for Plaintiff.

S. B. Sinha for *N. C. Chatterji*—for Defendant.

Order.—This is an application on behalf of the plaintiff for an order that the execution of certain orders, dated 16th July and 10th September 1931, for costs be stayed until the disposal of the suit. These were interlocutory orders. Mistakes in procedure had been made by the plaintiff, and he was ordered to pay the costs of the applications necessitated by his mistakes.

I have no doubt that according to the English practice in the King's Bench Division, as inherited from the Common law Divisions, the practice has always prevailed of having no taxation of costs till the termination of the action. This practice did not apply in the Court of appeal. I have already dealt with the point in the case of *Kedarnath Bhutra v. Johormull Bhutra* (1). To the decisions cited in that judgment I would add the case of *Phillips v. Phillips* (2). In this case it was asserted by counsel that such was the practice in the Common Law Divisions, and this was not dissented from either by the other side or by the Court. In Ch. 36, Cl. 20 of our Rules it is provided that within three months from the date of the signing of the decree or order awarding costs, the party claiming shall leave in the Taxing Office an office copy of the decree or order and lodge a bill with the vouchers and signatures of counsel.

There is a proviso to the clause stating that where the costs of an interlocutory application or hearing have been awarded and have not been previously taxed or paid they may be included in the bill for the whole case. It is clear therefore that according to our practice a person to whom such costs have been awarded has a choice between proceeding with taxation and execution at once and leaving both taxation and execution until after the final determination of the suit. In my view, it is convenient that some settled rule of practice should be laid down, and I propose to adhere to

(1) *A I R 1930 Cal 465*=126 I O 404=57 Cal 469.

(2) [1879] 5 Q B D 60.

the rule laid down by me in the case to which I have referred. Costs in a suit ought to be set off between the parties and in my opinion, it is wrong that either a plaintiff or a defendant, who may be a man of straw, should be paid costs upon interlocutory applications and should execute orders for costs forthwith made upon interlocutory applications, when it may be that the party will lose the suit in the end, and it will be found that he has nothing with which to meet the final order for costs which may be made against him.

I wish therefore to ask the office of this Court to note that when any interlocutory orders in suits are made by me they are not to be taxed or executed before the final determination of the suit unless a special direction is given to that effect. In my opinion, except in special cases, there ought to be only one taxation in a suit. This matter comes before me upon an application for an injunction, which is a matter of discretion and therefore apart from the question as to what is the correct rule, I have power to make the order and upon the facts of this case, I think it ought to be made.

Costs will be costs in the cause.

R.K. *Order accordingly.*

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GUHA AND M. C. GHOSE, JJ.

Sheikh Hari—Defendant—Petitioner.

v.

Sm. Diljan Bibi and others—Plaintiffs—Opposite Parties.

Civil Rule No. 140 of 1932, Decided on 10th May 1932, against order of Addl. Dist. Judge, Hooghly, D/- 13th January 1931.

Civil P. C. (1908), S. 148—Successor in office of Judge making decree can enlarge time for payment of costs to defendant if ends of justice are met.

Plaintiff's suit for partition and accounts was dismissed on the ground that it was not maintainable. On appeal the plaintiff in the suit was allowed to be amended on payment of ad valorem court-fees on the amended plaint within a time fixed by the appellate Court and the decree that was prepared ran thus: "It is ordered that the amendment be allowed as per order of judgment, on condition of paying the necessary court-fee, and on paying the defendant his costs of the original appellate Court, up to this stage, within two months after arrival of the record in the Court below. If the costs be not so paid or deposited, the suit will stand dismissed with costs throughout." Plaintiffs failed to carry out the direction within the time and applied to the successor of the Judge who

made the decree to extend time to carry out the direction. Extension of time was granted on two occasions without notice to defendants. It was contended that the order granting extension of time was without jurisdiction.

Held: that the direction contained in the decree as to the dismissal of the suit related only to non-payment or non-deposit of costs, within the time specified, and not to the payment of court-fees consequent upon the amendment of plaint, allowed by the appellate Court. The successor-in-office of the Judge who made the decree had therefore the jurisdiction to enlarge the time for payment of sufficient court-fees, and his orders were made in this behalf could not be challenged on the ground that they were without jurisdiction. The direction in the decree as to payment or deposit of costs, although inseparably connected with the other directions in the decree stood on a different footing, inasmuch as failure to comply with the direction within the time specified was to result in the dismissal of the suit. The order granting extension of time for payment or deposit of costs could not be said to be strictly in accordance with law, regard being had to the terms of the decree: *A I R 1923 Cal 612, Dist.*

[P 21 C 1, 2]

Rupendra Coomar Mitter—for Petitioner.

Bijan K. Mukherjee—for Opposite Parties.

Guha, J.—The facts of the case giving rise to the application on which this Rule was granted may be briefly mentioned: The opposite party were the plaintiffs in a suit for partition and accounts, Suit No. 18 of 1928, brought in the first Court of the Subordinate Judge, Howrah, against the petitioner as defendant. The suit was dismissed by the trial Court on 5th August 1930, on the ground that the plaintiffs were out of possession, and the suit as laid was not maintainable. On appeal by the plaintiffs Mr. R. R. Mukherjee, Additional District Judge, Howrah, allowed the plaintiff in the plaintiffs' suit to be amended, and directed payment of ad valorem court-fees on the amended plaint, within a period of time fixed by the learned Judge. The decree bearing date 28th August 1931, that was prepared and which was signed on 23rd September 1931, was in the following terms:

"It is ordered that the amendment be allowed as per order of judgment, on condition of paying the necessary court-fee, and on paying the defendants his costs of the original appellate Court, up to this stage, within two months after arrival of the record in the Court below. If the costs be not so paid or deposited, the suit will stand dismissed with costs throughout."

The plaintiffs failed to carry out the direction of the appellate Court within the time mentioned in the decree, and

applied to Mr. R. C. Sen, Additional District Judge, Howrah, the successor-in-office of Mr. Mukherjee, for extension of time, for enabling them to carry out the directions. Extension of time was granted by Mr. Sen on two occasions: once on 13th November and again on 21st November 1931. The orders granting extension of time to the plaintiff were made without notice to the defendant in the suit, the petitioner in this Rule, who applied to Mr. Sen to reconsider his orders, on the ground that Mr. Sen had no jurisdiction to vary the decree passed by Mr. Mukherjee, and extend time; and prayed for vacating the same. The learned Additional District Judge, Mr. Sen, on 13th January 1932, rejected the application, but observed that if he gave a wrong decision, he could not rectify the error; and if he was so inclined the petitioner could move this Court and get its decision on the point. The defendant has applied to this Court for setting aside the orders passed by Mr. Sen, Additional District Judge, on 13th and 21st November 1931, and 13th January 1932.

On behalf of the petitioner it has been argued that the decree passed by Mr. Mukherjee in appeal was a final decree, and no extension of time could be allowed for carrying out the directions contained in the same, unless it was by way of an order on an application for review of judgment made by Mr. Mukherjee. It has been contended before us that S. 148, Civil P. C., could not have any application where time was fixed by a decree, and reference was made to some decisions by the different High Courts in this country. The decision of this Court in the case of *Khajeh Habibullah v. Asmotar Khatun* (1) has been very strongly relied upon, in support of the arguments on behalf of the petitioner. That decision however does not touch the facts and circumstances of the case before us, regard being specially had to the terms of the decree which have been set out above. The direction contained in the decree as to the dismissal of the suit related only to nonpayment or non-deposit of costs, within the time specified, and not to the payment of court-fees consequent upon the amendment of plaint, allowed by the appellate Court. Mr. Sen, the successor-in-office of Mr.

Mukherjee had therefore the jurisdiction to enlarge the time for payment of sufficient court-fees, and his orders made in this behalf could not be challenged on the ground that they were without jurisdiction. The direction in the decree as to payment or deposit of costs, although inseparably connected with the other directions in the decree, stands on a different footing, inasmuch as failure to comply with the direction within the time specified, was to result in the dismissal of the suit.

The order granting extension of time for payment or deposit of costs could not be said to be strictly in accordance with law, regard being had to the terms of the decree; but we have no hesitation in holding that the order was one which met the ends of justice in the case, after the learned Judge considered it fit and proper to enlarge the time for payment of court-fees. If no discretion whatsoever was to be exercised in cases coming up to this Court in revision, we would have to interfere with the order enlarging time for payment or deposit of costs, although no case has been made out for our interference with the order extending the time for payment of court-fees. As it stands the order of the Judge is erroneous under the law, as it was not passed by the Judge who made the decree, but it is not one which should be interfered with in the exercise of the revisional jurisdiction of this Court. The interference with the order would lead to the final dismissal of the suit, causing perhaps irreparable loss to the opposite party and as such amounting to a denial of justice to them. In the result the Rule is discharged; but in view of the conduct of the plaintiffs-opposite party in obtaining ex parte orders from Mr. Sen, without notice to the petitioner, the opposite party are to pay to the petitioner his costs in this Rule; the hearing-fee in the Rule is fixed at five gold mohurs.

M. C. Ghose, J.—I agree.

K.N./R.K.

Rule discharged.

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RANKIN, C. J. AND MITTAR, J.

Radhu Ray and others—Appellants.

v.

Raja Jyoti Prasad Singh Deo — Respondent.

Appeal No. 129 of 1929, Decided on 20th May 1932.

(a) Land Acquisition Act (1894), S. 18—
Person making reference must adduce evidence showing his interest.

It is the duty of persons making a reference under S. 18 to the District Judge, to adduce proper evidence showing what their interest was on the date of the notification. [P 28 C 1]

(b) Land Acquisition Act (1894), S. 18—
Person claiming permanent interest as tenure holder under zamindar contending that zamindar is only entitled to compensation to extent of amount he agrees to grant abatement of rent—Burden of proof is on tenure holder.

Where, persons claiming a permanent interest as intermediate tenure holder under a zamindar in respect of certain land which has been compulsorily acquired under the Land Acquisition Act contend that the zamindar is only entitled to get compensation to the extent of the amount he has agreed to grant abatement in rent, it is for them to show that their interest is permanent, that the landlord has lost his prima facie right to enhance rent, and that the rent is mukarrari. [P 28 C 2]

(c) Evidence Act (1872), Ss. 13 and 43—
Decrees, not inter partes, are not evidence save under Ss. 13 and 43.

Decrees not shown to be inter partes are not evidence in respect of proof of title in a proceeding under Land Acquisition Act, save under S. 18 and S. 43. They are mere evidence of transaction: *A I R 1931 P C 89, Rel on.*

(d) Landlord and Tenant—Tenure holder claiming particular interest—Burden of proof is on tenant. [P 28 C 2]

Prima facie the zamindar has the whole of the interest. It is for the tenure holders to show that what part of the interest the zamindar has diverted himself of in their favour.

Bankim Chandra Mukherjee, Jogeswar Mazumdar and Nirmal Chandra Das Gupta—for Appellants. [P 24 C 1]

Karunamoy Ghose—for Respondent.

Rankin, C. J.—This is an appeal brought by certain persons who claim a permanent interest under the name of jagirdars under the respondent Raja Jyoti Prosad Singh Deo—the zamindar in respect of certain land which has been compulsorily acquired under the Land Acquisition Act. The purpose of the acquisition was for providing land for the offices of the Engineering and Telephone Staff of the East India Railway at Asansol and the date of the declaration is 4th August 1923. The amount of land that has been acquired appears to be 1861 acres. The land under acquisition has been divided into some eleven plots and in addition to the zamindar there are a number of persons claiming to be intermediate tenure holders of jagirdars as well as a number of persons who are tenants in occupation of the land. The

present appeal is brought by some of these intermediate tenure holders. They originally asked for a reference both against the amount of the Collector's valuation of the land as well as against the principle adopted by the Collector in the apportionment of the compensation money as between the intermediate tenure holders and the zamindar. It appears that the Collector by his award so far as regards the amount awarded as compensation for the land divided that half and half between the proprietor and the intermediate tenants and this is the portion of the Collector's award which in the end was attacked.

The reference to the District Court was brought in 1924 and the case was not heard until January 1929. When it was heard, the only evidence adduced on behalf of the present appellants was first of all, the evidence of one witness a man whose name is Atal Roy. This witness says: "I am one of the mukarrari mourashi jagirdars under the Raja." He says that the whole of the mouza is included in the jagir, that the rent of the entire jagir is Rs. 376-4-0, that his tenants are all mukarrari tenants and so forth. Having said these various things, upon what basis and upon what knowledge it does not appear, he goes on to say that he has documents to prove all these facts but that he has left them at home. He does not know whether there is any sanad of the jagir. He says that there are 100 or 150 jagirdars. It further appears that certain documents, although they were not put in at first were afterwards put in, in support of the appellants' case. There is a decree dated 1886 in a previous acquisition case, a proceeding between the zamindar and some 51 persons all described as jagirdars of Mouza Asansol. That appears to have been in respect of the acquisition of 176 bighas under a notification of 1869 the fact being that the original reference had proceeded on appeal to the High Court and there had been a remand in 1883. The decision of the learned District Judge then was that as between the Raja and those jagirdars, the Raja was only entitled to get compensation to the extent of the amount the Raja had agreed to grant abatement in the rent; and in that judgment it appears that there is included an account in which it is said that there are 5,841

highas in the Mouza of Asansol and that the rent payable for the same is Rs. 406 at an average rate of such and such per bigha. In addition to that, there is a further proceeding of 1899 which raises no question of apportionment and which does not appear to throw any light upon the present question. There is also a judgment of the District Judge delivered in 1909 against the zamindar and certain persons not fully set out, calling themselves jagirdars; and in the course of that judgment the learned District Judge said that in a previous case he had decided that the zamindar was entitled only to such compensation as had been awarded by the Deputy Collector and that only if he agreed to a corresponding abatement of the rent.

The learned District Judge who heard this reference was of opinion that before him there was no proof at all of the interest of the persons coming before him to object to the apportionment. The duty of the present appellants in the District Court was to adduce proper evidence before the learned Judge showing what their interest was on the date of the notification. Having seen what their interest was both vis a vis their landlord and vis a vis their tenants, the learned District Judge would be in a position to say whether the apportionment which had been made by the award was a proper apportionment or not. The first thing that happened was that the only person who gave evidence at all as sorted by his evidence that his own tenants were tenants upon mukarrari terms. He stated the terms from which it appears that, so far from his having any ground of complaint against the amount that had been awarded to him, he had on any view of the valuation of this land been very much overpaid. His case was that for his share he got Rs. 400 from his tenants but paid Rs. 10 to the zamindar and that the area in his share was 80 highas. The learned District Judge points out that if that is so then, so far as he is concerned, his interest would appear to be much overvalued. The only answer that could be made to that was:

"if that be so, then my tenants have been compensated by much too small a sum and for that reason I will help myself out of the landlord's share to a sum of money which does not belong to him but which should have gone to my mukarrari tenants."

That was the first difficulty that the learned Judge was faced with and a very formidable difficulty it was. The question is not only as to this particular man but as to these appellants as a whole. The case with which the appellants came to Court was that they undertook to show that the zamindar had lost all his interest in this land except his right to the rent plus certain conceivable contingencies such as that the permanent tenancy might come to an end or that the zamindar might get some casual or occasional profit hardly capable of being put at a money value. Consequently, they said all that the zamindar has lost is his right to a certain amount of rent and everything else belongs to the tenure-holders. Upon that, it is very necessary for the appellants to show what their interest was. The mere fact that they call themselves jagirdars so far from showing that they have a permanent interest tends the other way. They had to show that their interest was permanent. They had to show that the landlord had parted with his *prima facie* right to enhance the rent, a right which on the valuation arrived at in this case was a right which would be of a substantial value. They had to show whether the rent was mukarrari. The only proof, apart from the remarks of the gentleman who left his documents at home, comes to nothing. There are the two decrees of 1909 and 1886 which are put in evidence. It may be that the 1886 decree can be seen to proceed on the assumption that the whole of the land of this mouza was covered by a single jagir and that that was on mukarrari terms. That was no proof whatever in my judgment, of the title of the appellants before the District Judge but was evidence of transaction just as in the case of *Gobinda Narain Singha v. Sham Lal Singh* (1), the Court regarded proceedings in a suit for partition as evidence of transaction. Just as in that case it was rejected as evidence to show that the estate was partible, so in the present case it appears to me that these decrees not being shown to be inter partes were not evidence save under

Ss. 13 and 43, Evidence Act.

It does not follow that because in the case of certain land the landlord suffered

(1) A 1 R 1931 P C 89 = 58 I A 125 = 58 Cal 1187 = 131 I C 753 (P C).

a judgment to the effect that his interest in the mouza was very small, he has for ever and for all purposes and as against other people to put up with all consequences of that judgment. These decrees are not, in my judgment, evidence that the jagirdars have permanent interest, still less that the rent is not enhancible; and, if they are evidence at all, they are not such evidence as the learned District Judge was obliged in the absence of other evidence to be satisfied with. In that position, we have to consider the circumstance which Mr. Ghose has brought very fairly to our notice and which might have some effect in the present case. These lands have been valued at a fairly high figure as being either bastu lands or waste land fit for bastu. There is nothing said in the Collector's award and there is nothing in the evidence whether or not there is any value in the underground rights. Nevertheless, it does seem to me on principle that the correct position in the case of tenure holders under the zamindar is this : prima facie the zamindar has the whole of the interest ; it is for the tenure holders to show what part of the interest the zamindar has diverted himself of in their favour. It does not seem to me that any of the appellants laid any proper evidence before the learned District Judge in support of his claim. In these circumstances, I am at a loss to know what the learned District Judge could have done save to dismiss the appeal. I think that this appeal must fail and be dismissed with costs : hearing fee five gold mohurs.

Mitter, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1933 Calcutta 24

JACK, J.

Srinath Bose—Petitioner.

v.

Debendra Nath Barari and others—Opposite Parties.

Civil Rule No. 1370 of 1931, Decided on 11th May 1932, against order of Munsif, First Class, Chikandi, D/- 20th March 1931.

Bengal Tenancy Act (1885), S. 26-J — Transfer fee—Landlord has only to show in summary proceeding that holding is a raiyati holding.

For the purposes of S. 26-J, the landlord has only to show in a summary proceeding that the

holding is a raiyati holding in order to be able to recover the balance of the transfer fee to which he is entitled under S. 26-C or S. 26-E. But it will not debar any subsequent suit by the tenant to establish that the tenure is a permanent tenure or rent-free tenure; and if he establishes that fact in a subsequent suit, he will be entitled to recover the balance of the landlord's transfer fee which has been paid under S. 26-J of the Act. [P 24 C 2].

Amrita Lal Mukerjee—for Petitioner.

Asita Ranjan Ghose—for Opposite Parties.

Judgment.—This Rule has been issued upon the opposite party to show cause why the decision of the District Judge of Faridpur dismissing an appeal against the decision of an application under S. 26-J of the amended Bengal Tenancy Act directing payment of a certain amount under Cl. (2) of that section as the balance of landlord's transfer-fee should not be set aside on the ground that S. 26-J of the Act having not contemplated any application, the order of the learned Munsif was without jurisdiction and as such illegal. The learned advocate for the petitioner explains that this means that before coming under S. 26-J of the Act, the applicant must first of all establish by a regular suit the fact that his holding is an occupancy holding. The result of the adoption of this view would be that wherever a tenant wrongly describes his holding as a permanent tenure or a rent-free tenure in a deed of transfer, the landlord is forced to bring a suit in order to recover the transfer-fee which is justly due to him under the Bengal Tenancy Act. This view is, I think, quite untenable. For the purposes of S. 26-J, the landlord has only got to show in a summary proceeding that the holding is a raiyati holding in order to be able to recover the balance of the transfer-fee to which he is entitled under S. 26-C or S. 26-E. This of course will not debar any subsequent suit by the tenant to establish that the tenure is a permanent tenure or rent-free tenure; and if he establishes that fact in a subsequent suit, he will be entitled to recover the balance of the landlord's transfer-fee which has been paid under S. 26-J of the Act. The rule is accordingly discharged with costs, one gold mohur.

B.R./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 25

MUKERJI AND GUHA, JJ.

Nityagopal Sen Poddar and others—Appellants.

v.

Secy. of State—Respondent.

Appeals Nos. 424 and 441 of 1928, Decided on 26th August 1931, against original decrees of Addl. Dist. Judge, Bakarganj, D/- 25th June 1928.

(a) Land Acquisition Act (1894), S. 23—Belting system—System depends on variety of facts—It cannot be applied where land is sold by bighas or acres.

So far as the system of belting is concerned it is a system which is widely used, but its value as a system depends much upon a variety of facts. If data are available showing the proportion at which the value of land diminished, accordingly as it is situated at a particular distance from a main road or thoroughfare, the system would be perfectly scientific. In the absence of any such data also, it may be assumed that in big cities where land sells by cottas or yards or feet there is such a proportion, as common experience shows. But in places and localities where lands are sold by bighas or acres, and there is no real evidence of such proportionate diminution in value, the system is based on no sound principle and must be regarded as a method not quite satisfactory. Of course there is almost always a distinction in value between front lands and back lands everywhere but that distinction would not obviously justify recourse to the belting system in each and every case. It is a highly artificial system and cannot be resorted to as a hard and fast rule. Nor again can there be any hard and fast rule that back land must be always of less value than front land or that the proportion should be as one to a half or that there must be a certain proportion at a certain distance from the road : *Case law referred.*

[P 26 O 1]

(b) Land Acquisition Act (1894), S. 23—Income-tax return cannot be relied on in determining rental value of buildings.

Income-tax returns cannot be implicitly relied upon in determining the rental value of buildings acquired under the Land Acquisition Act when it appears that the claimant, before submitting his return, had become aware of the contemplated acquisition.

[P 27 O 1]

Gunadacharan Sen, Bhageerathchandra Das, Santoshkumar Basu and Birajmohan Ray—for Appellants.

Sr. Govt. Pleader, Saratchandra Basak, Asst. Govt. Pleader and Nasim Ali—for Respondent.

Judgment.—These two appeals have arisen out of an award made by the Land Acquisition Judge of Bakarganj. The land was acquired for a project known as "Additional land for the new Reserve Police line at Barisal." The lands are situate by the side of a road known as the Bagura Alekanda Road and lie within the municipal limits of the town of

Barisal. The declaration was dated 18th November 1926. The claimants are the appellants. In the decree of the Court below will be found the different plots, their character, the award made in respect of them by the Land Acquisition Collector and the variation, if any, made by the Judge. There were four groups of claimants in respect of the land acquired, of whom only two are the appellants in two appeals. Group No. 1 are the appellants in Appeal No. 441 and Group No. 2 in Appeal No. 424. It will be convenient to deal with the appeals separately.

F. A. No. 424 of 1928

As regards L. A. Plots Nos. 13 and 16, which consist of a building and a tank, the Land Acquisition Collector proceeded on the basis of rental. He assessed the rent at Rs. 35 a month and deducted 10 per cent on account of collection charges, probable vacancies and costs of repairs. He proceeded on the same basis as regards L. A. Plot No. 5, which consists of a building and a half of a tank, took Rs. 80 as its rental and made a similar deduction. The Judge has upheld the Collector's award so far as these plots are concerned. The rest of the area, so far as the lands of these appellants are concerned, was divided into three belts according to their distances from the Bagura Alekanda Road. He valued the belts at the following rates per bigha : 1st belt Rs. 5,000, Rs. 4,800 and Rupees 4,700 ; 2nd belt Rs. 4,300 and Rs. 4,000 ; and 3rd belt Rs. 3,000. The different rates for lands in one and the same belt were assessed as the lands were of different qualities ; but we are only concerned with the rate of Rs. 5,000 for the 1st belt and Rs. 4,000 for the 2nd belt, which were awarded for the appellants' lands. He valued tanks, ditches and drains at $\frac{1}{4}$ th of the said rates. The Judge has upheld the system of belting but enhanced the rates as follows : 1st belt Rs. 6,000, 2nd belt Rs. 4,700, 3rd belt Rs. 3,500. He ordered that deep ditches and tanks should be valued at $\frac{1}{4}$ th of the said rates, but that superficial ditches should be valued at the full value of adjoining lands. (After considering the evidence, his Lordship proceeded). As regards the plots which have been valued on the basis of rental, we think nothing can be said on behalf of the appellants. Their values as determined by

the Land Acquisition Collector and the Judge must remain as they are.

As regards the rest of the area, the main argument of the appellants is that it should be valued at an all round rate of Rs. 6,000 which the Judge has awarded for the first class lands of the first belt and that tanks should be valued at full rates for lands. Now so far as the system of belting is concerned it is a system which is widely used, but its value as a system depends much upon a variety of facts. If data are available showing the proportion at which the value of land diminished, accordingly as it is situated at a particular distance from a main road or thoroughfare, the system would be perfectly scientific. In the absence of any such data also, it may be assumed that in big cities where land sells by cottas or yards or feet there is such a proportion, as common experience shows. For instance, in land acquisition or improvement schemes in and near about Calcutta land is generally divided into blocks facing some particular street or road or lane and each block is divided into three belts, the first to a depth of 60 feet or so on the road frontage, the second to a depth of about 150 feet thereafter and the third consisting of all land behind, and the relative values of the three belts are fixed in the proportion of 100, 66·6 and 50. But in places and localities where lands are sold by bighas or acres, and there is no real evidence of such proportionate diminution in value, the system is based on no sound principle and must be regarded as a method not quite satisfactory. Of course there is almost always a distinction in value between front lands and back lands everywhere but that distinction would not obviously justify a recourse to the belting system in each and every case. It is a highly artificial system and cannot be resorted to as a hard and fast rule: see *Secy. of State v. India General Steam Navigation and Railway Co. Ltd.* (1), *Roghunath Das v. Collector of Dacca* (2), *The Collector v. Ramchandra Harischandra*, A. I. R. 1926 Bom. 44. Nor again can there be any hard and fast rule that back land must be always of less value than front land or that the proportion should be as one to a half or

that there must be a certain proportion at a certain distance from the road: see *Collector of Poona v. Kashinath Khasgiwala* (3), In the matter of *Government of Bombay* (4), *Ataul Huq v. Secy. of State* (5) and *Guru Das Kundu Chowdhury v. Secy. of State* (6). In the case before us, no data are available except such as are contained in Ex. C; and if we rely on that document we think the proper conclusion to arrive at so far as the present lands are concerned is to leave the value of the lands of the first belt (i. e., L. A. Plots Nos. 14, 15 and 17) intact, and to value the lands of the second and third belts (i. e., L. A. Plots Nos. 9, 12, 6, 7 and 8) at an all round rate of Rs. 4,500 per bigha. As regards tanks we hold upon the evidence that they are very valuable in the locality and their utility is in no sense less than the lands, having regard to their position and size. L. A. Plots Nos. 10-B and 19-A should be valued at the rate of Rs. 4,500 per bigha and L. A. Plot No. 18 at Rs. 6,000 per bigha. It may be noted that the Commissioner in Ex. C did not value the tank at any different figure from the lands. The result is that the Judge's award should be enhanced as indicated above, and statutory allowance being added, the total amount of enhancement will carry interest at the rate of 6 per cent per annum from the date on which the Collector took possession, that is to say, from 30th January 1927. The appellants will be entitled to their costs on the amount of success in this appeal. Hearing-fee, five gold mohurs.

F. A. No. 441 of 1928.

In this case the lands concerned lie at the corner, being L. A. Plots Nos. 1, 2 and 3, on which there are buildings and a big tank with a pucca ghat. The Collector valued the premises on rental basis, taking the rental to be Rs. 75 a month and making the usual deduction of 10 per cent. The Judge has assessed the rental at Rs. 80. The buildings consist of a main building with 14 rooms: two of which are in the upper storey, an one-roomed structure standing apart and an out-house with two rooms. The claimant used to occupy the buildings and they were never on rent. In 1922, the

(1) [1909] 36 Cal 967=36 I A 200=4 I C 448 (PC).

(2) [1910] 6 I C 457.

(3) [1885] 10 Bom 585.

(4) [1908] 33 Bom 325=10 Bom L R 660.

(5) [1909] 3 I C 277.

(6) [1918] 22 I C 854.

claimant submitted an income-tax return stating the letting value as Rs. 1,000. In the return for 1926-27, he gave the letting value at Rs. 1,300. There is some indication that he had become aware of the contemplated acquisition and for that reason this return may not fit to be implicitly relied on. But comparing the adjoining premises for which the award has been on the basis of a rental of Rs. 35 and Rs. 80, as already stated above, it is difficult to resist the conclusion that the rental assessed is inadequate. The accommodation which these buildings provide and their site, compared with those of the other two premises for which those rentals have been assessed, would call certainly for a figure somewhere about Rs. 100. The learned Judge has observed :

"The house is however nicely situated and has a large number of rooms and out-houses. The rent of houses at Barisal has always been high and it is difficult to rent any good house in the town."

We think we shall be justified, on the materials before us, in assessing the rental at Rs. 100 per month. The award should be made on the basis of this enhanced rental with the usual deduction of 10 per cent, and with the addition of statutory allowance and interest as in the other appeal. The appellant will be entitled to his costs in this appeal on the amount of his success. Hearing-fee, three gold mohurs.

K.N. R.K.

Order accordingly.

A. I. R. 1933 Calcutta 27

COSTELLO, J.

Ahmad Kasim Molla—Plaintiff.

v.

Khatun Bibi—Defendant.

Original Civil Suit No. 1390 of 1930,
Decided on 14th August 1931.

(a) Practice — Pleadings—Ordinarily, defendant is not allowed to set up counter-claim in answer to plaintiff's claim—Civil P. C. (1908), S. 128.

In the ordinary way, except in cases of one or two items in table of costs which may be allowed on taxation under the rules of the High Court, a defendant is not able to set up a counter claim in answer to the claim of the plaintiff.

[P 28 C 2]

(b) Mahomedan Law — Divorce—Mahomedan may divorce wife at his mere whim.

Any Mahomedan may divorce his wife at his mere whim and caprice without assigning any cause.

[P 29 C 2]

(c) Mahomedan Law — Divorce—Talak by written instrument is valid, notwithstanding that it is not brought to notice of wife.

It is not necessary for the wife to be present when the talak is pronounced. A talak made by a written instrument, is valid notwithstanding that it is not brought to the notice of the wife; the only question which arises in such a case is with regard to the wife's maintenance during such period as may elapse until the fact of the execution of the talaknama comes actually to the knowledge of the wife: 36 Cal 184; 30 Bom 587 and A I R 1920 Bom 101, *Foll.*

[P 32 C 1]

(d) Mahomedan Law—Divorce—Marriage is purely civil contract—Terms of Kabinnama must be construed in same way as provisions in any other kind of contract.

Under Mahomedan law marriage is purely a civil contract and nothing more. The terms of a kabinnama must be looked at and construed in the same way as the provisions in any other kind of contract.

[P 33 C 1]

Although it is competent for the relation of a Mahomedan girl at the time of her marriage or for the Mahomedan woman herself to take measures for her protection in the event of ill-treatment or even divorce on the part of the husband, yet when the conditions mentioned in a kabinnama amount to very little more than a declaration on the part of the husband of such obligations as would naturally fall on him in any event as the result of the marriage, the conditions so mentioned are not sufficient to bring the matter within the scope of the rule and do not entitle the wife to maintenance after she is divorced: A I R 1921 All 152, *Rel. on.*

[P 34 C 1]

(e) Practice—Duty of Court—Court has to look to matter from strictly legal point of view and not from religious or ethical point of view.

The Court is not a Court of morals and it cannot concern itself with the religious or ethical aspect of a matter. It has to look at it from a strictly legal point of view.

[P 35 C 2]

S. Ghose and Arun Sen—for Plaintiff.

J. N. Mazumdar and Sudhish Ray—for Defendant.

Judgment.—In this suit the plaintiff, Ahmad Kasim Molla, seeks a declaration that he has validly divorced his wife, Khatun Bibi. He also asks for an injunction restraining her from taking out the sum of Rs. 232-14-0 deposited by him in the Court of the Presidency Magistrate, Calcutta.

The plaintiff's case is that he married the defendant on 25th August 1929, at No. 63/1, Sovaram Basuk Street, Calcutta, according to the provisions of the Sunni School of Mahomedan law. He then says that on 20th September 1929 he divorced his wife at No. 17, Zakaria Street, in accordance with Mahomedan law and that he duly intimated to the defendant that such divorce had been pronounced by him.

The defendant, on 20th March 1930, obtained from the Presidency Magistrate, Calcutta, an order for payment to her of maintenance at the rate of Rs. 50 per month. It was as a result of execution proceedings under that order that the sum of Rs. 232-14, which I have already mentioned, was paid by the plaintiff into the Court of the Presidency Magistrate. That sum represented maintenance for the defendant up to the month of May 1930.

The answer made by the defendant, as contained in her written statement, is to the effect that she admits the marriage, as averred by the plaintiff, but denies that the plaintiff validly divorced her; alternatively she says that if she was divorced she had no knowledge of it. The defendant further sets up the defence that it was not competent to the plaintiff to divorce her in the manner in which he purported to divorce her. The defendant then goes on to set up what she alleges to be the effect of certain conditions contained in the marriage contract, namely, the kabinnama and says that, under those conditions, in any event, she is entitled to be maintained by the plaintiff for the duration of her life. She relies mainly upon a clause which seems to show that, if the plaintiff made any breach of the conditions contained in the marriage contract, the defendant would be justified in living separately from the plaintiff and that, thereupon, the plaintiff would be under the obligation of making suitable provision for her residence and maintenance and also for the maintenance of her grandmother. The defendant then alleges that the plaintiff, without any lawful excuse, assaulted her and wrongfully drove her and her grandmother from the premises No. 63/1, Sovaram Basak Street about a month and eight days after the marriage, and she sets up that she has obtained an order for maintenance from the Presidency Magistrate, that is to say, the order to which I have already referred. The last paragraph of her written statement contains what is, to all intents and purposes, a counter-claim, in which she submits that should the Court hold that she was validly divorced then the plaintiff should be directed to make suitable provision for the maintenance and residence of herself and her grandmother.

It was objected by Mr. Ghose on behalf of the plaintiff that, in any event, it was not competent to the defendant to ask for any order in her favour owing to the fact that the Civil Procedure Code contains no provision for the making of a counter-claim. Mr. Ghose however had to admit, after I had drawn his attention to S. 128, Civil P. C., that that contention on his part was not correct. The real position with regard to counter-claims is that, so far, this Court has not thought fit to exercise the powers conferred upon it and other High Courts of India, under S. 128 of making proper rules for the setting up of counter-claims in suits, though there are one or two items in the table of costs which may be allowed on taxation under the rules of this Court, which seems to indicate that, at some time or other, the making of such rules was contemplated. However the position undoubtedly is that, in the ordinary way, a defendant is not able to set up a counter-claim in answer to the claim of the plaintiff. The one or two items in the table of costs, to which I have referred, provide that an additional court-fee shall be paid in respect of written statements which do in fact contain counter-claims. Mr. Ghose, on behalf of the plaintiff, drew my attention to the fact that in this particular case the additional fee specified in the table had not been paid by the defendant. Mr. Ghose argued further that that difficulty could not be overcome by the payment on the part of the defendant of the necessary additional fee at a late stage of the proceedings. Mr. Ghose however has overlooked S. 149, Civil P. C. which provides:

"Where the whole of or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees have not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and, upon such payment, the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

Under the powers conferred by that section, I thought it right to allow the defendant to put herself in order as regards the payment of the fee by paying the additional court-fee during the progress of the suit and, so far as that matter is concerned, Mr. Ghose's objection is without substance. The position of the

defendant is this. She says that, if the plaintiff had validly divorced her, then she ought to be entitled to rely upon the conditions in the kabinnama and obtain from the Court an order that such sum by way of maintenance, as the Court should think fit, should be paid to her during the rest of her life. Having regard to the fact that the plaintiff is asking for relief of a kind which falls within the equity jurisdiction of this Court, in my opinion, despite the apparent technical difficulties arising on the question whether a counter-claim is strictly admissible or not, in a case of this description, if the terms of the contract between the parties so warranted, it would only be just and equitable that the defendant should receive, at the hands of the Court, proper compensation for the plight into which the action of the plaintiff had put her. I have however to ask myself in the first place whether the defendant was validly divorced and if so whether, under the terms of the marriage contract between the parties, the defendant is entitled to receive anything more than that which a divorced Mahomedan wife is entitled to receive under the general provisions of the Mahomedan law. (His Lordship then briefly stating the circumstances under which the plaintiff married the defendant proceeded as follows): It is necessary, I think, that I should first of all briefly recapitulate the facts of this particular case. I have already said that the first point, which I have to determine, is whether or not the plaintiff validly divorced his wife. Mr. Mazumdar, on behalf of the defendant, argued with his usual ability that there was no valid divorce for two reasons.

In the first place, says Mr. Mazumdar, it is not competent under the Mahomedan law for a talak to be given without just cause assigned. It has never been suggested on behalf of the plaintiff—indeed it was not part of his case—that he had really any proper or reasonable grounds for getting rid of his wife and the matter must be discussed upon the footing that there was in fact no justification for divorce and that what the plaintiff did was done entirely capriciously and arbitrarily. The question therefore is whether, in the circumstances, the talak given in this case is valid. Upon that point, there are a num-

ber of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the more recent decisions of the Courts. I regret that I have to come to the conclusion that, as the law stands at present, any Mahomedan may divorce his wife at his mere whim and caprice. I find that there are passages in one ancient authority, quoted by Mr. Ameer Ali in his treatise on Mahomedan Law, Vol. 2, 5th Edn., p. 472, which run as follows:

The Prophet pronounced talak to be a most detestable thing before the Almighty God of all permitted things. If talak is given without any reason it is stupidity and ingratitude to God.

On the next page Mr. Ameer Ali puts the matter thus:

The author of the *Multeka* (Ibrahim Halebi) is more concise. He says "the law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no Musalman can justify a divorce either in the eyes of the religion or the law. If he abandon his wife or put her away from simple caprice, he draws upon himself the divine anger, for 'the curse of God,' said the Prophet, 'rests on him who repudiates his wife capriciously'."

Mr. Macnaughten in his well-known book says that there is no occasion for any particular cause for divorce, and mere whim is sufficient. Then he goes on to point out that

"where conscientious and honourable feelings are insufficient to restrain a man from putting away his wife without cause the temporal impediments are by no means trifling. Dower is demandable upon divorce and with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of the husband to pay."

No doubt, in normal cases of Mahomedan marriages, those who are acting on behalf of the bride are careful to see that she is properly protected against capriciousness on the part of the husband in giving talak by adequate provision for the payment of a large sum by way of dower, that is to say, care is taken to ensure that what Mr. Macnaughten calls "the temporal impediments" shall be a real obstacle in the way of a husband acting arbitrarily or unfairly. In the present instance however so far as the provision for dower is concerned, it cannot be said that it is "by no means trifling;" on the contrary, the amount stipulated for, namely, Rs. 201 was extremely trivial. Upon this question of whether talak can be given without any just

cause or without assigning any reason the matter can be summed up in the words, used by Batchelor, J., in the case of *Sarabai v. Rabinbai* (1), with reference to an analogous question, where he said "it is good in law, though bad in theology." I need only make reference to one or two decisions of the Courts on this point. In *Asha Bibi v. Kadir Ibrahim Rowther* (2), at p. 25 the Court consisting of Munro and Abdur Rahim, JJ., said:

"The right to domestic authority is conceded to the husband rather than to the wife in consideration as hinted above of the pecuniary burden imposed upon the husband and also because of the presumed superiority of the male sex in judgment and discretion. For the same reasons the husband is recognized as having an absolute right to put an end to the marriage by his private act. No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband."

Then there is a decision of the Judicial Committee of the Privy Council in the case of *Ma Mi v. Kallander Ammal* (3), where Sir John Wallace, in his judgment says:

"According to that law" (that is the Mahomedan law), "a husband can effect a divorce whenever he desires."

It is therefore abundantly clear on all the authorities that as tersely stated in Sir Dinshaw Mulla's well-known book: "any Mahomedan of sane mind who has attained puberty can divorce his wife without assigning any cause."

The reference given by Sir Dinshaw Mulla in support of this proposition are Macnaghten, p. 59, Hedaya p. 75 and Baillie, pp. 208 and 209.

The second point taken by Mr. Mazumdar, on behalf of the defendant, was that, in the present case the talak was not brought to the notice of the defendant. As regards the facts, what happened was: that on 20th September 1929, the plaintiff in the presence of certain relatives had a document written out which was signed by some of those present as witnesses. It appears that the plaintiff pronounced the word "talak" three times in the presence of some five persons, some of whom gave evidence before me. I need not go fur-

ther into detail, as I am satisfied that he did execute the document he had written out and that it was signed as it purported to be signed. An English translation of the document reads as follows:

"Ahmad Kasim Molla, son of Kasim Ahmad Molla, deceased, resident of Baryao, at present residing at No. 17 Zakaria Street, Calcutta. This day, the 20th September year 1929 (Eng.), I divorce without any anger, Khatun Bibi, daughter of Ismail Saheb, deceased, who has been my wife up till now. Divorce, divorce, divorce."

Then follows the signature of Ahmad Kasim Molla and that of five witnesses. It appears that after the document was executed, it was sent by registered post in an envelope addressed as follows:

"Khatun Bibi, daughter of Ismail Saheb,
63A, Sovaram Basak Lane,
Off Sagur Datta Lane, Calcutta."

Then in the right hand bottom corner was put these words:

"From A. C. Molla,
17, Zakaria Street, Calcutta."

Evidence was given on behalf of the plaintiff that the letter came back endorsed by the postal authorities with the word "refused," and "I was asked to infer that the letter had duly reached the defendant or some one acting for her (either her grandmother or her uncle) and that the recipient, suspecting the nature of the contents, had declined to accept the letter and had handed it back to the postman. On the other hand on behalf of the defendant it was suggested that the defendant might never have been found by the postman at all and that the letter never came into her hands. I think I am bound to draw the reasonable inference, from the fact that the envelope is endorsed in the way I have described that the letter did reach the defendant or some one acting on her behalf, who had knowledge of the circumstances. The defendant herself gave evidence that just prior to 20th September, the plaintiff had indicated to her that he proposed to have nothing more to do with her. Therefore I think it not unnatural to surmise that when she saw an envelope "franked" as it were with the name of the plaintiff that she may have suspected that it contained some communication to her disadvantage, if not actually a communication divorcing her. However there is no evidence that in fact the defendant at that time was aware of the nature of the document contained in the envelope sent

[1905] 30 Bom 337=8 Bom L.R. 35.

[1909] 33 Mad 22=3 I C 780.

A I R 1927 P C 15=100 I C 1=54 I A 61=5 Rang 18 (P O).

to her by the plaintiff or by his cousin Golam Hossain Molla on his behalf. If it could be shown that the defendant was aware of the nature of the document which was being sent to her, the matter would fall within the ambit of the decision in the case to which I have already referred in another connexion: *Sarabai v. Rabiabai* (1).

In that case a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the kazi and there pronounced the divorce of his wife the plaintiff in the suit, in her absence. He had a talaknama written out by the kazi, which was signed by him and attested by the witnesses. He then took steps to communicate the fact of the divorce and to make payment of iddat money to the plaintiff, but she evaded both. In answer to the contention that the divorce was not final, as it was never communicated to the plaintiff, it was held that a haintalak, such as the one in that case, which was reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it was effective as soon as the words were written, even without the wife receiving the writing. There is also the decision of this Court in *Ful Chand v. Nazab Ali Chowdhry* (4), where it was held that under the Mahomedan law, absence of the wife does not make the pronouncement of talak void and inefficacious. The judgment of the Court was given by Stephen, J. He said:

"The first question, which we have to decide is whether the absence of the wife makes the pronouncement of the talak void and inefficacious. In our opinion it does not. The point is dealt with in the book of Mr. Ameer Ali in S. 3, Ch. 12, where he says: 'It is not necessary for the husband himself to pronounce talak in the presence of the wife, but it is necessary that it should come to her knowledge.' The matter is also dealt with in Wilson's Digest at p. 164, but not so decisively. It also seems to be the opinion expressed in Nawab Abdur Rahman's Institutes of Mussalman Law. The matter has twice, as far as we are aware, been dealt with by the Courts; in the first place, in the case of *Kursum Hossein v. Janu Bibi* (5) and, secondly in the case of *Sarabai v. Rabiabai* (1). In the second of these cases a distinct opinion is expressed that it is not necessary for the wife to be present, when the talak is pronounced although this is an obiter inasmuch as that case dealt with a written instrument of divorce. In the previous Calcutta case, the matter is also dealt with and the point itself is not directly

noticed, but talak was there pronounced in the absence of the wife, and it is significant that the case is not decided on that point, which it would have been, if it had been fatal to the effect of the divorce. We therefore hold that it is not necessary for the wife to be present when the talak is pronounced. It is necessary certainly for the purpose of dower that the fact of the pronouncement of talak should come to her notice."

With these observations I entirely agree. Finally, there is a case on this point decided by the Bombay High Court: *In re Rajasaheb Rasulsahab* (6). In that case, the facts were that a Mahomedan executed a talaknama in the presence of witnesses and caused it to be duly registered under the Indian Registration Act, 1908. Neither the kazi nor the wife was at present at the time the deed was executed. The making of the deed was not immediately communicated to the wife, but it came to her knowledge within a reasonable time. It was held that the talaknama was valid. Now, in this present case, whether or not the defendant by declining to take in the registered letter, as is suggested on behalf of the plaintiff, sought to evade notice that a talaknama had been executed by the plaintiff, really makes no difference, because it is part of the case of the defendant herself that she took proceedings before the Presidency Magistrate, Calcutta, as a result of which she obtained an order for maintenance on 31st March 1930. It seems to be clear that, in the course of those proceedings, the present plaintiff raised, by way of defence, the fact that he had already given a talaknama; so that, at any rate, by 31st March 1930, the defendant was fully aware of the fact that her husband had executed a talaknama on 20th September 1929. The facts of the case to which I have just referred, *In re Rajasaheb Rasulsahab* (6), were in some respects analogous to the facts of the present case because there also the wife, Khatijabai, had obtained an order from the Magistrate directing her husband to pay her a sum of Rs. 10 per month as maintenance for herself and her child under the provision of S. 488, Criminal P. C. Three weeks after the making of the order, the husband executed a talaknama divorcing Khatijabai.

As I have already said, the deed was duly executed in the presence of witnesses

(4) [1909] 30 Cal 184 = 1 I C 740,

(5) [1878] 4 Cal 488.

(6) A I R 1920 Bom 101 = 54 I C 573 = 44 Bom 44.

and registered under the Registration Act, but at the time of the execution neither the kazi nor the wife was present and it was not brought to the knowledge of the wife immediately. A few months after the wife had obtained the maintenance order the husband applied to the Magistrate for cancellation of the order for maintenance on the ground that he had already divorced his wife and that he was no longer bound to maintain her. It was held that not only was the talaknama valid, but that it put an end to any right on the part of the wife to receive maintenance in respect of herself although, on the facts of that particular case, the order of the Magistrate was not disturbed, because the Court was of opinion that the amount ordered to be paid was no more than sufficient for the maintenance of the child of the marriage. It seems to be clear therefore that not only can a Mahomedan divorce his wife without assigning any reasons, but also that a talak is valid, where it is made by a written instrument, notwithstanding that it is not brought to the knowledge of the wife; and the only question which can arise is with regard to the wife's maintenance during such period as may elapse until the fact of the execution of the talaknama actually comes to the knowledge of the wife. The matter is dealt with in the case of *Asha Bibi v. Kadi Ibrahim Rowther* (2) where it is held that it is not necessary that the talak or words of repudiation should be addressed directly to the wife to constitute a valid divorce, but

"the words should refer to the wife though if they be not communicated to her at the time a question may possibly arise as to whether she is not entitled until she comes to know of the divorce to bind her husband by certain acts such as pledging his credit for obtaining the means of subsistence."

With regard to maintenance proceedings, such as there were in the present case, the husband can, at any time during such proceedings, defeat any attempt on the part of the wife to obtain an order for maintenance by the giving of a talak and further, if any such maintenance order has in fact been made, it ceases to be effective as soon as a talak is validly given. In that connexion, I would refer only to one authority *Sha Abu Ilyas v. Ulfat Bibi* (7), in which it was held that

"where in answer to an application for enforcement of an order under S. 488, Criminal P. C., for the maintenance of a wife, the party against whom such order is pending pleads that he has lawfully divorced his wife and therefore the order can no longer be enforced, it is the duty of the Court hearing the application to entertain and consider such plea, and, if it find the plea established, to decline to enforce the order for any period subsequent to the date when the marriage ceased to subsist between the parties. In such cases, where the parties are Mahomedans, the marriage will be deemed to subsist until the expiration of the iddat."

In view of that authority, I am not at all sure that it was not the duty of the learned Presidency Magistrate to have considered the question whether a talak had been given as soon as it was brought to his attention before the order of 21st March 1930, already referred to was made. I am bound to say that, in my opinion, it does seem harsh that, at any time, a Mahomedan husband can, of his own power, put an end to any proceedings his wife may take under S. 488, Criminal P. C., and it may be that some day this matter will have to be seriously considered by the members of the Mahomedan community and the legislature with a view to determining whether such arbitrary power in the hands of the husband is not now an anachronism inconsistent with present day ideas and incompatible with modern conditions. I have however only to concern myself with the existing law and for the reasons which I have given, I hold that in the present instance there was a valid divorce by means of the talaknama executed by the plaintiff on 20th September 1929. As it has not been established by the plaintiff that the existence of the talaknama came to the knowledge of the defendant prior to the proceedings before the Presidency Magistrate, it cannot be disputed that she is entitled to maintenance up to that time. In regard to that however no question arises, because I understand that maintenance was in fact paid for that period.

I now come to what is the more serious and indeed more difficult aspect of this particular case, namely, whether, in the peculiar circumstances of the marriage between these parties, the wife is entitled to receive anything more than she would ordinarily be entitled to upon divorce. The law is that normally upon a husband giving talak the wife becomes entitled to payment of such dower as has

been provided for in the marriage contract. If the "prompt" dower has already been paid, she is entitled forthwith to receive the "deferred" dower. If, on the other hand, no part of the dower has already been paid she becomes entitled to payment of the whole of the dower stipulated for in the kabinnama. The wife is also entitled to maintenance during the period of iddat. There again in this case no question arises as to maintenance during iddat, because, as I have already said, maintenance has already been paid up till 21st July 1930. As regards the dower, the amount provided in the kabinnama was a sum of Rs. 201. That, as I have already said, was such a trifling sum, that it provided no impediment, nor did it act as a deterrent in any way to the husband, who having got all he wanted from his wife after a month's cohabitation, cast her aside.

I have no doubt however that the persons, who were acting on behalf of this little girl, the defendant, did intend, as far as they could, to ensure that the plaintiff should treat her kindly and properly and should maintain not only her but the grandmother, under whose care she had been before the marriage, and, accordingly, for the purpose of putting a check upon the "bridegroom," as he is described in the kabinnama, certain special conditions were inserted in that document, which constitutes the marriage contract between the parties. In discussing this matter, it must be borne in mind that, under Mahomedan law, marriage is purely a civil contract and nothing more. Therefore the terms of the kabinnama must be looked at and construed in the same way as the provisions in any other kind of contract.

I thought it right that I should have before me the naib kazi, that is to say, the assistant marriage registrar before whom the marriage contract was entered into. In answer to a question by me, he said that he was a moulti as well as being an assistant marriage registrar. In both those capacities, he may be taken to be an expert witness as regards the necessary ceremonial to be observed on the occasion of a Mahomedan marriage. In the course of his evidence, he gave a very full and complete account of exactly how this particular marriage was effected and the manner in which the

special conditions were inserted in the kabinnama. The defendant's maternal uncle, the man to whom I have already referred, acted as what is technically called the "vakil" of the intended bride; that is to say, he was acting as the bride's agent for the purpose of the wedding ceremony, and the making of the contract between the parties. It appears from the evidence of the naib kazi, Hafiz Nur Mahomed, that he satisfied himself that, first of all, the uncle, as the vakil of the bride, had duly ascertained that she was consenting to the conditions which were being put into the contract, and the naib kazi himself was satisfied that the bride's party, that is to say, the defendant's uncle as her vakil, and the two other witnesses acting on her behalf were fully aware of the exact terms which were being embodied by the naib kazi in the kabinnama. Hafiz Nur Muhomed said quite definitely that, in fact the language in which the special conditions were couched was written down by him in the document at the dictation of the parties. I cannot therefore but come to the conclusion that the defendant's agents were fully cognizant of the precise terms of the special conditions. I will repeat that, in my opinion, there is no doubt whatever that the girl's relatives did intend to protect her as far as they were able against any illtreatment or unkindness or even desertion on the part of the husband.

The girl's grandmother was fully aware of all the circumstances, and, as I have said earlier in this judgment, she knew, or ought to have known that the plaintiff had two wives already, and she must have realized that all the plaintiff wanted was an opportunity of having sexual relations with her granddaughter under the cloak of marriage. The fact that, under Moslem law, marriage is regarded merely as a civil contract and not a religious sacrament may perhaps make some difference to the moral aspect of the plaintiff's conduct, but one cannot be oblivious of the fact that the plaintiff was to all intents and purposes seducing the defendant under the pretext of entering into what would normally be a life-long union, and no words of reprobation are too strong in condemnation of the conduct of the plaintiff. It appears therefore that the girl's relatives had ample justification for supposing that the

plaintiff was the kind of man against whom it was desirable and indeed necessary to protect the girl whom he was about to marry. Unfortunately however the real question is not what the girl's relatives had in mind, but what the terms of the contract actually are. It was argued very forcibly by Mr. Mazumdar that not only the intention in the minds of the girl's people but the language of the document itself must be taken to mean that the plaintiff was under a legal obligation to support the defendant and her grandmother for the duration of their natural lives. No doubt it is competent for the relations of a Mahomedan girl at the time of her marriage or for a Mahomedan woman herself to take measures for her protection in the event of illtreatment or even divorce on the part of the husband. That was made clear in an Allahabad case *Muhammad Muinuddin v. Jamal Fatima* (8). The headnote of that case runs as follows:

"An ante-nuptial agreement entered into between the prospective wife on the one side and the prospective husband and his father on the other (the parties being Mahomedans) with the object of securing the wife against illtreatment and of ensuring her a suitable amount of maintenance in case such treatment was meted out to her, was not void as being against public policy."

There the husband, a man named Mehdi Hasan, had married twice before, and on each occasion seems to have ill-treated his wife. The father of the prospective bride, in consequence, thought it right that something should be done to protect his daughter and to secure for her a maintenance allowance in case she and Hasan did not continue to live together. To that end an agreement was entered into between the parties which provided that, in case of disunion or dissension, the prospective husband and his father should be bound to pay to his divorced wife for the rest of her life an allowance of Rs. 15 a month in addition to the dower due to the wife and certain properties were hypothecated to ensure payment of that allowance. The husband did eventually divorce his wife and thereupon the question arose as to whether the husband was bound to pay the allowance of Rs. 15 a month.

Mr. Mazumdar has argued that the present case is covered by the facts and

the decision in that case and that the special conditions contained in the kabinnama entered into on 25th August 1929, are wide enough to make it obligatory on the present plaintiff to pay to the defendant whom he has divorced a reasonable amount for the maintenance for herself and grandmother for the rest of their lives. I should mention that the defendant's maternal uncle, when he was in the witness-box seemed to be of opinion that he also, for some reason or other ought to share in the allowance paid by the plaintiff to the defendant. I cannot refrain from remarking that the maternal uncle did not impress me at all favourably. It seemed to me that he was much more concerned with his own comfort and convenience than for the well being and happiness of his unfortunate niece. I have no doubt however that at the time of the marriage, he thought that he was doing his best in the interests of the defendant but it equally appears to be the fact that no one on behalf of the defendant ever had in mind or contemplated the possibility of the plaintiff divorcing the defendant and so bringing about a situation such as now exists. That such an obvious method of cutting adrift from all his obligations (other than the payment of dower) might be resorted to by the husband should not have occurred to the minds of the uncle and grandmother is perhaps a little remarkable, but on the evidence, it must be taken that they never envisaged the position which would arise if the plaintiff took it into his head capriciously and without warning to exercise his right to divorce the girl whom he was then about to marry. I have to decide therefore whether the special conditions are wide enough to cover the circumstances which have now arisen. Mr. Ghose, on behalf of the plaintiff, very frankly and properly admitted that the plaintiff is bound by those conditions whatever they may mean and therefore the only question I have to determine in this connexion is what is the true meaning and extent of those conditions. The special conditions are contained in Col. 14 of the kabinnama. That document consists of the entries made by the assistant marriage registrar in the register of marriages which is maintained under Sec. 12, 15 and 22, Bengal Council Act 1 of 1876. The special conditions read as follows:

"I, the bridegroom, promise (or declare) that I shall not do the bride any hard-ship regarding maintenance and I shall not beat her or abuse her and I shall not do any acts which shall disgrace her or break her heart (cause her grief). I shall not be competent to take the aforesaid bride to any other place by force. I, the bridegroom, shall never separate the grandmother of the said bride who is the daughter of Syed Abdul Rahim, deceased, who has been responsible for (in charge of) the support and food and clothing of the said bride and who being the guardian of the said bride has now given her in marriage to me. I, the bridegroom, shall be responsible and in charge of her maintenance; also if I, the bridegroom, act against the defendant above-mentioned or if I commit any kind of mischief (wickedness) or show any carelessness (unconcern), then the aforesaid bride (putting up) wherever she pleases shall be competent to realize from me month by month according to my means her subsistence money and the rent of the house she dwells in and I, the bridegroom, shall not be competent to raise any objection."

Now the main difficulty in trying to arrive at a conclusion as to what precisely is the meaning and effect of these conditions is that, with small exceptions the stipulations amount to very little more than a declaration of the acceptance on the part of the husband of such obligations as would naturally fall upon him in any event as the result of marriage. The condition about not ill-treating the wife, disgracing her or causing her grief and later the provision with regard to her being at liberty to live separate from her husband should he ill-treat her and thereupon receiving maintenance from him, really amount to no more than a declaration of the normal rights of a wife as against her husband. The only extraordinary provision in these conditions is that which seeks to ensure that not only the wife, but also her grandmother should receive subsistence allowance and proper accommodation at the expense of the husband.

This it is that makes it fairly plain that this unfortunate little girl's relatives, who were in charge of her, were as much concerned with their own comfort as that of the girl. I cannot help thinking that these conditions were largely designed to ensure that the grandmother should obtain for herself what can only be described as a "consideration" (in the legal sense) for the "sale" by her of her granddaughter to this middle-aged and apparently lustful bridegroom. I regret that I feel bound to come to the conclusion, on the language employed in this contract, that the terms of the

special conditions are not sufficiently explicit to bring the matter within the scope of the decision in *Muhammad Muinuddin v. Jamal Fatima* (8). If the conditions had expressly stated that the bridegroom should according to his means pay to his wife subsistence money and the rent of a house to dwell in for her life, or had contained any expression indicating the period for which this maintenance was to be paid, the case would have been different.

In my opinion, it would have been quite competent for those acting on behalf of the wife to have stipulated that, if there were a divorce, the husband should be under an obligation to continue to pay to the wife an adequate subsistence allowance, or if no sum had been mentioned, then a reasonable sum would have been payable during the lifetime of the wife or for any other specified period. But in this case, no period is specified. Nothing whatever is said about divorce. On the contrary, the parties are referred to as the "bride" and "bridegroom" in other words "husband" and "wife" and accordingly, I feel bound to hold that upon a strict construction of the conditions as they stand they can only be made to apply during the existence of the marriage. I come to that conclusion with the greatest possible reluctance and with a sense that this is one of those hard cases which are said to make bad law. I can however only administer the law as I find it and I must interpret this contract as I should have had to interpret any other contract between the parties irrespective of the effect which it may have upon either of them. This Court is not a Court of morals and I cannot concern myself with the religious or ethical aspect of the matter. I have to regard the matter from a strictly legal point of view.

Looking at these conditions and considering them solely as the terms of a civil contract entered into between the parties, I feel bound to hold that they are not sufficiently definite to put upon the plaintiff any obligation to pay maintenance to the defendant now that the marriage between the parties has been dissolved. I can only express the hope that irrespective of the legal aspect of the matter, the plaintiff will be brought to some sense of his moral responsibility and that he will realize that whatever the law

may say he ought, in the circumstances, to provide for this little girl at any rate until such time as she may marry again. It follows from what I have said that here must be judgment for the plaintiff. The plaintiff will have the declaration which he seeks, but having regard to all the circumstances without costs.

R.M./R.K.

Suit decreed.

* * A. I. R. 1933 Calcutta 36

COSTELLO, J.

Jagadish Narain Tewary—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 10 of 1932, Decided on 2nd March 1932.

(a) Calcutta Police Act (1866), S. 62-A (1)—Police Officer issuing order under S. 62-A (1) need not be armed with previous sanction of Commissioner of Police.

A police officer issuing order under S. 62-A (1) need not be armed with a previous sanction of the Commissioner of Police. What the words "subject to the orders of the Commissioner of Police" used in the section mean is that if the Commissioner of Police so chooses he may by his direction supersede or alter the order issued by the police officer. [P 37 C 2]

(b) Penal Code (1860), S. 109—Illegal omission has reference to intention of "aiding the doing of a thing."

The words "illegal omission" in connexion with the definition of abetment have reference to an intention of "aiding the doing of a thing." [P 38 C 1]

* * (c) Penal Code (1860), S. 109—Accused president of public meeting—"Volunteer" at meeting sounding bugle in spite of order not to do so given by police officer—Accused taking no steps to prevent him from sounding bugle though police order given within his hearing—He refusing to disclose name and address of bugler hence was charged with abetting—Accused elected president just before meeting having no previous knowledge that bugle was to be blown—Charge of abetting held not established.

The accused was the president of a public meeting held at Haliday Park. Amongst the audience there were certain "volunteers" one of whom from time to time sounded a bugle. A police officer requested the bugler not to sound the bugle, but he did not listen. The accused took no steps to stop the sounding of the bugle, though the direction was given by the police officer within his hearing. The accused refused to give the name and the address of the bugler and was therefore charged with abetting a man to commit an offence under S. 62-A (1) (e). The accused however was elected president just before the proceedings of the meeting began; and had no knowledge that in the course of the meeting a bugle was going to be blown in that way:

Held: that in such cases to prove abetment something more should be established than the mere fact that the chairman of the meeting took no steps to prevent an objectionable or unlawful action on the part of some person at the meeting. As no guilty knowledge or conspiracy was proved against the accused the charge of abetting was not substantiated: *A I R 1932 Cal 549, Rel on.* [P 38 C 1, 2]

* (d) Criminal Trial—In dealing with trials of criminal cases extraneous considerations are to be excluded.

In dealing with the trial of criminal cases the evidence given before the Magistrate must alone be considered and any further facts which might have been within the knowledge of the police and all other extraneous considerations must be excluded. [P 39 C 1]

Santosh Kumar Basu and Purimal Mookerji—for Petitioner.

B. M. Sen—for the Crown.

Judgment.—In this case Jagadish Narain Tewary was convicted by one of the Honorary, Presidency Magistrates, Calcutta, on 2nd December 1931, under S. 109, I. P. C., read with S. 62-A, sub-S. (1), Cl. (e), Calcutta Police Act, 1866, and sentenced to pay a fine of Rs. 75 or in default, to undergo seven days' simple imprisonment. S. 109, I. P. C., provides for punishment of abetment where an offence is committed in consequence of the act of abetment and no express provision is made by the Code for the punishment of such abetment. S. 62-A (1), Calcutta Police Act, 1866, reads as follows:

"The Commissioner of Police and, subject to the orders of the Commissioner of Police, every police officer of a rank not inferior to that of Sub-Inspector, may, with a view to securing the public safety or convenience, but not so as to contravene any rule made under the last foregoing section or the provisions of any license granted under any such rule, give all such directions, either orally or in writing, as he may consider necessary to . . ."

Then follows a catalogue of matters and then S. 62-A (1) (e) runs thus:

"Regulate and control music, the beating of drums, tomtoms and other instruments and the blowing or sounding of horns or other noisy instruments, in any street or any public place other than public buildings and the precincts thereof."

Jagadish Narain Tewary was in fact charged with abetting a man whose name is unknown to commit an offence under S. 62-A (1) (e) by the blowing of a bugle at a public meeting which was held at Haliday Park. It may be assumed for the purposes of the case that Haliday Park is a public place within the meaning of the section. It appears that on the 12th October last year

there was a meeting at Haliday Park held at about half-past five in the evening and amongst the audience there were a number of persons described as "volunteers" one of whom from time to time sounded a bugle. Jagadish Narain Tewary was the President (or Chairman) of the meeting. It appears from the evidence that he was elected to that office just before the meeting began. There is no evidence to show that he had any knowledge beforehand that a bugle would be blown by anyone in the course of the meeting. A Police Inspector S. N. Mukherji requested the man sounding the bugle not to do so and in making that request he was apparently acting under the powers conferred on police officers under S. 62-A (1). It was proved in the course of the hearing before the learned Presidency Magistrate that both Inspector S. N. Mukherji and another Sub-Inspector made attempts to ascertain the name of the man who was blowing the bugle, but he refused to give his name or disclose his address. No doubt the police officers therefore might have taken the man into custody under the powers conferred on police officers under S. 57, Criminal P. C., but that they did not do so, apparently for the reason that the name and the identity of the President were known to them and they thought it better to proceed against him in the matter. Jagadish Narain Tewary was accordingly charged, as I have said, with abetment of the offence committed by the blower of the bugle.

The point urged before the learned Presidency Magistrate on his behalf was that merely because he was President of the meeting he could not rightly be held liable for acts done by a person forming part of the audience. The learned Presidency Magistrate in the course of the judgment which he gave says:

"In the present case, I am inclined to hold the view that since the bugle was sounded at intervals, and Inspector S. N. Mukherjee while acting under S. 62-A, sub-S. (1) of the Act, directed the volunteer, within the accused's hearing, not to sound the bugle, it was the clear duty of the President to stop further sounding of the bugle. As the President, he had the control over the proceedings, and the intermittent sounding of the bugle formed a part of the proceedings. By failing to discharge this duty, the President has clearly been guilty of an illegal omission as contemplated in S. 109, I. & C."

Upon that view of the matter the

learned Presidency Magistrate came to the conclusion that the offence with which Jagadish Narayan Tewary was charged, had been properly substantiated. The rule was issued on a number of grounds and it has been cogently argued before me by Mr. Santosh Kumar Basu on behalf of the petitioner that, first of all, as the charge only had reference to an offence under S. 62-A (1), the prosecution had not succeeded in showing that the man who sounded the bugle had committed any offence whatever. It was contended that no evidence had been given to show that Inspector Mukherjee at the time when he orally asked the bugler to desist was properly armed with authority given by the Commissioner of Police—either under any general or particular order to deal with the matters mentioned in S. 62-A. So far as that point is concerned, I think there is no substance in it and the view expressed by the learned Honorary Presidency Magistrate in the explanation which he has given is correct. He says:

"The position is that for the purpose of S. 62-A (1), it is not necessary to act under any orders or to prove that the officer concerned was acting under any orders. The section says: The Commissioner of Police, and subject to the orders of the Commissioner of Police, every police officer of a rank, etc., may with a view to securing public safety or convenience, etc. What this section contemplates is that the Commissioner of Police may himself, if personally present, give certain directions; if he is not personally present, any of his subordinates not being one below the rank of a Sub-Inspector may give such directions. In the latter case, the section makes the order of such officer subject to the orders of the Commissioner of Police and not with the previous sanction—of the Commissioner of Police. The effect is that any subordinate police officer down to a Sub-Inspector may give the direction contemplated in this section and for this purpose he need not be previously authorized. If the Commissioner of Police so chooses he may by his direction supersede or alter the directions so given. If it was the intention of the Legislature to contemplate previous authority by the Commissioner of Police the words used would have been with the previous sanction of the Commissioner of Police, or words to the same effect."

In my view, that is the correct interpretation of the section. I have no doubt whatever that it was well within the powers and duties of Inspector Mukherjee to request that there should be a cessation of the blowing of the bugle.

The real point for determination in this case is whether or not it can be

rightly said that the prosecution fully established that Jagadish Narain Tewary was "abetting" the person who was sounding the bugle. The learned Presidency Magistrate based his decision upon the fact that the accused, as the President of the meeting, did not take any steps to prevent the blowing of the bugle although he must have heard and undoubtedly did hear the order given by the Sub-Inspector with regard to it. The learned Presidency Magistrate seems to think that that was an "illegal omission" but one must bear in mind that the words "illegal omission" in connexion with the definition of abetment have reference to an intention of "aiding the doing of a thing" and it is a little difficult to understand how it can reasonably be said that failure to request the blower of the bugle to desist could amount to an intentional aiding of the blowing of the bugle after it had been prohibited by the Inspector. Further, I have very great doubt whether the mere fact that the Chairman of the meeting failed to request the person sounding the bugle, to desist could amount to an "illegal" omission at all. I think, to establish that position, it is necessary to show that there was a legal duty on the Chairman of the meeting to take action in the circumstances. S. 107, I. P. C., lays down three main ways in which persons can be said to abet the doing of a thing. They are as follows:

"A person abets the doing of a thing who (1) instigates any person to do that thing, or (2) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or (3) intentionally aids by any act or illegal omission, the doing of that thing."

It is necessary to see whether in the present instance it can properly be said that the accused as the President of the meeting either instigated the sounding of the bugle or conspired with the person who blew it, to have it sounded. The learned Presidency Magistrate seems to have assumed that the accused as Chairman of the meeting must have known that a bugle was going to be blown at regular intervals. It was suggested that the accused as Chairman of the meeting must have known that the bugle would be sounded at regular intervals during the proceedings. But in the circum-

stances of this case it seems to me more than a little doubtful if that was so. At any rate it seems clear that the prosecution did not succeed in establishing that that was, in fact the case. As I have said the evidence goes to show that Jagadish Narain Tewary was only nominated as President of the meeting or invited to take the chair just as the meeting was about to begin. There was no evidence, in my opinion, that he had arranged that the bugle should be blown or that he, in fact, knew that a bugle would be blown at regular intervals. It may well be that some persons other than the gentleman who took the chair, arranged the details of the meeting, and that the Chairman himself knew no more of the programme of the proceedings than the names of the persons who would address the meeting. Having regard to the evidence in this case, I am of opinion that the learned Honorary Presidency Magistrate was not justified in drawing the inference which he did. Inspector Mukherji gave his evidence with scrupulous fairness and in no wise attempted to overstate the case. His evidence and that of the other police officer do not seem to me quite sufficient to establish that there was such guilty knowledge on the part of the Chairman so as to justify the suggestion that he had "conspired" in the legal sense with the person who blew the bugle.

I associate myself with the observations made by Panckridge, J., on a similar point in the case of *Emperor v. Bepin Behari Ganguli* (1). It is necessary that in a case of this description something more should be established than the mere fact that the Chairman of the meeting took no steps to prevent an objectionable and unlawful action on the part of some person or persons at the meeting. It is quite true that the present case is somewhat stronger against the accused than is the case tried before Panckridge J., because here there was evidence that the person blowing the bugle was a "volunteer" and, therefore presumably, some kind of official connected with the meeting and there was the further fact that the bugle was blown at regular intervals and apparently between each of the speeches for some definite purpose. But nevertheless, in the

circumstances in which Jagadish Narain Towary came to be the Chairman of the meeting he may not have known that the blowing of a bugle was a part of the proceedings either because it did not appear on any agenda before him or because he had not been given directions about it at the time when he took the chair. I think the case for the prosecution, therefore falls short of the full proof of the offence with which Jagadish Narain Towary was charged.

In dealing with the matter, the evidence as given before the learned Honorary Presidency Magistrate must alone be considered and any further facts which might have been within the knowledge of the police and all other extraneous considerations excluded. Dealing with the matter solely upon the evidence I think that the accused was entitled to the benefit of the doubt and, therefore the conviction must be set aside. The Rule is made absolute and the fine if paid should be refunded.

S.N./R.K.

Rule made absolute.

* A. I. R. 1933 Calcutta 39

MITTER AND BARTLEY, JJ.

Asia Khatun and others—Judgment-debtors—Appellants.

v.

Nurjahan Khatun and others—Decree-holders—Respondents.

Appeal No. 420 of 1931, Decided on 14th April 1932, against original order of Sub-Judge, First Class, Backergunj, D/- 10th October 1931.

* (a) Civil P. C. (1908), O. 21, Rr. 53 and 89—Judgment-debtor depositing money in Court to set aside mortgage sale—Attaching creditors of decree-holder purchaser by order of Court withdrawing part of deposited amount—Decree-holder not consenting—Decree-holder can challenge validity of deposit—Deposit is not decree and R. 53 does not apply—Sale should not be confirmed unless mortgagee decree-holder refunded amount withdrawn—Election—Evidence Act, S. 115.

Where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts; the election, if made with the knowledge of facts, is in itself binding. The election must be however a voluntary act, not forced upon him by circumstances over which he had no control and notwithstanding his protest. The receiving of an indirect benefit from a transaction, if without the party's own procurement, cannot have the effect of precluding him from denying the validity of the transaction : 37 I C 804, Dist.

Judgment-debtors deposited the decretal amount together with costs and applied for setting aside the sale held in execution of a mortgage decree and purchased by the mortgagee decree-holders. Portion of the deposited amount was attached by a creditor of the mortgagee decree-holder in execution of a rent decree. The Court ordered payment of the attached amount in full satisfaction of the decree against the mortgagee in spite of his protests. The trial Court set aside the sale; on appeal by the mortgagee decree-holder the deposit was held to be not good; the order was reversed and the case was remanded to consider what effect the fact that the decree of the attaching creditor was satisfied out of the amount deposited had on the position and rights of the parties. On remand the trial Court rejected the application of the judgment-debtor:

Held : that in resisting the application of the mortgagor judgment-debtor under O. 21, R. 89 the mortgagee decree-holder was not precluded by O. 21, R. 53 from challenging the validity of the deposit as what was attached was not a decree and as R. 53 applied only to attachment of decrees.

Held further : that the fact that the mortgagee decree-holder enjoyed the benefit of the deposit to a certain extent as the rent decree against him was dismissed as fully satisfied did not prevent him from challenging the validity of the deposit as the application of a part of the deposit to the satisfaction of the decree obtained against him was in spite of his protests and therefore involuntary.

Held also : that the sale should not be confirmed until the mortgagee decree-holder brought into Court the amount withdrawn by his creditor in satisfaction of his decree. [P 41 O 1, 2]

(b) Civil P. C. (1908), O. 34, R. 5—Redemption—Right of, is extinguished by sale taking place before Act 9 of 1929.

The right of redemption is extinguished with reference to persons who are concluded by the decree for sale by the sale actually taking place where the sale has taken place before Act 9 of 1929 came into force : A I R 1922 Pat 92, Diss. from ; 31 Cal 863 ; A I R 1922 P O 11 ; A I R 1918 P C 34 and A I R 1932 Cal 126, Dist. [P 42 O 1]

(c) Transfer of Property (Amendment) Supplementary Act (21 of 1929), S. 15 (e)—Act has no retrospective effect—Civil P. C. (1908), O. 34, R. 5 (as amended by Act 21 of 1929).

No retrospective operation can be given to the Act as it affects substantive rights and as S. 15 (e) expressly states that nothing in the Act will affect rights already acquired. The question of redemption on payment of the mortgage decretal amount before confirmation of sale is not merely a matter of procedure so as to allow the Court to give retrospective operation to the aforesaid Act : 22 Cal 767 (FB), Dist. [P 43 O 2]

Sarat Ch. Roy Choudhury and Mahendra Kumar Ghose—for Appellants.

Dwarkanath Chakrabarty and Srish Chandra Dutta—for Respondents.

Mitter, J.—This is an appeal by the judgment-debtors from an order of the Subordinate Judge of Backergunj dated

10th October 1931 by which he refused to set aside the sale in execution of a mortgage decree. The questions of law which fall for determination in this appeal depend on facts which have not been seriously disputed before us and which may be briefly stated. It appears that the respondents Nurjahan Khatun and others obtained a mortgage decree against the appellants Asia Khatun and others for a sum of Rs. 10,830-10-6 sometimes in the year 1928 and in execution of the said decree purchased the properties which formed the subject of the mortgage on 19th February 1930. On 19th March 1930 judgment-debtors 2 to 7 made an application to have the sale in execution set aside under O. 21, R. 89, Civil P. C., and they deposited the decretal money with compensation. On 24th March following notices were issued on the mortgagees decree-holders and judgment-debtor 1 to show cause why the sale should not be set aside. In the meantime on 25th March Narendra Nath Gupta and others who had obtained a rent decree against the mortgagees decree-holders, attached the sum of Rs. 3,410-10-0 out of the money deposited under O. 21, R. 89 by the mortgagors defendants 2 to 7, and on 26th May 1930 the Subordinate Judge after hearing the objections of the mortgagees decree-holders set aside the mortgage sale. On the next day the mortgagees decree-holders put in a petition before the Subordinate Judge asking the Court to stay the payment of Rs. 3,410-10-0 to Narendra Nath Gupta as they were intending to prefer an appeal against the order of the Subordinate Judge setting aside the sale to the High Court. They repeated this prayer for stay of payment in their application of 27th June 1930.

On 28th June 1930 the mortgagees decree-holders put in a further application in which they distinctly alleged that they did not admit that the amount deposited by the judgment-debtors under O. 21, R. 89 belonged to them and they prayed that in the circumstances till it was decided by the High Court that the said money belonged to them, the attaching creditors could in no sense be entitled to the money on the footing that the said money belonged to them and they asked for time to bring an order for stay from the High Court. The Subordinate Judge who was dealing

with both the rent execution case and the application under O. 21, R. 89 directed that the sum of Rs. 3,410-10-0 be paid to the attaching creditors on their furnishing security and on 12th July 1930 the security was furnished and payment order was made in favour of the attaching creditors and the rent execution case against the mortgagees decree-holders in the present case was dismissed on full satisfaction. On 21st July 1930 the mortgagees decree-holders preferred an appeal to the High Court against the order of the Subordinate Judge setting aside the mortgage sale. The appeal was heard by the learned Sir George Rankin, C. J. and Pearson, J. Pearson, J., with whom the Chief Justice concurred allowed the appeal and made the following observations :

"In my judgment therefore this was not a good deposit under R. 89 which entitled the judgment-debtor to have the sale set aside and prima facie, the order of the learned Judge cannot stand.

It appears however that on 25th March 1930, a few days after the deposit, an attachment in execution was made of the deposit moneys to the extent of Rs. 3,410-10-0 by creditors holding a decree against the decree-holders in the present matter. A certificate for payment of that amount was granted to the attaching creditors on 12th July 1930. In the circumstances this matter must go back to the lower Court for consideration of what effect, if any, this fact may have upon the present position and rights of the parties."

It appears therefore from the observations last quoted that the High Court remanded the case for consideration of the question as to what effect the fact of the attachment of Rs. 3,410-10-0 and of the payment of the same to the attaching creditors of the mortgagees decree-holders may have upon the rights of the parties. When the matter goes back on remand not only this question but also other objections to the sale in execution of the mortgage decree were raised before the Subordinate Judge. The Subordinate Judge rejected the application under O. 21, R. 89, and the other applications made on 17th August 1931 by which the judgment-debtors 2 to 7 prayed that the mortgage decree may be held to be satisfied and that the sale and purchase by the mortgagees decree-holders might be set aside. It is against this order refusing to set aside the sale that the present appeal has been brought. The sale was attacked substantially on four grounds before the learned Subordi-

nate Judge below and the same grounds have been repeated before us by the learned advocate for the appellants.

The first ground taken is that the attaching creditors Narendra Nath Gupta and others were representatives of the mortgagees decree-holders and the withdrawal of money by them precludes the mortgagees decree-holders from contending that the deposit was not a good deposit within the meaning of O. 21, R. 89, Civil P. C., and reliance is placed on O. 21, R. 53, Civil P. C., in support of this contention. It is obvious however that O. 21, R. 53 has no application to the present case seeing that what was attached in the present case was not a decree and O. 21, R. 53 applies only to attachment of decrees. This ground therefore fails.

It is contended in the second place that as the mortgagees decree-holders had enjoyed the benefit of the deposit made by the judgment-debtors 2 to 7 he is precluded from challenging the validity of the deposit or from challenging the order made by the Subordinate Judge in the first instance setting aside the sale. It is pointed out that before filing the appeal on 21st July 1930 against the order of the Subordinate Judge setting aside the sale the decree-holder enjoyed the benefit of the deposit to a certain extent as the rent decree against the mortgagee decree-holders was dismissed on full satisfaction. In support of this contention reliance has been placed on a decision of this Court in the case of *Banku Chandra Bose v. Marium Begum* (1). An examination of that case shows that where a suit which was dismissed for non-prosecution was restored on an application on behalf of the plaintiffs and the Court made certain orders in respect of the payment of defendant's costs incidental to the application and the defendants got their costs taxed and obtained an allocatur it was held that they having taken advantage of the order were precluded from appealing against it. The learned Sir Lancelot Sanderson, C. J., said that the defendants acted under the order and enjoyed the benefit of it and they could not adopt the order for one purpose and then claim to have it set aside for another purpose. Other cases were also cited to show that where a person accepts a benefit under the order

of a Court he is precluded from challenging the order. This rule is only a special phase of the rule that a party cannot either in course of a litigation or in dealing in pais occupy inconsistent positions; upon that rule election is founded. In other words a man shall not be allowed in the language of the Scotch law to approbate and reprobate. Where a man has an election between several inconsistent courses of action he will be confined to that which he first adopts; the election, if made with the knowledge of facts, is in itself binding. The election must be however a voluntary act not forced upon him by circumstances over which he had no control and notwithstanding his protest. Three petitions of the decree-holders dated 27th May, 27th June and 28th June 1930 respectively make it clear beyond doubt that the mortgagees decree-holders respondents were persistently resisting the application of the deposit money to the satisfaction of the rent decree obtained by Guptas against them. The true rule in cases of this kind is laid down by Dr. Bigelow in his classic work on the Law of Estoppel, Edn. 6 at p. 747. The learned author says this :

"Nor will the receiving an indirect benefit from a transaction, it seems, if without the party's own procurement, have the effect to preclude him from denying the validity of the transaction."

The decree-holders were no free agents in the matter of attachment of Rupees 3,410-10-0 and in those circumstances I can see no reason on principle and I can see nothing in authority to guide me to the conclusion that the respondents are precluded from challenging the validity of the deposit. At the same time I feel that no order for confirmation of sale can be made until the mortgagees decree-holders can bring into Court the sum of Rs. 3,410-10-0 and place it to the credit of the judgment-debtors, defendants 2 to 7. The next ground taken is that under the provisions of O. 34, R. 5, as it stood before its amendment by Act 21 of 1929 the judgment-debtors are entitled to redeem before the confirmation of sale. It is argued that the right of the mortgagors to redeem is not extinguished by the sale, that the security remains alive till the date of confirmation of the sale and reliance has been placed in support of this contention on a Full Bench of this Court in the case of *Bibijan Bibi v.*

Sachi Bewah (2). An examination of that case will however show what was there laid down is that a mortgagor judgment-debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage decree by payment of the debt before the sale actually takes place and the sale proceeds are distributed. It is argued that the use of the words "and the sale proceeds are distributed" in the said Full Bench judgment goes to show that the mortgage could be redeemed before confirmation of sale. We cannot agree with this contention. In our opinion the right of redemption is extinguished with reference to persons who are concluded by the decree for sale by the sale actually taking place. It is then said that this might have been the position when the Transfer of Property Act of 1882 (S. 89) was in force, where on payment of the mortgage debt the defendants' right to redeem and the security was held to be extinguished. It is said that the words: "and thereupon the defendants' right to redeem and the security shall both be extinguished" which occurred at the end of S. 89 having been omitted from O. 34, R. 5, Civil P.C., the effect is that the right of redemption of the mortgagor is not extinguished by the sale. In support of this contention reliance has been placed on the following observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Sukhi v. Gholam Safdar* (3). Dealing with *Hetram v. Shadi Ram* (4) Lord Dunedin said this:

"But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so soon as the decree of sale was obtained; and that was based on the express words of S. 89, T. P. Act, 1882, which ends after providing for the decree 'and thereafter the defendants' right to redeem and the security shall both be extinguished.' Now the group of Ss. 85 to 90 inclusive of the Transfer of Property Act, 1882 were repealed by the Civil Procedure Code, 1908 and were replaced by the rules under O. 34. In these rules the words above quoted are omitted in the rule which corresponds to S. 89. They do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34 which are limited to providing for the extinction of the debt. Now the words being gone their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, namely that an owner of a property

who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded to set up the first mortgage as a shield."

This case in our opinion is no authority for the proposition that when a mortgagee has obtained a decree for sale the mortgage as between himself and his mortgagor and all parties to the suit is not extinguished by the sale. As I read the decision of their Lordships it merely lays down that by the decree and the sale the security is not extinguished so far as to prevent the agitation of the rights under it which were not decided by the decree. Their Lordships were not dealing with the question of re-agitating rights already concluded by the decree and the sale. In *Sukhi's* case (3) the prior mortgagee had obtained a decree for sale without joining a puisne mortgagee and in the suit by the latter the puisne mortgagee contended that the prior mortgagee could not use his mortgage as a shield because the mortgage was merged in the decree for sale and was therefore extinguished. The Judicial Committee held the mortgage was not extinguished and could be held up as a shield. On the other hand their Lordships held that the purchaser of the mortgage sale was in the rights of the first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage and this shows that the right of the mortgagor in the mortgaged property was gone. This view receives support from a decision of Wallace, J., in the case of *Y. Ellarayan v. N. Nagaswami Ayyar* (5). There is some authority for the view that the security might not be extinguished by the decree for sale for as has been pointed out by Sir Rash Behary Ghose in his *Law of Mortgage*, p. 503, Edn. 5:

"A judgment being a security of the highest character known to the law, there seems to be an idea, a mistaken idea, I think, that when a judgment is recovered on a debt secured by a mortgage, the security is extinguished. It is said that there cannot be two debts, one leviable by execution and the other continuing to be a charge on the property. The original debt is gone, transit in rem judicatum; and a fresh debt is created with different consequences. This notion however is based on a misapprehension of the observations of Lord Bramwell: *In re*

2. (1904) 81 Cal 869=8 C W N 684 (F B).

3. A I R 1922 P C 11=48 I A 466=43 All 469=66 I C 151 (P C).

4. A I R 1918 P C 34=45 I A 180=40 All 407=46 I C 798 (P C).

5. A I R 1926 Mad 816=49 Mad 691=98 I C 607.

European Central Railway Co. (6) which can only lend support to it, if they are detached from the context. A careful examination of the judgment will show that the remarks of the learned Judge are applicable only to a personal action of the covenant against the mortgagor and not to an action to realize the security."

but there can in our opinion be no doubt that the security was extinguished by the sale which took place before Act 21 of 1929 came into force. By the omission of the words "the security shall be extinguished" (from O. 34, R. 5) the inference follows that the law under O. 34, R. 5 before amendment remained as it certainly was before the Transfer of Property Act 1882 as expounded and applied in *Sunder Koer v. Shamkrishen* (7) where Lord Davey observed as follows:

"After the expiration of the period of grace if the property should not be redeemed, the matter would pass from the domain of the contract to that of judgment and the rights of the mortgagee would thenceforth depend not on the contents of his bond but in the directions in the decree."

Reliance has next been placed on a recent decision of this Court in the case of *Kuli Pada Mukerjee v. Basanta Kumar Dutta* (8). In that case my learned brother Mukerji, J., made the following remark on which reliance has been placed by the appellant as supporting the contention that the right of redemption existed even up to the date of the confirmation of the sale:

"In any case there is no foundation for the view that under the sale in the present case treating the auction-purchaser Basanta as a stranger the right of redemption remained in the appellant after the sale or in any event after the confirmation thereof."

In making these observations Mukerji, J., was referring in this passage to the facts of the particular case where the payment was made after the confirmation of the sale. On the other hand it seems to me that Mukerji, J., was clearly of opinion that in a sale held under an order absolute under O. 34, R. 5 the purchaser acquires the right of the mortgagee as also of the mortgagor, that is to say the latter's right of redemption; see p. 886, top of the right hand column. The only decision which supports the contention of the appellant that the right of redemption remained in the

mortgagor after the sale and for long afterwards is the decision of Das, J., in the case of *Muhammad Musa v. Edal Sing* (9). For the reasons we have given above we are unable to agree with Das, J. It is argued for the appellant that it is somewhat anomalous that the security will be held not to be extinguished with reference to persons who are not parties to the decree for sale and will be held to be extinguished with reference to persons who are parties to the decree for sale. We do not consider that there is any such anomaly for we cannot overlook the effect of the decree for sale against the mortgagor which merges the debt into the decree for sale and prevents the mortgagor who is concluded by the decree for sale from re-agitating his rights of redemption after the sale actually takes place. We are therefore of opinion that this ground must also fail.

The next and the last ground taken is that Act 21 of 1929 must be held to have retrospective operation and that it is therefore permissible to the judgment-debtors to redeem even before confirmation of sale, for under O. 34, R. 5 as amended payment could be made at any time before the confirmation of a sale made in pursuance of a decree passed under sub-S. 3 of the rule. There is no force in this contention as the Act expressly states in S. 15, Cl. (c) that nothing in the Act will affect rights already acquired. The rights acquired by the mortgagee at the sale in question was a substantive right and even if there was no such saving clause under the ordinary rules of interpretation no retrospective operation could be given to the Act for it affects substantive rights. It is sought to be argued that the question of redemption on payment of the mortgage decretal amount before confirmation of sale is merely a matter of procedure and retrospective operation could be given to the recent enactment and reliance is placed on a decision of the Full Bench in the case of *Jagadanandan Sing v. Amritlal Sircar* (10). This Full Bench decision is not applicable to the present case as it related to a very different state of facts.

We are therefore of opinion that the order refusing to set aside the sale is right. We think however that the sale

6. (1876) 4 Ch D 88=46 L J Ch 57=35 L T 582=25 W R 92.

7. (1907) 34 Cal 150=34 I A 9=11 O W N 249=5 Cr L J 106 (PQ).

8. A I R 1932 Cal 126=188 I C 177=59 Cal 117.

9. A I R 1932 Pat 92=65 I O 801.

10. (1895) 22 Cal 767 (F B).

should not be confirmed until the mortgagees decree-holders bring into Court the sum of Rs. 3,410-10-0 and put it to the credit of defendants-appellants 2 to 7. This money must be brought into Court within a month from the date of the arrival of the record in the Court below. On the failure of the respondents to bring the money into the Court within the time fixed the sale will be set aside and the appellants will be allowed to redeem on payment of the amount due on the mortgage, with interest and costs. In all the circumstances we think that each party should bear their own costs of these proceedings throughout.

Bartley, J.—I agree.

K.N./R.K. *Order accordingly.*

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RANKIN, C. J. AND C. C. GHOSE, J.

Sree Sree Jagannath Jew Thakur and others—Plaintiffs—Appellants.

v.

Ananta Adhikary and others—Defendants—Respondents.

Appeal No. 2430 of 1930, Decided on 24th February 1932, against appellate decree of Addl. Dist. Judge, Midnapur, D/- 21st May 1930.

(a) **Hindu Law — Religious endowment—Pujari**—Property allotted to pujari in lieu of wages is debutter and cannot be alienated by him.

The whole object of the grant was apparently to provide for the proper and necessary worship of the idols and also for the purpose of remunerating the person who would perform the duties of the office of pujari.

Held: that it was a grant for remunerating the pujari for the services rendered by him. The lands were therefore debutter lands of the idols and the pujari was merely a custodian thereof on behalf of the idol and was not entitled at any time to alienate or dispose of the said debutter lands. Any alienations made by the pujari were void as against the idol and the shebait was entitled to such a declaration as against the pujari and his alienees. [P 46 C 1, 2]

(b) **Hindu Law — Religious endowment—Pujari**—Failure to carry out the duties but willing to work as such—He should be allowed to continue.

Where a pujari to whom debutter lands were granted in lieu of wages had not been properly discharging his duties as such pujari but expressed his willingness to work as pujari and to provide for the expenses of the worship out of the usufruct of the lands allotted to him, he should be allowed a *locus penitentiae* and to continue in his office as pujari without prejudice to the right of the shebait to ask at any future time, should occasion arise for his removal. [P 46 C 1]

Brojo Lal Chakravarti and Ananta Kumar Banerji—for Appellants.

Satinādra Nath Mukherji, Hare Krishna Pramanik and Sisir Kumar Sil—for Respondents.

C. C. Ghose, J.—The facts involved in this appeal, shortly stated are as follows: The plaintiffs are certain idols established many years ago by the predecessor-in-interest of the present shebait Raja Narasingh Malla Ugal Sanda Deb. He is a ward under the Court of Wards and is represented by the Manager, Khagendra Nath Banerji. On behalf of the idols the case as formulated in the Court of first instance was that defendants 1 to 6 were pujaris of the said idols, and have been so for a long period, that in fact many years ago the ancestor of defendants 1 to 6 was appointed priest or pujari of the said idols, that certain properties were made over to the said ancestor in order that he should meet the daily and occasional expenses of the worship of the idols out of the usufruct of the properties and that there should be no wages or salary attached to his office as pujari but that he should be able to remunerate himself out of the said usufruct and would generally act under the supervision of the idol's shebait. The allegation further was that in 1329 it was ascertained that in respect of certain of the properties so made over to the ancestor of defendants 1 to 6 the said defendants had been guilty of misconduct in that they had granted a permanent lease to a certain person and in respect of certain other properties they had granted an usufructuary mortgage. It was also alleged that there had been neglect by defendants 1 to 6 in the performance of the duties of their office as pujaris and that in the events which had happened it was prayed that it might be declared that the alienations referred to in the plaint were not binding as against the deities and that the Raja as such shebait was entitled to dismiss defendants 1 to 6 from their office as pujaris, they having been guilty of misconduct.

Various defences were taken by the defendants, the principal ones being that the lands which had been granted to the ancestor of the defendants were so granted for the performance of the worship not of the plaintiff idols but of

certain other idols in the house of defendants 1 to 6.

It may be stated at the outset that both Courts came to the conclusion that there was no substance whatsoever in the defendants' contention and that the finding of both the Courts was that the lands in question were the debutter properties of the idols referred to in the plaint in this suit and that the lands had not been granted to the ancestor of defendants 1 to 6 for defraying the expenses of the worship of any idols other than those referred to in the plaint.

The question then arises as to what was the character of the lands so held by the defendants; had those lands been granted to the ancestor of the said defendants burdened with certain services or had those lands been granted to the defendants or their predecessor in lieu of their services as pujaris of the said idols? The Court of appeal is apparently of opinion that the lands so granted were burdened with certain services and were not lands which were granted to the ancestor of the defendants in lieu of service as pujari of the said idols; and, in that view of the matter, the Court of appeal below came to the conclusion that the lands so granted were not resumable; and although it incidentally observed that the alienations could not bind the deities, it omitted to make any declaration one way or the other in respect of the alienations in favour of the deities and against defendants 1 to 6 and their transferees.

Now the character of the grant of the lands in question has got to be determined first and reliance has been placed upon the fact that there is no written grant forthcoming to explain how these lands came to be granted to the ancestor of the said defendants or what were the conditions imposed by the grantor at the time of the grant and it is argued by the learned advocate for the respondents that, in the circumstances of this case, the view taken by the Court of appeal below namely, that it was a grant burdened with services should be upheld and further that in accordance with the view taken by the Judicial Committee in several cases it ought to be held that the character of the grant being as described above the plaintiffs should not be held to be entitled to resume the grant in the events which have happened. On

the contrary it has been argued by the learned advocate for the appellants that the view taken by the Court of appeal below does not amount to a clear finding of fact but that the question has to be considered from the entire facts which can be gathered from the judgments of the two Courts below and it ought to be held as a matter of law that having regard to the character of the services which the ancestor of the defendants and the said defendants were expected to perform, the grant in question was really a grant for remunerating the pujaris for the services rendered by them as such and for making provision for the expenses of worship from time to time. It is unsatisfactory that no grant was forthcoming in this case and therefore for the purpose of determining the question in issue regard must be had to such surrounding circumstances as might throw light upon the elucidation of the point under discussion.

The defendants are not the shebaita. It is conceded that they were appointed under the shebaita and by the shebaita. They were appointed as pujaris, that is to say, persons who would be charged with the duty of performing the rituals according to the directions which might be given to them from time to time by the persons in authority, namely, the shebaita. It is true that the grant was made a long time ago and it is true that, at any rate, for at least two generations the office of pujari of the idols in question has been in the family of the defendants. That is a circumstance no doubt to be taken into consideration and given its proper weight. At the same time regard must be had to the fact that the whole object of the grant was apparently to provide for the proper and necessary worship of the idols and also for the purpose of remunerating the person who would perform the duties of the office of pujari. The pujari might not inaptly be called a minor ecclesiastical dignitary employed under the shebaita. Those being the circumstances and regard being had to what was the central idea underlying the grant it ought not in my opinion to be held that the nature of the grant could not be anything else but a grant burdened with services. Such matters as may usefully be taken into consideration in determining the question tend in favour of the view that it

was a grant for remunerating the pujari for the services rendered by him; or in other words, shortly put, it was a grant in lieu of wages. That in my opinion, is consistent with the facts which are to be found in the judgments of the two Courts below and I am therefore of opinion that it ought to be held that it was a grant in lieu of wages. That being my view of the nature of the grant, I now proceed to determine the question as to whether or not, having regard to the events which have happened, the plaintiffs have made out a sufficient case for an order directing the dismissal of defendants 1 to 6 from their office of pujaris and for the necessary consequential reliefs.

The plaintiffs, own case is that the office of pujaris has been in the family of the said defendants for at least several generations. There is also the fact to be taken into consideration that whatever may have happened in the past, the pujaris are now not unwilling to perform the duties of their office. In fact, we are informed by the learned advocate for the respondents that at the present moment the said defendants have been performing the duties of pujaris. In my opinion, subject to what is about to be stated below as regards the declarations to which the Raja as shebait of the said idols may be held to be entitled to, and without prejudice to the rights of the plaintiffs in the future it ought not to be directed that at the present moment that the defendants 1—6 are liable to dismissal from their office as pujaris. If, as a matter of fact, they are willing to provide for the expenses of the worship out of the usufruct of the lands in question, there is no reason, having regard to the circumstances present in this case, why defendants 1 to 6 should not be allowed a *locus penitentiae* and to continue in their office as pujaris. In that view of the matter, without prejudice to the right of the shebait to ask at any future date, should the occasion arise, for the removal of defendants 1 to 6 from their office as pujaris I think that, in the present circumstances the plaintiffs have not made out a sufficient case for their removal from the office of pujaris. But this, as I have just indicated, is on the footing that they will perform the duties of the office of pujaris in

strict accordance with the directions which may be given to them from time to time by the shebait and that they will undertake to provide out of the usufruct of the lands in question whatever expenses may be required for the proper and necessary worship of the idols. Should it appear that defendants 1 to 6 show by their conduct that they are recalcitrant in the performance of the duties of the pujaris on the footing indicated above, it would be open to the plaintiffs to take the necessary steps for their removal as they may be advised. Liberty to the plaintiffs to apply.

I now come to the question as to what the form of relief should be in this case. If I am right in the view which I have taken of the nature of the grant to the ancestor of defendants 1 to 6 it follows that the lands were debutter lands of the idols referred to in the plaint and that defendants 1 to 6 being custodians of the lands in their capacity as pujaris of the idols were not entitled at any time to alienate or dispose of the debutter lands in the manner in which they have done; and that they were guilty of misconduct; in other words, it ought to be declared that these alienations (within which expression I include all the alienations effected by means of the documents which are Exs. 10, 11 and 12 in this case) are not binding upon the deities and that such declaration should be given not only against the alienees who are parties to this appeal but also against defendants 1 to 6 who were the alienors.

The result therefore is that there ought to be a declaration in manner indicated above. There ought to be a declaration that the nature of the grant of these lands was as stated in an earlier portion of this judgment and that in the circumstances of the present case, subject to what has been stated above, it is not necessary to direct the removal of defendants 1 to 6 from their office as pujaris.

The result is that there will be declarations in manner indicated above and the appeal will be allowed to the extent indicated above. As regards the costs of this suit and of the appeals there will be no costs on either side.

Rankin, C. J.—I agree.

K.N./B.K.

Order accordingly.

A. I. R. 1933 Calcutta 47**JACK AND M. C. GHOSE, JJ.****Emperor
v.****Dwarika Nath Goswami—Accused.**

Jury Ref. No. 22 of 1932, Decided on 4th August 1932, made by Sess. Judge, Sylhet and Cachar.

(a) Penal Code (1860), S. 115 — "Express provision" in S. 115 refers to S. 121 or S. 131 and not to Penal Code (1860), S. 117.

The cases referred to by the words "express provision" in S. 115 refer to sections such as 121 and 131 where there is an express provision for abetting of an offence punishable with death or transportation for life. S. 117 is not an express provision for abetment of an offence punishable with death or transportation for life. It covers all offences and is a general provision for abetment by any number of persons exceeding 10.

[P 48 C 1]

(b) Penal Code (1860), S. 115—Abetment need not be of offence by particular person against particular person.

Abetment under S. 115 need not be abetment of the commission of an offence by any particular person against any particular persons. It may include abetment of the commission of an offence by unspecified persons against a class or number of other persons described generally and not particularly specified. When the people who gather together in meetings were instigated to commit an offence of murder the case comes under S. 115 as well as under S. 117, I. P. C.

[P 48 C 1]

(c) Criminal P. C. (1898), S. 307—High Court is entitled to open whole case.

In a case referred to under S. 307 the whole case is open for consideration and the High Court is entitled to exercise any of the powers which it may exercise on an appeal: *A I R 1915 Cal 292* and *A I R 1923 Cal 453, Dist; A I R 1923 Bom 284, Rel on.*

[P 48 C 2]

N. N. Sarcar and Anil Chandra Roy Chaudhury—for the Crown.

B. C. Chatterji, Hemendra Kumar Das, Paresk Lal Shome, Priyanath Dutt and Binoyendra Nath Palit—for Accused.

Judgment.—This is a reference by the Sessions Judge of Sylhet and Cachar under S. 307, Criminal P. C. in a case in which the accused was charged under Ss. 115/302, I. P. C. or alternatively under Ss. 117/302, I. P. C. The majority of the jury brought in a verdict of not guilty under Ss. 117/302. As regards the charge under Ss. 115/302 all of them brought in a verdict of not guilty unanimously. The learned Judge came to the decided conclusion that the verdict regarding the charge under Ss. 117/302, I. P. C., was

perverse and was against the weight of the evidence, and that as such for the ends of justice it was necessary that the whole case should be placed before this Court. The facts of the case shortly are that on 9th July 1931 the accused Dwarikanath Goswami led a procession of young men and girls consisting of about 40 carrying black flags and pictures of Dinesh Gupta and Bhagat Singh in front of the procession to the Sylhet Town Hall. At about 6 o'clock in the evening a meeting was held at the Town Hall of about 200 people in which the accused moved a resolution and delivered a speech. The resolution was that

"the people of Sylhet both male and female admire the noble example shown and left by Dinesh Gupta in the service of the mother country and request all to follow that example."

This was followed by a speech exhorting the people in accordance with the terms of the resolution. Then on 26th July the accused supported a similar resolution, namely, that

"Bhagat Singh, Shukdeb, Rajguru, Dinesh Gupta, Harkishen and other hero martyrs of Young India, have set brilliant example of self-sacrifice with a view to overthrowing imperialism and this conference invites the youths of the Surma Valley to be inspired with that ideal of fearless self sacrifice;"

and he supported it with a speech in which he exhorted the youth of the Surma Valley to follow the examples of those persons. Charges were framed in respect of the conduct of the accused on both those occasions, namely, the two alternative charges, one under S. 115 read with S. 302, I. P. C., and the other under S. 117 read with S. 302, I. P. C. It is obvious and it is not disputed that the accused was guilty under S. 117 read with S. 302, I. P. C. But it is argued that the learned Judge was right in holding that S. 115, I. P. C., did not apply in this case. On the other hand on behalf of the Crown it is urged that the whole case is open to us and that S. 117 does in fact apply. S. 115, I. P. C., is as follows:

"Whoever abets the commission of an offence punishable with death or transportation for life, shall, if that offence be not committed in consequence of that abetment, and no express provision is made by this Code for the punishment of abetment, be punished with imprisonment of either description for a term which may extend to seven years."

It is argued that the words "no express provision is made by his Code for

the punishment of such abetment" exclude the application of S. 115, inasmuch as S. 117 is an express provision for cases of abetment of the kind which was committed in this case. The learned Advocate-General urges that the cases referred to by the words "express provision" refer to sections such as 121 and 131, I. P. C., where there is an express provision for abetting an offence punishable with death or transportation for life; and this seems to be the proper interpretation of the section. S. 117 is not an express provision for abetment of an offence punishable with death or transportation for life. It covers all offences and is a general provision for abetment by any number of persons exceeding 10. "Express provisions" seem to refer to sections in which specific cases of abetment of offences punishable with death or transportation for life are dealt with. It is not disputed that the learned Judge is not correct in holding that abetment under S. 115, I. P. C., must be abetment of the commission of an offence by any particular person against any particular persons. It may include abetment of the commission of an offence by unspecified persons against a class or number of other persons described generally and not particularly specified. In this case when the people who gathered together in these meetings were instigated to commit an offence punishable with death in fact, the offence of murder, they clearly come under S. 115 as well as under S. 117, I. P. C.

The only other point urged is that inasmuch as the Judge and the jury agree as regards the finding that the accused is not guilty of the offence charged under S. 115, I. P. C., it is not open to us to find him guilty on that charge. Under S. 307, Criminal P. C., in dealing with the case submitted, this Court may exercise any of the powers which it may exercise on an appeal; and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused. From the letter of reference it is quite clear that the whole case is open for consideration and all we are to do is to give due weight to the opinions of the Judge and the jury and then acquit or convict the accused. In support of the argument on the contrary we have been referred to two cases, *Em-*

peror v. Madan Mandal (1) and *Emperor v. Profulla Kumar* (2). But admittedly neither of these two cases supports entirely a proposition that this Court cannot interfere where the whole case is referred under S. 307, Criminal P. C. In the latter case the Judge has expressly found that it was not necessary to decide that question; and in the former case although there is a statement that the Judge has no power to interfere with the unanimous verdict of the jury with which the Judge agrees, the facts were entirely different and this dictum must not be taken to apply in general. In support of this, reference may be made to the case of *Emperor v. Hasrat Mohani* (3). But the words of the section are quite clear and that obviously entitle this Court to exercise any of the powers which it may exercise on an appeal; and in Cl. (2) it is laid down that

"whenever the Judge submits a case under this section he shall not record judgment of acquittal or of conviction on any of the charges on which the accused has been tried."

In this case therefore the whole case has been referred and it is open to us to find the accused guilty under Ss. 115/302 or Ss. 117/302, I. P. C. Accordingly we find the accused has committed the offences with which he has been charged. Evidence shows that the offences charged were committed on both the occasions with deliberate intention of instigating a large number of young persons of Sylhet to commit murder and we think we should not be justified in passing a sentence of less than three years rigorous imprisonment on account of each of the two sets of offences under Ss. 115/302, I. P. C. to run concurrently, no separate sentences being passed under Ss. 117/302, I. P. C. The accused should be put in division B. He must surrender to his bail and serve out the sentence.

M.N.

Order accordingly.

1. A I R 1915 Cal 292=22 I C 731=15 Cr L J 155=41 Cal 662.
2. A I R 1928 Cal 458=74 I C 267=24 Cr L J 763=50 Cal 41.
3. A I R 1923 Bom 284=75 I C 299.

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COSTELLO AND JACK, JJ.

Sarat Kumar Banerji — Plaintiff — Appellant.

v.

Munshi Abdul Bary and others — Defendants—Respondents.

Appeal No. 3042 of 1929, Decided on 29th April 1932, against appellate decree of Sub-Judge, Second Class, Hooghly, D/- 14th August 1929.

(a) **Bengal Tenancy Act (1885), S. 167 — Annulment of incumbrance—Date of service of notice for annulment is not terminus ad quem but date of application to Collector.**

The date of service of notice is not the terminus ad quem, as S. 167 in fact says that an application in writing must be made to the Collector within one year from the date of confirmation of sale or the date on which the purchaser first has notice of the incumbrance, whichever is later. Therefore the proper date to be taken is the date on which the application (on which the notice is founded) is made to the Collector.

[P 50 C 1]

(b) **Bengal Tenancy Act (1885), S. 87 — Abandonment—Usufructuary mortgage does not itself constitute abandonment—Landlord selling holding in execution of rent decree and himself purchasing—Mortgagee proceeding under O. 21, R. 100, Civil P. C.—Landlord is entitled to resume possession as there is abandonment by tenant.**

If in addition to executing a usufructuary mortgage, the tenant fails to pay rent to the landlord and the holding is sold in execution of a rent decree and purchased by the landlord himself, the execution of the usufructuary mortgage plus the sale in execution proceedings are sufficient to constitute a complete abandonment on the part of the tenant, and the landlord has a right to resume possession *qua* landlord as against the mortgagee.

[P 50 C 2]

Sarat Chandra Mukherji and Indubhusan Mukherji—for Appellant.

Benoyendra Prasad Bagehi for Bijan Kumar Mukherji and Biraj Mohan Majumdar for Deputy Registrar — for Respondents.

Costello, J.—This was a suit for declaration of title and for recovery of possession of certain lands mentioned in the plaint. I need not for the purpose of our decision specify the lands in detail, but put quite shortly the position was that there was an occupancy raiyati standing in the names of two persons, Golapdi Mallik and Abdul Sattar, at a jama of Rs. 36.3as.17gds. That was a non-transferable occupancy holding. It was mortgaged by way of conditional sale and the mortgage was a usufructuary mortgage. It is conceded that the mortgage was of the whole of the property

in question. The plaintiff in the suit was the landlord *Sarat Kumar Banerjee* and he is the appellant before us. The respondent in this appeal, *Munshi Abdul Bari*, was the principal defendant in the suit and he was the mortgagee. The other defendants in the suit were the tenants who were the mortgagors.

It appears that the present plaintiff brought a suit against the tenants for recovery of rent. In that suit he obtained a decree and proceeded to put the decree to execution in consequence of which there was a sale of the holding and at that sale the landlord, that is to say, the present plaintiff, was the purchaser. The sale was duly confirmed and the plaintiff as the purchaser was put into possession of the property. Thereupon the present defendant as the mortgagee filed an objection under the provisions of O. 21, R. 100, Civil P. C. There seems to have been an investigation as provided for in R. 100, Cl. 2, as a result of which the Court made an order under the provisions of O. 21, R. 101 and directed that the applicant, that is to say, the present defendant, the mortgagee, was to be put in possession of the property. The present plaintiff thereupon instituted the suit with which we are now concerned, claiming that he had the right to eject the mortgagee and recover possession of the property. The Munsif of the second Court, Arambagh, made a decree in favour of the plaintiff and ordered that he should get khas possession of the lands in question, the defendants being evicted. Thereupon the defendants appealed and the matter came before the Subordinate Judge, Second Court, Hooghly, who reversed the decision of the trial Court on the ground that the mortgage in question was an incumbrance within the meaning of S. 161, Ben. Ten. Act, and that the plaintiff as the purchaser at the auction sale had not given proper notice to annul that incumbrance under the provisions conferred under S. 167, Ben. Ten. Act, in that the plaintiff knew of the mortgage of 12th November 1923 or at any rate when the sale was confirmed on 24th June 1924, and he had not served the notice under S. 167 until 18th August 1925 which the learned Subordinate Judge erroneously computed to be within two years after the confirmation of the sale or more than two years of the date of the knowledge of the plaintiff.

It is clear that the notice was served after one year, indeed one year two months after the date of the confirmation of the sale. The learned Subordinate Judge was wrong in taking the date of the service of the notice as the terminus ad quem, as S. 167 in fact says that an application in writing must be made to the Collector within one year from the date of the confirmation of the sale or the date on which the purchaser first had notice of the incumbrance, whichever is later. Therefore the proper date to be taken was the date on which the application (on which the notice was founded) was made to the Collector. However if we had to decide the case on this point alone we should probably take the view that as the notice was served on 18th August 1925 the presumption is that the application was made to the Collector within a week or two before the date on which the notice was served. In the ordinary course the Collector in matters of this kind would doubtless take the necessary steps to have a notice served within a week or two of the application made to him. However in the view which we now take of this case it is not necessary that we should further deal with this point.

This appeal has been argued at great length and much force by the learned advocate on behalf of the landlord, the appellant before us, that this is in fact a case where we ought to hold that the usufructuary mortgage which was created by the tenants defendants was not an incumbrance within the meaning of S. 161, Ben. Ten. Act, and therefore no notice of the kind contemplated in S. 167 as a condition precedent to the right of the landlord to resume possession as against the mortgagee was required.

Having regard to the facts and circumstances of this particular case we do not think it necessary to make any attempt to reconcile the many conflicting decisions upon the question whether or not the mortgage of the whole or of a part of a non-transferable occupancy holding constitutes an incumbrance within the meaning of S. 161 or whether the fact that it is a usufructuary mortgage makes any difference or the fact that a purchaser at the auction sale which was held under execution proceedings is himself a landlord. We only say with re-

gard to this aspect of the matter that the time must come when the Court will have to make some attempt to reconcile these conflicting decisions, or at any rate to extract some general principles from them. We think however the matter can be decided upon the footing that the usufructuary mortgage, even though it was a mortgage of the whole of the holding, did not of itself constitute on the part of the tenants an abandonment of the holding so as to give the landlord by that alone, the right to resume possession on the ground that the tenants had made a transfer of a non-transferable holding and had therefore abandoned the holding. It appears that in this particular case the mortgage deed provided that the tenants mortgagors would continue to pay the rent to their landlord. The case of *Prionath Bose v. Kusum Kumari Dassi* (1) seems to indicate that the mere making of a usufructuary mortgage, even a mortgage covering the whole of the holding, does not itself constitute an abandonment. There must be some further facts found in addition to the mere execution of the mortgage and other circumstances must exist in order to show conclusively that not only by the making of the mortgage but for other reasons the tenant intended to abandon the holding and no longer be responsible for, or at any rate to fulfil his obligation towards his landlord as regard the payment of rent.

In the present instance, as I have already mentioned, there was not only a mortgage, but the tenant defaulted in payment of rent to the landlord and the present plaintiff secured a decree for the rent which was in arrears and brought the holding to sale and himself became the purchaser. We are of opinion that although prior to the sale the tenants still had some interest in the holding in that he had not parted with the equity of redemption after the sale whatever the interest the tenant still had in the holding passed to the landlord by virtue of the purchase which he had made. Thereafter the tenant had no further interest in the holding as against his landlord. That being the position we may take it that the execution of the usufructuary mortgage plus the sale in the execution proceedings are sufficient to constitute a complete abandonment on the

1. (1918) 47 I O 882.

part of the tenant particularly when one takes into account also the facts that subsequent to the rent sale there was a proceeding by the mortgagee under O. 21, R. 101 in consequence of which he was put in possession of the land in question.

In those circumstances we feel able to decide this matter on the footing that that there was a complete abandonment by the tenant and therefore the plaintiff in the suit had the right to resume possession *qua* landlord irrespective of the fact that he himself happened to be the auction-purchaser as by the sale the scintilla of interest which remained in the tenants' was finally extinguished. The plaintiff by virtue of his position as the landlord of a holding which has been totally abandoned by the tenant has a right to resume possession and we think that he is entitled to resume possession as against the mortgagee. We therefore come to the conclusion that this appeal must be allowed. The judgment and decree of the lower appellate Court are set aside and those of the Court of first instance restored. The appellant is entitled to his costs in this Court as well as in the lower appellate Court.

Jack, J.—I agree with the decision of my learned brother and I would only like to say that the possession taken by plaintiff must have been actual possession not symbolical possession; otherwise there would not have been any proceeding under O. 21, R. 100, Civil P. C. The trial Court does not appear to be correct in stating that the plaintiff took symbolical possession.

B.R./R.K.

Appeal allowed.

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MITTER AND BARTLEY, JJ.

Sm. Nirmalanalini Devi—Plaintiff—Appellant.

v.

Sm. Kamalabala Dassi and another—Defendants—Respondents.

Appeal No. 869 of 1931, Decided on 13th May 1932, against appellate decree of Addl. Sub-Judge, Zillah Bankura, D/- 25th November 1930.

Evidence Act (1872), Ss. 32 (5) and (6)—Horoscope—Horoscope prepared by person having special means of knowledge of date of birth of particular person and who being dead cannot be examined, is admissible under S. 32 (5) though not under S. 32 (6).

The time of one's birth relates to the commencement of one's relationship by blood and a

statement therefore of one's age made by a deceased person having special means of knowledge relates to the existence of such relationship within the meaning of S. 32, Cl. (5).

An horoscope prepared by an astrologer who used to prepare horoscopes for others in the same village on information given by one who had special means of knowledge is therefore admissible to prove the date of birth of the person, whose horoscope the document purports to be under S. 32 (5) though not under S. 32 (6): *A I R 1916 P C 342, Rel on.* and *17 Cal 840, Dist.* [P 52 C 1]

Jitendra Mohan Banerjee—for Appellant.

Nakuleswar Mukerjee and *Benode Lal Ghose*—for Respondents.

Judgment.—This is an appeal by the plaintiff and arises out of a suit for enforcement of a mortgage said to have been executed by defendant 1's husband, one Dharma Das Datta, now dead, in favour of the plaintiff. Defendant 2 who is the brother of Dharma Das has been made a party to the suit, for the mortgage is said to have been executed for the necessities of the joint family which consisted of Dharma Das and his brother. The claim is laid at Rupees 1,339-13-0. Amongst several defences to the suit, the main defence is that the mortgagor Dharma Das was a minor at the time of execution of the mortgage bond and that therefore the mortgage is void as a minor is incompetent to contract. Both the Courts below have given effect to this defence and have agreed in dismissing the suit. The question in this appeal is whether these decisions are right. It has been contended that in arriving at the conclusion that the mortgagor was a minor the Courts below have relied on a horoscope which is not admissible under S. 32, Cl. 6, Evidence Act. It has been found by the lower appellate Court that the horoscope comes from the custody of defendant 2, the brother of the husband of defendant 1, who made it over to the father of defendant 1 for filing it in the record of the suit. It is further found that it was written by an astrologer, now dead, whose handwriting has been proved by a near relation of the said astrologer. It has been further found that the astrologer died in 1926 B. S., before the death of Dharma Das and that the said astrologer used to prepare horoscope for others in the village in which Dharma Das resided. In these circumstances we are of opinion that the horoscope is admissible

in evidence under S. 32, Cl. 5, Evidence Act, to prove the date of the birth of Dharma Das.

The time of one's birth relates to the commencement of one's relationship by blood and a statement therefore of one's age made by a deceased person having special means of knowledge relates to the existence of such relationship within the meaning of S. 32, Cl. (5). Illus. (1) S. 32 would go to show that any statement made by a person having special means of knowledge relating to the date of birth of a particular person on a given date is a relevant fact when the issue is what is the date of birth of that particular person. This view receives support from the decision of the Judicial Committee in *Mahomed Ariff v. Yeoh* (1). Reliance has been placed by the appellant on the case of *Satish Chunder Lal v. Mohendra Lal* (2) in support of the contention that the horoscope is not admissible in evidence. It will appear from an examination of that case that there was no evidence that the person who made the horoscope had any special means of knowledge. In this case it has been proved that the astrologer used to prepare horoscopes for others in that village and consequently must be taken to have special means of knowledge of the date of the birth of Dharma Das. This statement was made ante litem motam. The Calcutta case just referred to was doubted in *Raja Goundan v. Raja Goundan* (3). It would seem also from the case of *Krishnamachariar v. Krishnamachariar* (4), that the horoscope would be admissible in evidence to prove the age of the person whose horoscope the document purports to be, if the person who made the horoscope is called is alive to testify to his special means of knowledge of the date of the birth of the person in question. We are therefore of opinion that in the circumstance the horoscope has been rightly admitted in evidence and the first ground taken therefore must fail. It appears also that the horoscope was examined and compared by Dharma Das's father-in-law at the time of Dharma Das's marriage with his daughter.

Apparently this horoscope was given by Dharma Das's mother to Dharma Das's father-in-law for comparison with the horoscope of Dharma Das's wife. The astrologer who made the comparison is dead and the mother of Dharma Das is also dead and their evidence was not consequently available at the hearing of the suit. The Subordinate Judge is of opinion that the horoscope is admissible in evidence under S. 32, Cl. 6, Evidence Act, but we are of opinion that it is not receivable in evidence under Cl. 6 but is receivable in evidence under Cl. 5 which no doubt requires that the party making it must have special means of knowledge. In the circumstances detailed above it appears clear that the astrologer prepared the horoscope on the information of some one who had special means of knowledge, viz., some members of Dharma Das's family and the horoscope was adopted by the family as representing the correct date of Dharma Das's birth as it was used for the purposes of comparison at the time of Dharma Das's marriage. The next ground taken is that defendant 1 should have been made liable as the money borrowed was for the marriage of Dharma Das, a member of the joint family; and the expenses of the marriage is undoubtedly a legal necessity which would make the loan binding on the joint family; and would be recoverable from the joint family properties. The answer to this contention is that the finding of the lower appellate Court is that the creditor did not make any bona fide inquiry about the existence of necessity and that the brothers Dharma Das and defendant 2 were possessed of considerable landed property at the time and there was no justifying necessity for the mortgage. Both grounds taken in the appeal fail and the appeal must be dismissed.

B.R./R.K.

Appeal dismissed.

* A. I. R. 1933 Calcutta 52

GUHA AND M. C. GHOSE, JJ.

Mano Mohan Neogy—Appellant.

v.

Surendra Kumar Ray Chowdhury and others—Respondents.

Appeal No. 412 of 1931, and Civil Rule No. 1246 (M) of 1931, Decided on 9th June 1932, against original order of Sub-Judge, 1st Class, Dacca, D/- 14th September 1931.

1. A I R 1916 F C 212 = 49 I A 256 = 39 I C 401 (P.C.).

2. (1890) 17 Cal 849.

3. (1894) 17 Mad 184 = 4 M L J 85.

4. (1915) 38 Mad 166 = 19 I C 452.

* Civil P. C. (1908), O. 41, Rr. 1 and 4—
Order removing receiver is appealable—But
receiver cannot appeal from such order.

As the authority to call a receiver into being necessarily implies the authority to terminate his functions, the order removing a receiver is, like the order appointing him, an appealable order. But a receiver cannot properly appeal from an order of the Court discharging him from his trust: the right to discharge him rests with the Court at any stage of the controversy: and from the exercise of this right the receiver cannot appeal: *A I R 1926 Cal 593, Rel on.*

[P 53 C 2; P 54 C 2]

Gunada Charan Sen and Asita Ranjan Ghose—for Appellant.

S. C. Basak, Bankim Chandra Banerji, Rajendra Chandra Guha, Bansari Lal Sarkar and Mahendra Kumar Ghose—for Respondents.

Guha, J.—The plaintiffs-respondents in this appeal instituted a suit in the first Court of the Subordinate Judge at Dacca, Suit No. 263 of 1924, for dissolution of partnership and for accounts, for partition of immovable properties, as also for ancillary and incidental reliefs. There was a prayer for appointment of a receiver in the suit. A preliminary decree was passed in the suit, and two persons were appointed joint receivers, by an order dated 3rd September 1928. The receivers so appointed took possession of the properties in suit, and were in charge of the management of the same. On 15th May 1931, defendants 5 to 21 made an application for the removal of the joint receivers appointed by the Court, and for the appointment of a competent and efficient receiver or manager, on a modest scale of remuneration or on a fixed salary, so as to reduce the cost of management, and effect economy. It appears that the pleaders appearing on behalf of the plaintiffs and defendants, other than defendants 5 to 21 the applicants for removal of the joint receivers, stated before the Court below that their clients had no objection to any curtailment of costs if that could be effected without impairing efficiency in the management of the properties. The parties to the suit represented by their pleaders were heard by the learned Subordinate Judge in the matter of the removal of receivers, and on 14th September 1931, an order was passed directing that Babu Ban Behari Saha, one of the joint receivers, do provisionally work as the sole receiver from October 1931, and that the other receiver Rai Man-

mohan Neogy Bahadur be removed. The receiver so removed by the order of the learned Subordinate Judge has appealed to this Court.

To this appeal, so preferred by the receiver removed by the order of the Court, a preliminary objection was taken, on behalf of defendants 5 to 21, respondents in the appeal. It was urged that the appeal was not maintainable: the order of removal of the receiver passed by the Subordinate Judge on 14th September 1931, was not an appealable order under the law, regard being had to the provisions contained in S. 104, R. 1, sub-R. (a), O. 43, Civil P. C. It was further contended by the learned advocate for defendants 5 to 21, respondents, that inasmuch as none of the parties to the suit had appealed, the order of removal of one of the joint receivers could not be challenged by the receiver so removed; the receiver himself had no right of appeal under the law, from the order as it stood. It has been strenuously contended on behalf of the appellant, that the preliminary objection directed against the maintainability of the appeal, could not be given effect to; it was urged that none of the grounds upon which the objection was formulated was sustainable in law. The first question that requires consideration is whether the order of removal of a receiver was appealable as such, irrespective of the position whether the receiver has the right to appeal against any order made under R. 1, O. 40, which will presently be examined. The order appointing a receiver of any property under R. 1, O. 40, Civil P. C., is an appealable order; order of removal has not been made appealable by any express provision, contained in the Code. The power of a Court to remove or discharge a receiver whom it has appointed may however be regarded as well established, and that power may be exercised at any stage. The power of removal must of necessity be treated to be an adjunct to the power of appointment a power incident to and following from the power of appointment. The authority to call a receiver into being necessarily implies the authority to terminate his functions. In this view of the matter, it may be held in favour of the appellant before us that the order of removal passed by the Subordinate Judge is an appealable order. This would be

in consonance with the decision of this Court in the case of *Sripati v. Bibhuti Bhusan* (1), in which it was held, by special reference to the provisions of the General Clauses Act, that if the right of appeal was given against appointment, it was given also against the removal of a receiver.

The next question is the one that relates to the receiver's right to appeal against an order of removal passed by the Court appointing him. The receiver has under the law, the right to appeal when any order is made by the Code, under R. 4, O. 40 of the Code. The express provisions so made, conferring the right of appeal so far as a receiver was concerned, limits the general right to appeal in any of the other matters mentioned in R. 1, O. 40, including an order of removal of a receiver, by implication. It is inconceivable that the legislature intended that a receiver should have the right of appeal from any and every order passed by the Court appointing him, seeing that the express provision contained in the Civil Procedure Code limits the right of appeal by a receiver to the only case where there is a direction for the attachment of his property. The parties to the litigation had undoubtedly the right of appeal, if they were aggrieved by any order passed by the Court, under R. 1, O. 40 of the Code.

The view expressed above which follows the plain reading of the provisions of the Code of Civil Procedure, bearing upon the question under consideration, is amply supported by authority of decisions of Courts in England. According to the English practice, a summons or notice of motion for the discharge of a receiver, should be served on all the parties and the receiver; but a receiver is not generally entitled to appear at the hearing of the application: see *Kerr on Receivers*, Edn. 8, p. 344, and the cases referred to there. So far as decisions by Courts in America are concerned, based upon general principles, the views are very well pronounced, and we have no hesitation in accepting the same. A Receiver, according to decisions by American Courts, should not be heard on motion to vacate his appointment; he is not a party in interest, and has no standing to oppose the motion: He cannot interfere in questions affecting rights of

parties and the disposition of the property in his hands; the receiver is not an agent or representative of the parties to the litigation. So far as the right of appeal is concerned, the decisions by American Courts indicate that a receiver cannot properly appeal from an order of the Court discharging him from his trust; the right to discharge him rests with the Court at any stage of the controversy; and from the exercise of this right the receiver cannot appeal. The Court in the exercise of its discretion may make any order discharging or removing a receiver for the proper care and management of the property in the Court's custody; and the receiver, an officer of the Court, should not be allowed by an appeal, to interfere with such an order: see *High on Receivers*, Edn. 4, pp. 313, 975, 982 and 897). In the case before us it is for the purpose of effecting economy, consonant with efficient administration of the property in suit, that the Court has directed the removal of one of the joint receivers; and it is pre-eminently a case where the rules of general application, to which reference has been made above, in the matter of right of the receiver when a question of his removal or discharge by the Court arises, are applicable. We have therefore come to the conclusion that upon the provisions contained in the Code of Civil Procedure and also upon principles of general application, the appeal by the receiver, as preferred to this Court, cannot lie, from the order by the learned Subordinate Judge. The preliminary objection raised on behalf of defendants 5 to 21, respondents, relating to the maintainability of this appeal should, in our judgment, be allowed to prevail, and the appeal must be dismissed. We direct accordingly.

Rule No. 1246 (M) of 1931 is discharged. The parties are to bear their own costs in the appeal and the Rule.

M. C. Ghose, J.—I agree.

K.N./R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 54

MUKERJI AND BARTLEY, JJ.

Bhupendra Narayan Sinha—Defendant—Appellant.

Maharaj Bahadur Sinha and others—
Plaintiffs—Respondents.

Appeal No. 446 of 1928, Decided on
20th May 1932.

(a) Putni Regulation (8 of 1819)—Putni tenure, consisting of lands in more touzis than one can be sold under Regulation.

There is nothing in Regulation (8 of 1819) to justify the view that a putni tenure consisting of lands situated in more touzis than one is not a taluk under that Regulation or that it cannot be sold under it: 15 I C 686, *Ref.* [P 57 C 1]

(b) Putni Regulation (8 of 1819)—Collector can hold sale in spite of Commissioner's decision to contrary.

For the purpose of the Putni Regulation the Commissioner is not appellate authority in his relation to the Collector. The Collector has jurisdiction to hold the sale in spite of the decision of the Commissioner to the contrary. [P 57 C 1]

(c) Putni Regulation (8 of 1819)—Putnidar bound to pay additional revenues—No remedy suggested in kabuliyat for realization of demand as to cesses—Cesses should be regarded as part of putni and sale held under Regulation.

Where by the terms of the putni kabuliyat the putnidar remained bound to pay any additional revenue or any new impost which might be levied by the authorities on the zamindaris, cesses were covered by these words and there being no other means suggested in the kabuliyat for realization of the demand as to cesses than a sale under the Regulation, it is only a fair construction to put on the document to hold that the intention of the contract was that the additional imposts were to be treated as part of the putni rent and realized as such. [P 58 C 1]

(d) Putni Regulation (8 of 1819)—Estoppe—Plaintiff can object to putni sale although previously he prevented sale by paying up revenue.

Where on all previous occasions when proceedings under the Regulation were applied for, the plaintiff deposited the zamindar's dues and prevented the sale, it cannot be contended that there was anything in plaintiff's conduct which precluded him from taking the objection that the Regulation did not apply to the putni and that it could not be sold thereunder. [P 58 C 2]

(e) Putni Regulation (8 of 1819)—Auction sale—Bidders under impression that if money due would arrive, sale would not be effected—Sale cannot be upheld.

Intending bidders present at a putni sale were under the impression that if the money due would arrive during the course of the day, the sale would not be effected.

Held: that an auction sale held under such circumstances is not a sale with free and unrestricted competitive bidding which is its essential characteristic and cannot be upheld. [P 60 C 1]

(f) Putni Regulation (8 of 1819), S. 8—Putni in arrears regarding which zamindar does not wish to proceed need not be mentioned in notice.

Where there are several other tenures in a zamindari in arrears and the zamindar mentions only the particular tenure against which he wishes to proceed in his application and notice, the requirements of S. 8 are complied with. It is not necessary to state in the application or in the notice any putni which may be in arrears but in respect of which the zamindar does not

desire to proceed: 4 I R 1925 P C 397; 4 I R 1931 Cal 296 and 4 I R 1930 Cal 249, *Ref.* [P 60 C 2]

(g) Putni Regulation (8 of 1819), S. 8 (2)—Conspicuous—Meaning of, explained.

The word 'conspicuous' occurring in S. 8 (2) is a relative term. A place inside the *Nasrat*, where putni notices have always been affixed and the public have free access to the place and everybody interested in matters of this description knows very well that such notices are to be found there, is a conspicuous place within the meaning of S. 8. [P 61 C 1]

Sarat Chandra Basu, Sitaram Banerjee and Prokash Chandra Bhose—for Appellant.

S. C. Basak, Nares Chandra Sen Gupta and Urukramdas Chakravarti—for Respondents.

Judgment.—This is an appeal from a decree passed by the Subordinate Judge of Murshidabad, setting aside a putni sale. The plaintiff held the mehal which formed the subject matter of the suit, eight annas in patni right and the other eight annas in durpatni right, the patnidars in respect of the latter share being the pro forma defendants 5 to 7. The principal defendant, the Raja of Nashipur, is the zamindar. The patni was originally created in 1854. The plaintiff and the pro forma defendants 5 to 7 acquired it in 1902 and executed the usual security bond in respect of it and got their names recorded in the zamindar's sherista on payment of nazar. It comprises lands of three touzis, namely, Nos. 434 and 523 of the District of Murshidabad, and No. 1152 of the District of Birbhum. It goes by the name of Mehal Sail Mail and bears an annual jama of Rs. 12,350. For arrears of rent for the first half year of 1331 B. S. the defendant, the Raja, on 1st Kartick of that year, applied for sale of the patni mehal under Regulation 8 of 1819. The plaintiff objected to the proposed sale on the ground that the Regulation did not apply inasmuch as the mehal was comprised within more touzis than one. The Collector upheld the objection and rejected the application for sale. On appeal by the defendant the Commissioner affirmed the Collector's order on 13th May 1925. In the meantime the rent for the next half year having fallen in arrears the defendant on 1st Baisak 1332 (=15th April 1925) made another application for the sale of the mehal under the said regulation for the entire amount of arrears of rent for 1331 B. S.

The sale was fixed for 1st Jaistha 1332 (=15th May 1925).

The plaintiff put in an objection on the ground already mentioned as also on other grounds, and in support thereof filed certified copies of the order of the Collector and of the Commissioner in connexion with his objection in the previous application for sale, to which reference has already been made. That objection was heard at 2 p. m. on the said 15th May 1925, the date fixed for the sale, by the then Collector Mr. W. S. Adie, who for reasons to which it is not necessary to refer, disagreed with the view taken by his predecessor and did not feel bound by the decision of the Commissioner and verbally rejected the plaintiff's objection. What happened next is a matter of controversy between the parties, and of it two versions have been given. (Versions of both parties were then stated and the judgment proceeded.) The accounts of the events set forth above have been taken from the pleadings of the parties and they represent only the bare outlines of the two stories in the main features which were developed in much fuller details in the evidence adduced, but with variations, here and there, which are not worth mentioning.

On 19th May 1925 the defendant put in the balance of the purchase money, that is to say, Rs. 13,600, and the Collector thereupon confirmed the sale on the 20th. The plaintiff then appealed to the Commissioner, who held that the sale was illegal and invalid and ordered the sale certificate issued by the Collector to be cancelled. The sale certificate was accordingly cancelled on 24th August 1925. The defendant thereupon moved the Board of Revenue who, on 8th February 1926, expressed the view that the sale was illegal, but that neither the Commissioner nor the Board of Revenue had jurisdiction to set it aside, and the plaintiff would have to seek his remedy if he so desired in the civil Court. The plaintiff accordingly instituted the present suit on 13th February 1926. The Subordinate Judge has decreed the suit and set the sale aside. From this decision the defendant has appealed. The validity of the sale was challenged on behalf of the plaintiffs on various grounds on some of which the

Subordinate Judge held in plaintiff's favour and on the others in favour of the defendant. Connected with the appeal therefore there has been a cross-objection preferred on behalf of the plaintiff as respondent in the appeal.

Before dealing with the grounds urged in the appeal and the cross-objection it would be convenient to dispose of a preliminary objection taken on behalf of the plaintiff as regards the maintainability of the appeal. The substance of the objection is that under an order made by this Court on 13th May 1929 the plaintiff, who is still in possession, has been paying in the patni rents and the defendant has been withdrawing the same and that therefore the defendant is precluded from questioning any longer the validity of the decision of the Court below by which the sale was set aside and the plaintiff was restored to his rights as the holder of the patni notwithstanding the sale that had taken place. In our opinion, there is no force in this objection because the withdrawal and acceptance of the rents on the part of the defendant have been under the order of this Court, made in pursuance of an arrangement which the parties suggested and which obviously was intended to operate without prejudice to their rights in the appeal. It cannot be suggested that the defendant in withdrawing and accepting the rents as aforesaid has taken a benefit under the decree of the Court below so as to be estopped from questioning the validity of that decree any longer.

It will be convenient to deal with the cross-objection first because the grounds urged in connexion with it may be disposed of quite shortly and none of them, in our opinion, ought to succeed. These are grounds as regards which the Subordinate Judge has held against the plaintiff.

The first ground is that inasmuch as the patni comprises lands of three touzis or estates, two of which are in the District of Murshidabad and one in the District of Birbhum, the provisions of Regulation 8 of 1819 would not apply to it. The substance of the contention is that the patni taluk being an offspring of a touzi or an estate cannot be more extensive than the touzi or the estate itself. This contention is supported by certain decisions of the revenue authori-

ties with regard to the same patni (vide Ex. 7, 7 (a) and 7 (b), and what was said in Note 31 to S. 8 contained at p. 202 of the Board's Manual of the Revenue and the Patni Sale Laws, 1928. It was however held by this Court in the case of *Manindra Chandra Nandi v. Annada Mohan Rai* (1), that the contention is not well founded and that there is nothing in Regulation 8 of 1819 to justify the view that a patni tenure consisting of lands situated in more than one taluk is not a taluk under that Regulation or that it cannot be sold under it. It is interesting to note that Note 31 referred to above has been abrogated by the Board by a Resolution passed on 10th June 1929. Certain anomalies and difficulties which are supposed to ensue from such a view have been pointed out to us, but whatever the peculiar results might be in any particular case we are not prepared to hold that the view is not correct. It is not suggested that by reason of a part of lands of the patni being situated within the Collectorate, the Collector of Murshidabad had no jurisdiction to sell the patni or that the Collectorate of Murshidabad does not satisfy the requirements, S. 3, Act 6 of 1853 and S. 3, Act 8 of 1865.

The second contention is that the Collector had no jurisdiction to hold the sale in spite of the decision of the Commissioner to the contrary. The Commissioner's decision (Ex. 7) passed on 13th May 1925 appears to have been brought to the notice of the Collector on 15th May 1925 (vide Ex. 5). The Collector was not altogether conventional in refusing to follow the ruling of the Commissioner, a superior revenue authority, and especially as the latter was amply supported by the view of the Board of revenue as it then was. But for the purposes of the Patni Regulation the Commissioner is not an appellate authority in his relation to the Collector. It is not possible therefore to hold that the Collector had no jurisdiction to hold the sale in spite of the view which the Commissioner had expressed: vide also Ex. 7 (b).

The third ground taken is that the postponement of the sale to a future hour and the holding of the sale at that hour was without jurisdiction, or in any event was irregular and

occasioned an injury to the plaintiff because most of the bidders had by that time left the Court. The facts are that the property was put up for sale about 2 p. m., and time was granted to the plaintiff at his request for bringing and paying in the money and when about 5 p. m. the money did not arrive, the sale was held. The Subordinate Judge has held that the sale in question was not held in the order provided for in the regulation, but that this irregularity had been waived by the plaintiff because it was at his instance that the sale was adjourned to 4-30 p. m., and as the plaintiff must have foreseen the circumstances under which the sale would be then held, he cannot be permitted to complain. It is quite true that once the sale commences, the notice under S. 8 being taken down, it has to be conducted by calling up the lots successively in the order in which they may be found in that notice (Ss. 9 and 10) and no sale shall be stayed or postponed on any account unless the amount of the demand be lodged: S. 14.

But in this case it is not at all clear that the sale had so commenced or that when the Collector took up the matter at 2 p. m. he intended to proceed with the sale any more than to deal only with the objection of the plaintiff. If at that point of time, on the plaintiff's objection to the sale being verbally rejected, the Collector at the plaintiff's request granted him time to pay in the arrears and adjourned the sale to a future hour, the plaintiff should be the last person to be allowed to say that the Collector acted without jurisdiction. What S. 10 speaks of is the calling up of the lots in the order in which the lots are mentioned in S. 8, which is an entirely different thing from what is complained of by the plaintiffs so far as this ground is concerned. To get over the effect of the consent which had been given on the plaintiff's behalf it was suggested in the plaint and attempted to be proved on behalf of the plaintiff that the order (Ex. A) which bears date 15th May 1925 did not contain a correct recital of facts and was not passed by the Collector at the time. And this position is sought to be supported by the petition, Ex. 1 (a), which the plaintiff made to the Collector on 20th May 1925, and on which the only order passed by the Collector was "File."

We are not prepared to hold that the plaintiff has been successful in establishing the position he contends for. In our opinion it is clear beyond doubt that there was consent on the part of the plaintiff to have the sale held on that day if the dues were not paid by 4-30 p. m. We think the plaintiff having himself obtained the order for adjournment and for a sale at a future hour in case of default, must be taken to have waived all such objections as were the results which that consent produced.

It has then been urged that the finding of the Subordinate Judge that the notice which is necessary to be served at the mofussil, namely, "at the principal town or village upon the land of the defaulters" was duly served, is wrong and unjustified on the evidence. We have examined the evidence bearing upon this point and we see no reason to dissent from the view which the Court below has taken. The appellant has applied to tender as a piece of additional evidence a school register in order to contradict D. W. 2, Mohamed Matlab Hossain, who is one of the witnesses to that service; but to receive such evidence at this stage would obviously be very unsatisfactory and we have accordingly rejected this application.

Another objection taken, which however was not taken in the Court below, is that the cesses which formed a part of the arrears for which the sale was held could not be realized by a sale under the regulation. It appears that by the terms of the Patni Kabuliyat of 1854 (Ex. J) the patnidar remained bound "to pay any additional revenue for any new impost which might be levied by the authorities on the zamindaries." That cesses fall within these words cannot be disputed. There being no other means suggested the kabuliyat for realization of the demand as to cesses and a sale under the regulations, it is only a fair construction to put on the document to hold that the intention of the contract was that the additional imposts were to be treated as part of the patni rent and realized as such. We may point out, though not as an authority on the question, that the recovery of interest and cesses under the regulation is a practice sanctioned by the Board of Revenue: vide Board's Manual of Revenue and Patni Sale Laws, 1928, p. 203, Note 32.

The objections which the defendant took in the Court below as regards the maintainability of the suit were decided against him and they have not been repeated before us. To resist the plaintiff's claim a further objection was taken, namely, that the plaintiff was not competent to challenge the validity of the sale for two reasons: firstly because, as it is said, the plaintiff had never before taken any exception to a sale of the Patni under the Regulation; and secondly because the plaintiff had waived all irregularities in connexion with the present sale by asking for an adjournment of it and consenting to it being held at 4-30 p. m. on the day in question. Both the grounds have been overruled by the Subordinate Judge and we are in entire agreement with him so far as this matter is concerned. It appears to be an admitted fact that on all occasions previously when proceedings under the Regulation were applied for the plaintiff deposited the zamindar's dues and prevented the sale, and it was only when the rent for the first half year of 1331 fell due and sale was applied for and the plaintiff was not able to pay the same that he took the objection. In such circumstances it cannot be contended that there was anything in the plaintiff's previous conduct which precluded him from taking the objection: he had never allowed a sale under the Regulation to take place. The application that was made for adjournment of the sale and in consequence of which the sale was adjourned to 4-30 p. m. can, in our opinion, in no view of the case be regarded as a waiver of all antecedent irregularities, if any, but only a waiver of such irregularity as was necessarily due to what was done at his own request, namely, by the adjournment of the sale.

We have now to deal with such of the grounds as have been found in favour of the plaintiff and on which the Court below has set aside the sale and which consequently form the subject-matter of the findings which the appellant assails in his appeal. In this connexion the first and most important question to consider is what exactly took place at the sale that was held. The plaintiff's allegation was that the Collector told the defendant's agents, Babu Purna Chandra Chatterjee, and Babu Anil Kumar Chatterjee, that if the money would be

paid by the plaintiff on the next day, i.e. 16th May, he would cancel all papers, etc., relating to the proceedings that were being held and the said two agents consented to the proposal of the Collector and gave an undertaking that they would receive the money and let the proceedings be annulled. The defendant, on the other hand, denied that there was any such proposal made by the Collector, or any such undertaking given by the defendant's agents. The Collector Mr. Adie undoubtedly would have been the best witness to speak on this matter, but he has not been and indeed could not be examined on either side because he was on leave at the time when and for a long time before the trial took place in the Court below. We may say here that we do not agree with the Subordinate Judge in his view that it was the defendant's duty to examine him; in our opinion, that was no more the defendant's duty than it was of the plaintiff, but we cannot blame either party for his non-examination because in point of fact he was not available. (Evidence as regards the version of what occurred was considered and the judgment then proceeded). In our judgment the interest which the Collector took, and in our opinion rightly took, in seeing that the defendant's agents should act up to the undertaking that had been given, and the conduct of Purna Babu in drawing up the draft, when admittedly he had no authority from his principal to allow the sale to be cancelled, lead unmistakably to the conclusion that the sale must have been held on an understanding such as has been spoken to on behalf of the plaintiff. The account given on behalf of the defendants, of the events that followed the sale, would not, in our opinion, sufficiently explain the aforesaid two facts.

To our mind it is plain beyond doubt that Purna Babu, although he had no authority from his principal, had readily agreed to the proposal which the Collector had made and which was a very fair one, and had assured the Collector, as one might naturally do, that he was really concerned with the money and did not care for the property, that out of the best of motives he agreed to accept the money and not proceed to complete the sale, should the money arrive, that he honestly thought that his principal

would consent to the course if all future troubles would be saved, and that he quite honestly suggested the conditions that the plaintiff should also agree to in order that objections might not be raised to a sale of the patni in future. But it seems that he had counted without the host, for his principal evidently did not ultimately agree to forego the bargain that he had made, and consequently the negotiation fell through. The result was that the Collector was unable to do anything further in the matter and had to conclude the sale on 20th with the following order :

"The purchaser paid Rs. 2,400 on the date of sale which was kept in a bag in the Treasury (vide T. O. W. receipt dated 15th May 1925) and was credited into the Treasury on 18th May 1925 (vide Chalan No 109 Revenue deposit, dated 18th May 1925). The balance of the purchase money, Rs. 13,600, thirteen thousand and six hundred, was deposited by Chalan No. 113 dated 19th May 1925. The sale is concluded."

These, in our judgment, were the facts. But there is one aspect of them which, in our opinion, requires very serious consideration. There can be no doubt that the sale was held on the clear understanding that should the money come, the sale would not stand. Four bidders bid at the sale. Of them, the bids for the zamindar were the initial bid of Rs. 10,000, an intermediate bid of Rs. 14,000 and the final bid of Rs. 16,000. The three other bidders offered Rupees 12,000, Rs. 13,000 and Rs. 15,000 respectively. The plaintiff's allegation was that

"the two agents, on behalf of the zamindar having consented thereto (i. e., to receive the money should it arrive) the Collector did not allow the intending purchasers who were present to offer any further bid."

P. W. 2, Jnanendra Mohan Sircar, says: "People were present in the Court at the time of the sale to the extent of 10 or 15, and some of them bid at the sale, but the Collector told them not to bid as, if the plaintiff's men came with money, it would have to be accepted and the bidder's money returned and after that no one bid for the property at the sale."

P. W. 5, Kristonath Gupta, says: "There were 2 or 3 bids including the last bid of Purna Babu and then the Collector said that when the sale would be cancelled upon payment further bidding was not necessary. No one else bid after that."

P. W. 8, Dharendra Chandra Das Gupta, says:

"In holding the sale the Collector repeated with Purna Babu once or twice that if the money came he would have to accept it and Purna Babu expressed his assent to it * * *

when the bidding was going on the Collector said that if they would take the money when it came, there was no use for much bidding, and after that Purna Babu bid and no other bidders did so."

The Nazir, D. W. 1 Gobinda Gopal Mazumdar, whose evidence on this point is on a par with what it is on all other points, says:

"I do not remember whether when bidding was going on the Collector said that it was no use bidding as the money would be paid the day after and the sale cancelled."

On the evidence quoted above, which we see no reason to disbelieve and which fits in very well with the probabilities of the case, we have no hesitation in holding at least this: that everybody present at the sale was under the impression that if the money would arrive the sale would not be effective. That the facts were as we have found clearly appears from a petition which was filed before the Collector on behalf of the plaintiff on the very next day, viz., the 16th: vide Ex. 1 as appears from the Collector's initials with that date underneath the same, in which it was said:

"Both the agents of the zamindar having agreed to that and having given express undertaking to that effect you did not allow the bidders present to bid any further."

The story given in the plaint was the story given on the very next day, and it is inconceivable that it could find a place in this petition unless it was substantially true or that it would not have been challenged if it was not so. An auction sale held under such circumstances is not a sale with free and unrestricted competitive bidding which is its essential characteristic and is not a sale which can be upheld. Added to it is the patent fact that the sale, such as it was, fetched a ridiculously low and utterly inadequate price which cannot but have been its direct result. The patni rent for one year was Rs. 13,000 and odd and the patni itself was knocked down for Rs. 16,000. The plaintiff's case is that its value is Rs. 5 lacs, but in any case it is evident that it is nowhere near what it has fetched.

Two other points have been found in favour of the plaintiff by the Subordinate Judge and as they have formed the subject of the appellant's attack it is as well that we should deal with them quite shortly.

The Subordinate Judge has held that there was no comprehensive application

and notice in this case, such as is required by S. 8, Cl. (2) of the Regulation. The application that was made is Ex. E and the notice that was put up is Ex. 12. The Subordinate Judge found on a comparison of these two with the notice Ex. H that was put up on the same day at the zamindar's kutchery, that in Ex. H a very large number of tenures were mentioned as being in arrears, while in Ex. E and Ex. 12 it was this one tenure that was asked to be sold and advertised for sale. The conclusion that he has arrived at on this comparison is that inasmuch as there were other tenures which were in arrears in Ex. H and the zamindar mentioned only this particular tenure in the application Ex. E and in the notice Ex. 12, the requirements of the section were not complied with. We are unable to agree with the view which the Subordinate Judge has taken. It has not been proved that there was any other patni tenure of the zamindar that was sought to be proceeded against under the regulation; and so long as that has not been proved, the mere fact that there were other patni tenures in arrears as shown in the notice put up at the zamindar's kutchery would not mean that the application and the notice were not the comprehensive ones required by S. 8.

It is not wholly easy to construe a Regulation of 1819, which was concerned with a zamindari as the unit in its relation to touzis created long after and several of which may be within one zamindari. But we are not called upon in this case to determine whether a petition in which all the patnis within one particular touzi are mentioned and a notice of similar purport would not be enough or whether the petition and the notice should not contain all the patnis within the entire zamindari. But we are not prepared to hold that it is necessary to state in the application or in the notice any patni which may be in arrears but in respect of which the zamindar does not desire to proceed. It is true that an omission to issue a general notice as required by S. 8 is fatal: *Bhupendra Narayan Sinha v. Madar Buksh* (2). But from the decision of the High Court in *Bhupendra Narain Sinha v. Madar*

Buksh (3) which the Judicial Committee affirmed by the decision cited above it would appear that in that case what was contained in the notice was one patni only while from the evidence it appeared that there were about 40 cases under Regn. 8 in which the zamindar was interested. In the case of *Bejoy Krishna v. Lakshmi Narain* (4) it was pointed out that the lots to be sold are to be mentioned in the notice under S. 8, Cl. (2) and that under S. 10 the sale should take place in the order given in the notice. The plaintiff-respondent, after the hearing of the appeal was over and while the case stood over for judgment, put in an application for letting in some additional evidence to show that there were other patnis in respect of which the defendant is the zamindar and which were also sold under the regulation at the said sale. We have rejected this prayer as having been made too late.

The Subordinate Judge has also been at great pains to hold that the notice that was put up at the Collector's kutchery was not put up at a conspicuous place as required by S. 8, Cl. (2) of the regulation. We have examined the evidence that there is on the record on this point and we think that this conclusion is wholly untenable. There is a large body of evidence which establishes that the place inside the Nazarat where the said notice was put up is the usual place where such notices have always been affixed and that the public have free access to the place and everybody interested in matters of this description knows very well that it is to be found there. The word "conspicuous" must be a relative term; and upon such evidence as there is on the record it is impossible to hold that the place in question is not a conspicuous place. Reference in this connexion may in particular be made to the evidence of the Collectorate Nazir, D.W. 1 Gopal Gobinda Mazumdar, and the plaintiff's own witnesses such as P.W. 2 Jnanendra Mohan Siroar, P.W. 5 Kristo Nuth Gupta, P.W. 6 Shyamapada Gupta and P.W. 7 Dwijendra Nath Lahiri.

The result is that in our opinion the appeal should be dismissed and we order

§. A. I. R. 1921 Cal 290=66 I C 793.

4. A. I. R. 1920 Cal 249=64 I C 736=47 Cal 337.

accordingly. The respondent will be entitled to his costs.

The cross-objection is also dismissed but with no order as to costs.

K.N./R.K.

Order accordingly.

* A. I. R. 1933 Calcutta 61

MUKERJI AND BARTLEY, JJ.

Barendra Krishna Das Adhikari —
Defendant—Appellant.

v.

Dwijendra Krishna Das Adhikari and
others—Plaintiffs—Respondents.

Appeal No. 137 of 1930, Decided on 24th May 1932, against original decree of Sub-Judge, Second Class, Midnapore, D/- 1st March 1930.

* Civil P. C. (1908), Sch. 2, Para. 12 and O. 22, R. 11—Persons whose rights are not affected by award cannot be substituted in place of parties to appeal against award and appeal in absence of proper substitution on death of party abates.

Arbitrators have no authority to adjudicate the rights of a person who was not a party to the suit in which the arbitration proceedings arose and therefore any decision by the arbitrators made behind his back, is certainly not binding on him and cannot in any way affect his legal status or right. [P 62 C 2]

Where the adjudication contained in the award as affirmed by the decree under appeal is entirely a personal one so far as the appellant is concerned, it must be deemed to have spent all its force except as regards parties who were the other parties to the suit, and when on the death of the appellant during the pendency of the appeal, his alleged adopted son, who was no party to the suit but whose rights were wrongly adjudicated by the award and with reference to whom the trial Court expressed that the decree based on the award will have no effect so far as he was concerned, should not be allowed to be substituted in place of the appellant as it would be a mere waste of procedure to let him come in only to have the same thing said once again in his presence and the appeal should be dismissed as having abated. [P 63 C 1]

Rupendra Kumar Mitter, Sarat Chandra Jana, Kshitindranath Mitra and *Kapilendra Krishna Deb*—for Appellant.

Panchanan Ghose and *Pulin Behari Das*—for Respondents.

Judgment.—This is an appeal from a decree based upon an award of certain arbitrators which was accepted by the Court with a slight modification. As alternative to the appeal there is an application in revision. The suit in which the said award was made was instituted by Dwijendra and Rohindra, the two younger sons of one Rai Radhashyam

Das Adhikari Bahadur deceased, in their personal right and also as shebait of a certain deity, against their eldest brother Barendra who was sued both in his personal right and as the other shebait of the said deity. The sons of the said plaintiff were subsequently added as co-plaintiffs. The plaintiffs asked for declaration of title and confirmation of possession in a two-thirds share in certain properties by right of survivorship. They prayed that if it be found that the properties were subject to a charge for deb-sheba the said charge might be declared. In the alternative, they prayed that if the properties be found to be debutter, their rights as shebait be declared and they be put in joint possession with the defendant and a scheme be framed for the performance of the sheba (worship). On a joint application by all the parties the suit was referred to certain arbitrators who made an award the important terms whereof were the following:

1. That the properties are the absolute debutter properties of the deity.
2. That the defendant had been duly installed by the previous mohunt of the deity and he was the sole mohunt of the endowment, validly appointed.
3. That the next mohunt would have to be nominated by the defendant from amongst the descendants of the late mohunt Rai Radhashyam Das Adhikari Bahadur, and failing such nomination during his lifetime the said descendants shall nominate one from amongst themselves to be such mohunt. That the plaintiffs would get maintenance from the debutter properties and to that end certain properties specified in a schedule were to be given to them, to be enjoyed by them from generation to generation but with no power of transfer or alienation.
5. That the plaintiffs and their descendants will have free access to the temple and right of worship therein.
6. That Jatindra who was said to have been adopted by the defendant would on no account, be appointed mohunt, not even if he was so nominated by the defendant.
7. That provision for the maintenance of Jatindra would have to be made by the defendant out of the secular properties left by the late mohunt, the father of the plaintiffs and the defendant.

The award being submitted, the defendant put in an objection on the ground that some portions of it were beyond the

scope of the reference and outside the subject-matter of the suit. The Subordinate Judge overruled the objection except as regards one matter, namely as regards the provision relating to the maintenance of Jatindra. Pursuant to his decision, a decree was drawn up incorporating all the clauses of the award referred to above with the exception of Cl. 7. This decree is the subject-matter of the appeal and the application in revision. On 10th June 1930 the appeal was preferred, and the application was filed on the next day, the 11th. On 31st March 1931 Barendra died. On 15th June 1931 Jitendra, who, as already stated, was alleged to have been adopted by Barendra prior to the suit and was no party therein, applied to this Court to be substituted as appellant in the place of Barendra and obtained an order from the Registrar to be so substituted. On 23rd November 1931, Rohindra, one of the plaintiffs, denying the factum as well as the validity of the adoption of Jitendra and also Jitendra's right to the shebaitship under the alleged nomination of Barendra, and claiming to have been elected by the male descendants of the mohunt Rai Radhashyam Das Bahadur as provided for in the award, put in a petition asking that the order obtained by Jitendra for his substitution might be vacated. On 18th December 1931, Jitendra filed an affidavit asserting that his adoption was valid and also that he had been appointed by Barendra as his successor in accordance with the custom governing the endowment and further that there was a custom under which the shebaitship devolved by lineal primogeniture. Now, the first question to be considered is whether on the death of the appellant Barendra, the appeal can proceed at the instance of Jitendra as appellant substituted in his place. The deity was not a party to the suit and so no determination made by the award and affirmed by the decree will affect the rights and interests of the deity so as to make a shebait of the deity bound thereby. Jitendra too was not a party to the suit and the Subordinate Judge has rightly observed in his judgment:

"Jatindra Nath Adhikari is not a party to the suit. The arbitrators therefore had no authority to adjudicate his rights, and any decision made behind his back is certainly not binding on him and cannot in any way affect his legal status or right. From that standpoint any adjudication

regarding his rights cannot but be outside the scope of reference and wholly beyond the jurisdiction of the suit."

The parties, it should be stated here, are governed by the Mitakshara law. Whatever rights Jitendra may have either personally as adopted son of Barendra or as mohunt or shebait of the deity, either by nomination or by right of lineal primogeniture, are not rights which have in any way been affected by the decree and in no sense can it be said that Jitendra is a legal representative of Barendra in so far as such rights of his are concerned. The adjudication contained in the award as affirmed by the decree is an adjudication which is entirely a personal one in so far as Barendra was concerned and on Barendra's death has spent all its force except as regards parties who were the other parties to the suit. The Court below has expressly said that the decree will have no effect so far as Jitendra is concerned, and it will be a waste of procedure to let him come in only to have the same things said once again in his presence. There is no application before us by anybody else to come in and prosecute the appeal in the place of Barendra. The result is that in our judgment the order obtained by Jitendra for his substitution should be vacated, and it being held that the appeal has abated, the appeal as well as the application, should be dismissed. There will be no order for costs.

K.N./R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 63

RANKIN, C. J. AND COSTELLO, J.

Karnani Industrial Bank, Ltd.—Appellant.

v.

Ranjan—Respondent.

Appeal No. 489 of 1931, Decided on 26th April 1932, against original order of Commissioner for Workmen's Compensation, Bengal, D/- 7th October 1931.

Workmen's Compensation Act (1923), S. 12—Liability of principal—Test of liability—Contractor undertaking to do what principal would do—Principal does not escape liability.

Section 12 contemplates that for a person to be liable for compensation it is necessary that the execution of the work in the course of which the workman is injured should be an ordinary part of that person's trade or business. The general notion of S. 12 is that, if it is ordinarily part of the business of a person to execute certain work, then ordinarily he will do that work

by his own servants; he is not to escape liability for any accident that takes place merely by interposing a contractor, the contractor undertaking to do what ordinarily the principal would do for himself: *A I R 1929 Bom 179, Ref.* [P. 64 C 1]

Nripendra Chunder Das—for Appellant.

Phanindra Kumar Sanyal—for Respondent.

Rankin, C. J.—This is an appeal from the order of the Commissioner for Workmen's Compensation, Bengal. The applicant was a workman engaged by one Kamil Sardar to do the work of putting up certain joists in a building in Park Street. Kamil Sardar was employed as a contractor by the Karnani Industrial Bank. It appears that the Karnani Industrial Bank was causing this house to be put up and it was getting the house put up by contracting with different people to do different parts of this work. It had evidently not entered into a contract with one builder to do the whole work, but it entered into contracts with particular persons employed in that behalf that particular parts of the work should be done on behalf of the bank. In these circumstances, the applicant having met with an injury by a joist falling on his leg, the commissioner has fixed the compensation at a lump sum of Rs. 514. Originally, the application was brought against Rai Bahadur Sukhlal Karnani personally but, in view of the written statement, the Karnani Industrial Bank was added as an opposite party and, in the end, the commissioner has made this award against the bank. The matter coming before us, it is pointed out that the liability of the bank depends upon the terms of S. 12, Act 8 of 1923.

That section deals with a case where the principal, as it calls him, in the course of or for the purpose of his trade or business contracts with any other person called the contractor for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal. If these conditions are fulfilled, the principal is made liable for compensation to the contractor's men. The first question therefore to which the commissioner had to address his mind was; Is it ordinarily part of the trade or business of this bank to put up joists as a house building operation? Any

ordinary notion one has of banking business would lead one prima facie to give a firm answer in the negative to that suggestion. The only evidence that was before the commissioner to satisfy him that it was ordinarily part of the business of this bank to undertake the erection of joists in a house is the circumstance that in the Memorandum of Association of the Limited Company, there is among the thirty-six objects of the usual redundant character one No. 14 which says :

"To build, erect, construct, lay down, enlarge, alter, equip, improve and maintain any offices, buildings, warehouses, godowns, factories, wharves, mills, jetties, roadways, tramways, railways."

On the basis and on the basis of the fact that this bank was building this house, the commissioner found in favour of the applicant saying this :

"It is clear that the bank constructed the house in the course of its business as such bank and it is clear also from paras, 13 and 14 of the Memorandum of Association of the Karnani Industrial Bank Limited that the bank was competent to do so."

I quite agree with the commissioner that these two propositions are both clear ; but they are not the tests laid down by S. 12. The general notion of S. 12 is that, if it is ordinarily part of the business of a person to execute certain work, then ordinarily he will do that work by his own servants ; he is not to escape liability for any accident that takes place merely by interposing a contractor, the contractor undertaking to do what ordinarily the principal would do for himself. But, if anybody is entitled to say that he is outside that principle if, for example, he went to a builder to build a house for him, I should suppose that body to be a bank which ordinarily would not take house building operations into its own hands at all. Of course, my notion of banking business may not be the same as the notion of the Karnani Industrial Bank. Merely because it is called a bank, I cannot say, as a matter of law, that it has not got this business of a speculative builder or the business of building houses for itself. I cannot say that it is not part of its ordinary business except upon some evidence. It seems rather extraordinary that any person engaged in banking business should go so very far from ordinary banking business, but in the particular circumstances of this case, as neither the

parties nor the commissioner appear to have appreciated what the test is in the act, it would only be fair to the applicant to let the matter go back to the commissioner to have this question determined upon evidence if there is any reason to suppose that putting up a house is ordinarily part of business of the bank. I may say here that it is by no means evident to me that Cl. 14 of the Memorandum of Association was intended to entitle the bank to build houses in the sense of building them itself as distinct from getting them built in the ordinary way as one would expect a bank to do. There is Indian authority upon the meaning of S. 12 in the case of *Rabia v. The Agent, G. I. P. Ry.* (1). In those circumstances, this appeal must be allowed, the order of the commissioner must be set aside and the matter must be remanded to him to deal with this question of fact upon further evidence according to law. There will be no order as to costs in this appeal.

Costello, J.—I agree that this matter should go back for further consideration by the learned commissioner. It is to be observed that the language of S. 12 of Act 8 of 1923 is somewhat more specific than the language used in the corresponding section of the English Act of 1925. That section is S. 6. The words there are:

"Where any person (in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay any workman employed in the execution of the work any compensation under this Act, etc."

So S. 6 of the English Act applies where the work is "undertaken" by the principal. Even so, the English authorities are all one way in this respect: the work must be of a kind which is part of the business or trade of the principal who carries it out. The words of the Indian Statute, as I have said, are even more specific because the section says that the work must be work "which is ordinarily part of the trade or business." In this connexion I would refer to the case of *Skates v. Jones & Co.* (2). In

1. A I R 1929 Bom 179=117 I C 431=53 Bom 203.
2. (1910) 2 K B 903=79 L J K B 1169=103 L T 408=26 T L R 643.

that case, the respondents were two shopkeepers. They also kept a billiard saloon. They were minded to join together in running a skating rink. They bought an existing iron structure and made a contract with a person for its removal and re-erection. The applicant, that is to say, the workman while employed on this work by the person with whom the two shopkeepers contracted was injured by accident and in respect of his injuries he claimed compensation from the respondents, that is to say, the two shopkeepers who were the principals. It was held that the work in which the applicant was injured was not undertaken in the course of or for the purposes of the respondents' trade or business and that therefore they were not liable to pay compensation. Also it has been held in English authorities that it is the duty of the arbitrators as is there called, and therefore in India it is the duty of the Commissioner in India, to find as a fact that the work undertaken is so undertaken as part of the ordinary trade or business of the person or persons who are to be put in the position of the principal for purposes of S. 12. Looking at the judgment of the learned Commissioner it does not appear that he has fully directed his mind to the importance of that part of S. 12 because I find that he says at the top of p. 21 of the paper book:

"The learned pleader's argument on behalf of the opposite party No. 2 based on the language of S. 12 does not assist the employer for the present proceedings are not indemnity proceedings."

That observation of the learned commissioner seems to indicate that he has not considered the question of whether or not the erection of the building with which this matter is concerned was ordinarily part of the business of the Karnani Industrial Bank. I agree with my Lord therefore that this matter should be remanded. It is desirable and necessary that there should be a definite finding on that question.

R.K.

Case remanded.

* A. I. R. 1933 Calcutta 65

PANCKRIDGE AND M. C. GHOSE, JJ.

Sham Das Kapur—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 818 of 1931, Decided on 13th July 1932.

1933 C/9 & 10

(a) Evidence Act (1872), S. 164—(Quære). It is doubtful if S. 164 applies to criminal proceedings (Quære). [P 66 C 1, 2]

* (b) Evidence Act (1872), S. 164—Production of document for inspection is not contemplated—Notice and call for production can be made—Accused not producing document after notice can use it to cross-examine complainant.

Section 164 does not contemplate the production of documents for inspection. What it contemplates is that one party should call upon another, in Court to produce a document of which the first party has given the other notice to produce. It does not give him any right at any stage of the case to call upon his opponent to produce the document and use it or not as he sees fit. [P 66 C 2]

In a prosecution under S. 408, I. P. C., the complainant called upon the accused to produce certain account books for inspection. The accused evaded their production but produced them for cross-examining the complainant.

Held: that the Court could not refuse to permit the accused to cross-examine the complainant on them. [P 66 C 2]

Hiralal Ganguli—for Accused.

Anilendra Nath Roy Chowdhury—for the Crown.

Panckridge, J.—In this case the accused has been convicted of an offence punishable under S. 408, I. P. C., and sentenced to undergo rigorous imprisonment for six weeks and to pay a fine of Rs. 1,000 and in default, to undergo further imprisonment for six months. The learned Magistrate further ordered that the whole of the money, if realized should be paid to the complainant as compensation.

The case for the prosecution is that the accused was a servant of the complainant and was left in charge of a business belonging to the complainant in Calcutta known as the Punjab Watch Company. The complainant fell ill and went to Amritsar of which place he is a resident. On his return, he found that the accused had removed all the stock in trade of the shop and converted it to his own use. The defence suggested by the accused was that he was not a servant of the complainant but a partner in this business called the Punjab Watch Company. The complainant gave evidence that the accused was his servant and in this he was corroborated by a man named Kissen Chand, P.W. 8. If Kissen Chand is believed it is very difficult to see how the accused can have any answer to the charge. After the complainant had discovered what had happened, he made inquiries and he eventually got the accused arrested by

the police at Moradabad. In the possession of the accused when he was arrested were found two books of account. These books were seized by the police but were afterwards returned to the accused on his giving security for their production. The next step taken by the accused was that he filed a suit in the Amritsar Court for dissolution of partnership in which he made the complainant a defendant and asked for taking the accounts of the Punjab Watch Company. I will assume that this case is defended and that the complainant denies the fact of partnership alleged by the accused. In the course of the proceedings before the learned Chief Presidency Magistrate it appears, from the order sheet that the complainant from time to time called for the production of the two books to which we have referred. The accused did not produce the books and he gave excuses for their non-production which appear to me to be extremely flimsy. It may be that his security has been forfeited by his conduct. But that depends on the terms of the security bond and we express no opinion with regard to that. Among other attempts to get the production of the documents on the part of the complainant is a petition filed by him on 24th June 1931, in which he asked that a notice should be given to the accused for the production of the books in Court for inspection. As I have said the accused never did produce these books for inspection.

However his failure to do so, is, it appears to the learned Magistrate, a ground to deprive him of the right to use these documents as material for his defence. The learned Magistrate based this view on the provisions of S. 164, Evidence Act, which provides that when a party refuses to produce a document which he has had notice to produce he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court. Accordingly, when in cross-examination the complainant was shown these books he refused to have anything to do with them or to answer any question with regard to them and in his refusal it is clear that he was supported by the learned Magistrate. In my opinion the learned Magistrate misunderstood the meaning and intention of S. 164. Speaking for myself, I am by no means con-

vinced that S. 164 applies to criminal proceedings. S. 164 does not contemplate the production of documents for inspection. What it contemplates is that one party should call upon another in Court to produce a document of which the first party has given the other notice to produce. It does not give him any right at any stage of the case to call upon his opponent to produce the document and use it or not as he sees fit. I do not myself see any indication in the section that the complainant can call for a document in this sense. We think that the learned Magistrate was wrong in not permitting the pleader for the defence to put these documents to the complainant and cross-examine him on them. The fact that the accused adopted an unreasonable attitude with regard to their production may be material when the time comes to consider as to what weight to be attached to them. We think that the learned Magistrate was wrong in not permitting the documents upon which the accused claims to base the main part of his defence to be put to this particular witness for the prosecution. This seems to us to be a sufficient reason for setting aside the conviction. At the same time we consider that a very strong *prima facie* case has been made out by the evidence of the complainant and the witness Kisson Chand and we do not think that we should be justified in directing that the accused be acquitted.

We therefore set aside the order of conviction. But the appeal will remain pending for a period of three months. During that time if the accused so desires he can take reasonable steps to have the question decided in the Amritsar Court. The case will be laid before us again after the interval of three months for considering whether we should order retrial or pass some other order.

M. C. Ghose, J.—I agree.

M.N. *Conviction set aside.*

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GRAHAM AND MITTER, JJ.

Girish Chandra Singha and another—
Appellants.

v.

Mahammad Rausan Mian and others—
Respondents.

Appeal No. 52 of 1928, Decided on 8th May 1930.

(a) Bengal Tenancy Act (1885), S. 29—Compromise decree passed in contravention of S. 29 operates as binding in subsequent suit until vacated.

Compromise decree passed in contravention of the provisions of S. 29 cannot be treated in a subsequent suit between the same parties as without jurisdiction and a nullity but is operative and binding until vacated by appropriate proceedings: *A I R 1926 Cal 1101*; *A I R 1928 Cal 606* and *A I R 1921 Cal 84, Rel. on*; *18 I C 809, not Appr.*; *A I R 1928 Cal 606, Fall.*

[P 67 C 2]

(b) Bengal Cess Act (1880), S. 20—Landlord is debarred under S. 20 from suing for rent in respect of jamas not included in Road Cess Return filed by him.

Plaintiff landlord is debarred under S. 20 from suing for rent in respect of jamas which were not included in the Road Cess Return filed by him. A supplementary return filed, not before the institution of the suit but after the suit had been disposed of and after an appeal had been filed cannot have the effect of getting rid of the disability imposed by S. 20: *26 Cal 712, Dist.*

[P 68 C 1]

Bijoy Kumar Bhattacharjya, Panchanan Ghose and Gunendra Krishna Ghose—for Appellants.

Anil Chandra Roy Choudhuri for Syed Nasim Ali—for Respondents.

Graham, J.—This is an appeal by the plaintiffs from a decision of the District Judge of Birbhum modifying a decision of the Munsif, Second Court, of Rampurhat and arises out of a suit for rent for the period 1327-1330 B.S. in respect of ten different holdings described in the schedule to the plaint. The defence set up in regard to four of these jamas described as chha, ja, jha and ena was that there was no relation of landlord and tenant, while as regards the remaining six jamas the plea was taken that the rate of rent had been illegally enhanced in contravention of the provisions of S. 29, Ben. Ten. Act, and that the plaintiffs could only recover rent in respect of them at the admitted rates. The trial Court found that the four jamas were included in the plaintiff's estate and that the relation of landlord and tenant existed. As regards the remaining six jamas it found that, with the exception of two, viz., ka and uma, they did not contravene S. 29, Ben. Ten. Act. As to ka the Munsif found that the original rent was Rs. 5-2-6 per annum, while the rent claimed was Rs. 6-2-17½ gandas, and that it therefore contravened S. 29. Similarly as regards uma the finding was that the original rent was Rs. 2-4-0 whereas the rent claimed was Rs. 10-4-6. The Munsif ac-

cordingly gave a decree in respect of these two holdings at the admitted rates. On appeal by the defendants the District Judge dismissed the appeal as regards the four jamas chha, ja, jha and ena on the ground that they had not been included in a Road Cess Return filed by the plaintiffs some years previously and that as a consequence no suit would lie under S. 20, Cess Act (Bengal 9 of 1880).

The plaintiffs filed a cross-objection as to jotes ka and uma which was dismissed, the District Judge holding in agreement with the Munsif that a decree passed in a suit in the year 1890 was a nullity. A decree was therefore given in respect of these two jotes at the rates admitted by the defendants. The plaintiffs have now preferred this second appeal and two points have been taken on their behalf. It is contended, firstly, that the Court of appeal below erred in law in holding that the compromise decree 1890 did not operate as *res judicata*, and in treating it as a nullity. Secondly it has been urged that under S. 20, Cess Act, the plaintiffs were precluded from realising rent in respect of the four jamas chha, ja, jha and ena. With regard to the first contention we are of opinion that it is well-founded and must prevail. We have no hesitation in holding that the compromise decree of 1890 operates as *res judicata*, and in support of the view which we take may refer to recent decisions of this Court *Ishan Chandra v. Moomraj Khan* (1) and *Nawabzada Md. Hossain v. Khana Kasi* (2). The District Judge has referred in his judgment to the former of these cases but preferred, as he himself expresses it, to follow an earlier decision reported in *Surjeeg Saran Lal v. Dukhit Mahto* (3). As this latter case was referred to in the subsequent decision reported in *Ishan Chandra v. Moomraj Khan* (1), and as there had in the interval been a Full Bench decision *Hriday Nath Roy v. Ram Chandra Barma* (4), which had shaken the decision in the *Surjeeg Saran Lal v. Dukhit Mahto* (3), we think that the District Judge should have followed the later decisions. In the case reported in *Mahmed Hossein v. Khana Kasi* (2)

1. *A I R 1926 Cal 1101*=97 *I C 770*.

2. *A I R 1928 Cal 606*=118 *I C 570*.

3. (1913) 18 *I C 809*.

4. *A I R 1921 Cal 84*=58 *I C 806*=48 *Cal 188* (F B).

the Full Bench decision was expressly referred to and was mentioned as a reason for not following the previous decision reported in *Surjee Saran Lal v. Dukhit Mahto* (3). With regard to the second contention the terms of S. 20, Cess Act seem to be explicit. The four jotes chha, ja, jha and ena were not entered in the plaintiff's return under the Cess Act (Ex. A), and, that being so, the plaintiffs were debarred under that section from suing for rent in respect of them. The words in the section are "suing for, or recovering." It seems clear therefore that the inclusion of the holdings in question was a condition precedent not only to the recovery of rent but to the institution of a suit for rent so far as they were concerned. What then are the facts? The relevant facts are that a Road Cess Return had been filed by the plaintiffs as far back as 1905 at the time of the last Revaluation and that Return did not include the jamas in question. The plaintiffs were precluded therefore from suing for the rent of these jamas.

On behalf of the appellants two contentions have been put forward in this connexion. Firstly, it is argued that, as the point was not taken in the written statement, it ought not to have been entertained, and secondly, it has been urged that in any case the defect, if any, was rectified by the filing of the supplementary return in which these four jamas were included. As regards the first contention it appears to be correct that the point was not raised in the pleadings, but it is clear from a passage in the judgment of the Munsif at p. 3 of the Paper-Book that the point was taken, and it is a point which goes to the root of the matter and affects jurisdiction. The second contention is, it is plain, based upon an erroneous view of the facts. The supplementary cess return was filed before the Collector on 17th March 1926 during the trial of the suit, and the copy of that Return was filed on 20th August 1926 in the lower appellate Court. That copy was never filed in the trial Court, and the Munsif had therefore no knowledge of any such return. A supplementary Return filed not only not before the institution of the suit but after the suit had been disposed of and after an appeal had been filed could not have the effect of getting rid of the disability imposed

by S. 20 of the Act. There is no substance therefore in either of these contentions.

It was further strenuously argued that it could never have been intended by the legislature to deprive the owner of his right to recover rent by suit, and that even assuming that there was any disability by reason of failure to include the jamas in the return, that disability was removed by the subsequent filing of the supplementary Return. In support of this view an analogy was taken from S. 78, Registration Act, and in conjunction therewith reference was made to the case of *Abdul Khan v. Mcher Ali* (5). But the two cases are not on the same footing, and there is danger in applying an analogy borrowed from another Act. In the case of the Registration Act the defect is of a formal character, whereas in the case of the Cess Act it is something more than that purpose underlying S. 20 of the latter Act being apparently to impose a disability upon those who evade cess by not making a true return. Moreover, as already stated, the omission was in this instance not made good during the pendency of the suit but in the appellate stage. The result therefore is that the appeal succeeds upon the first contention as regards the effect of the compromise decree, and fails upon the other point. The judgments and decrees of the Courts below are accordingly set aside and in lieu thereof we direct that the plaintiff's claim stand dismissed in respect of the four jotes chha, ja, jha and ena, and be decreed in respect of the remaining six jotes at the rate claimed by the plaintiffs. The appellants will get three-fifths of the costs throughout, and the respondents the remaining two-fifths.

Mitter, J.—I agree with my learned brother in the conclusion he has arrived at on both the points urged before us by the appellants. With regard to the first point taken, namely, that the Courts below erred in law in regarding the compromise decree which was passed in Rent Suit No. 1298 of 1890 as a decree made without jurisdiction and in granting to the plaintiffs a decree not at the rate arrived at by the compromise but at the rate admitted by the defendants, the contention of the appellants seem to be well founded and must prevail. The compromise decree, it is said, contra-
5. (1899) 26 Cal 712.

vened the provisions of S. 29, Ben. Ten. Act inasmuch as the rent which was agreed to was in excess of more than 2 annas in the rupee and this was in respect of the holding which was an occupancy-holding carrying a money-rent. In a previous case, namely, in the case of *Mohammed Hossein Chowdhury v. Khana Kazi* (2) it was held by me (Mullick, J. concurring) that a compromise decree passed in contravention of the provisions of S. 29, Ben. Ten. Act cannot be treated in a subsequent suit between the same parties as without jurisdiction and a nullity but is operative and binding until vacated by appropriate proceedings. It was argued on behalf of the respondents that a compromise decree cannot be placed upon a higher footing than a mere agreement of the parties and that same infirmity which attaches to an agreement would attach also to an agreement which has merged in a decree of a Court. That may be conceded. But the question still remains that a compromise decree is to be vacated by appropriate proceedings within the time prescribed under the Limitation Act. The compromise decree is as much binding between the parties as a decree on contest. That was laid down so far back as in the year 1895 in the case of *South American and Mexican Co.* (6). It operates as an estoppel by judgment in the same way as a decree on contest. So long as this compromise decree is not vacated it is binding as estoppel between the parties. That being so, the Courts below were wrong in not decreeing rent in respect of theka and una jotes at the rate claimed by the plaintiffs on the basis of the compromise decree in the suit of 1890.

With regard to the second point taken I agree that the contention of the appellants must fail. S. 20, Cess Act (Act 9 of 1880) operates as a bar to the plaintiffs realising rent in respect of the four jotes chhna, ja, jha and ona. It is argued on behalf of the appellants that S. 20 cannot take away a right which exists independently of any provision of the Cess Act. It is said that admittedly the plaintiffs are proprietors of the estate under which the tenancies are situated and that it is his right as a proprietor that entitles them to get rent and S. 20 merely imposes a bar which may be re-

moved at any stage of a proceeding whether in the course of a suit or in the course of an appeal arising from the suit. I am unable to accept this contention for the language of S. 20 suggest that every holder of an estate or tenure in respect of which a return has been made as required by the Cess Act shall be precluded from suing for or recovering any rent whatsoever unless it be proved that the holding or tenure for the rent of which the rent is claimed was created subsequently to the lodging of such return . . . in cases where the holdings have not been mentioned in the return filed. In this case Road Cess Return which was before the Court was filed in the year 1905 and it is conceded that that return which was filed long prior to the institution of the suit did not contain any mention of the four jamas in question. This point was raised before the Court of first instance which overruled the contention of the defendants on the ground that the omission might have been due to inadvertence. Whatever the reason for the omission might be the strict provisions of S. 20 render it impossible for the plaintiffs to sue for recovery of rent unless it is established that in the return filed before the institution of the suit these holdings were mentioned. It will not certainly bar the plaintiff's right to recover rent for all time to come if the plaintiffs can place before the Court in any subsequent proceeding Road Cess Return which would include these holdings. But in the present case before the Court of first instance no return other than the return of 1905 was exhibited. Therefore the Court had not before it any document in the nature of Cess Return which contains a mention of these holdings. For these reasons as I have already said, I agree with my learned brother in making the order which he has made.

S.N./R.K.

Decree set aside.

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S. K. GHOSE, J.

Nagenbala Dasee—Plaintiff—Appellant.

v.

Sridam Mahato and others—Defendants—Respondents.

Second Appeal No. 2316 of 1929, Decided on 18th June 1931, against decree of Dist. Judge, Midnapore, D/- 3-7-1929.

6. (1895) 1 Ch. 37=64 L J Ch 189=12 R 1=71 L T 594=43 W R 131.

(a) Bengal Tenancy Act (1885), S. 3 (5)—Suit for price of wood contracted to be supplied by tenant to landlord over and above rent is suit for rent.

Where by a compromise, a tenant binds himself to supply to his landlord certain quantity of wood over and above the rent of his land, a suit for the price of the wood so deliverable is a suit for rent, as the wood is something deliverable in kind by the tenant to his landlord on account of the use or occupation of the land held by the tenant. [P 71 C 1]

(b) Civil P. C. (1908), S. 11—Rent suit—Compromise in former suit superseded by another compromise—Decision based on former compromise does not operate as *res judicata* in subsequent suit.

A decision given in a rent suit based on a compromise does not operate as *res judicata* in a subsequent rent suit where the compromise on which the prior suit was based has in the meanwhile been superseded by another compromise between the parties. [P 71 C 1]

(c) Civil P. C. (1908), S. 11—Waiver.

If a party does not put forward a plea of *res judicata*, he must be taken to have waived it and to have intentionally invited the Court to decide the case on the merits: *A I R 1929 Cal 163, Ref.* [P 71 C 1]

(d) Bengal Tenancy Act (1885), Ss. 29 and 113—Enhancement of rent effected by compromise—Ss. 29 and 113 do not apply.

Although an enhancement of rent might be in contravention of the provisions of S. 29 still when such enhancement is effected by a compromise which is embodied in a decree, it operates as an estoppel by judgment. Ss. 29 and 113 have no application where enhancement is made under a compromise whereby the status of the tenancy is raised: *A I R 1932 Cal 165 and 4 Pat L J 667, Ref.* [P 72-C2]

Parichanan Ghosh and Durgadas Ray—for Appellant.

Pramathanath Banerji—for Respondents.

Judgment.—This litigation has come to this Court under the following circumstances. There is a tenure held by certain Kalamuris, who gave an *ijara* to one Surabala and subsequently to the plaintiff. Under this tenure, there is an under-tenure held by the Mahato defendants. The suit lands are in mouza Barasole, which is included within the under-tenure. In 1907 the Record of Rights was finally published and therein the defendants were recorded as under-tenure holders in respect of the lands of mouza Barasole, at a rental of Rupees 118-14-0. As Surabala, the then *ijaradar*, brought a rent suit in 1909 and obtained decree at the rate of Rs. 118-14-0. In 1910, the present defendants brought title suit—T. S. No. 200 of 1910—in order to have the rent decree set aside. In that suit, there was a compromise by

which the parties agreed that the rent for the under-tenure would be Rupees 118-14-0., and that, on account of the jungle land, the defendants would supply 15 cart loads of sal and other kinds of wood for fuel annually. Thereafter the plaintiff brought Rent Suit No. 2274 of 1922, consolidating the claim for rent in respect of the aforesaid cash amount and of the wood.

The Court held that the two claims could not be so consolidated and that in respect of the claim for wood, the plaintiff was to seek for remedy in a regular civil suit. Then the plaintiff brought Money Suit No. 383 of 1925, claiming supply of wood for the jungle lands for 1330 and 1331 B. S. In that suit, there was again a compromise, by which it was settled that, instead of wood being supplied as fixed by the compromise decree in Title Suit No. 200 of 1910, the defendants would supply 8 cart loads of sal and 7 cart loads of other kind of wood. The suit was accordingly decreed in terms of this compromise. Then the plaintiff brought the present suit No. 521 of 1926, claiming wood for the years 1332 and 1333 B. S. The defence denied the finding of the *solenama* as aforesaid and also alleged undue influence. But the denial was not seriously pressed and undue influence was also not proved. The further defence was that the contract to supply wood as aforesaid was illegal and wholly void. The Munsif took this view and held that, by this contract, there was an enhancement of rent contrary to S. 113, Ben. Ten. Act, and it was in the nature of an *abwab*. In that view, the Munsif dismissed the suit. An appeal was taken to the District Judge. But he held that the suit was based on a contract and as the learned Munsif had Small Cause Court powers up to Rs. 250, the appeal was incompetent. Against that judgment, the plaintiff has filed this second appeal and also an application under S. 115, Civil P. C. Both these matters are before me.

The first question is whether the learned Judge in the Court of appeal below is right in holding that the suit is not a suit for rent. If the suit was for rent then the decision of the learned Judge was wrong and the appeal should have been heard by him on its merits. Now, the present claim is based on the compromise decrees made in the afore-

said suits in 1910 and 1925 respectively. The terms of the first compromise (Ex. 2) show that the tenants bound themselves to supply to their landlords so much sal and other wood annually from the jungle lands of the mouza. It cannot be gainsaid that this is rent even in the restricted sense of Cl. (5), S. 3, Ben. Ten. Act of 1885. Obviously it was something deliverable in kind by the tenants to his landlord on account of the use or occupation of the land held by the tenant. As against this, there are some observations in the judgment (Ex. 4) of the rent appeal arising out of Rent suit No. 2274 of 1922. There it is remarked as follows:

"As to 15 cart loads of fuel, I fully agree with the conclusion arrived at by the lower Court. It is clearly not rent, not being amalgamated with rent and payable in kists. If the plaintiff can at all recover it, he must seek his remedy in a regular civil Court and not in a rent Court."

It may be that this only decides that the claim on account of the supply of wood is not rent in respect of the same holding, of which the cash rent of Rs. 118-14-0 is payable. But even assuming that there was a clear decision that the claim was not one of rent, it can have no effect as *res judicata* against the plaintiff because the parties later on came to another compromise (vide Ex. 1) dated 14th September 1925, and this was embodied in the decree of 21st October 1925. By this compromise the tenant bound himself to supply 8 cart loads of sal and 7 cart loads of other kinds of wood annually. It has been held that if a party does not put forward a plea of *res judicata*, he must be taken to have waived it and to have intentionally invited the Court to decide the case on the merits: see the case of *Rajani Kumar Mitra v. Ajamaddin Bhuiya* (1).

The question that next arises is whether this claim for the supply of wood is lawfully payable or deliverable. The trial Court held that it was not. The learned advocate for the appellant has contended that this position is not tenable in view of the fact that the compromise has merged in the decree. I consider that this argument must prevail, because I feel that I ought to follow the decision in the case of *Ishan Chandra v. Moomraj Khan* (2) which dissepated from the case of *Sarjugsharan*

Lal v. Dukhit Mahato (3). The former case has been followed in the case of *Krishnalal Sadhu v. Pramila Bala Dasi* (4) and in a still later case namely that of *Girischandra Singha v. Mahammad Rausan Mian* (5). In this last case, it was held that although an enhancement of rent might be in contravention of the provisions of S. 29, Ben. Ten. Act, still, since the compromise by which the enhancement was effected was embodied in a decree, it operated as an estoppel by judgment. But even apart from this question, it seems to me that it cannot be said that the stipulation as to supply of wood which was effected by the compromise was illegal in view of S. 113, Ben. Ten. Act, and was in the nature of an *abwab*. The rent was enhanced by the Record of Rights in 1907 and the compromise took place in the suit of 1910. But the terms of the compromise show that the status of the tenancy was being raised. The tenancy was a temporary one, but by the compromise, it was stated that the rent would not be enhanced nor would the tenant be liable to pay additional rent for any increase of area. The learned Munsif observed that there was really no occasion for enhancement of rent only three years after the previous enhancement of 1907. But that could not prevent the parties from coming to such a compromise in the suit of 1910. The learned Munsif further observed that the revenue officer might settle a higher rent at the time of the next settlement, as the mouza in question was within Government khas mehal. But that again could not prevent an arrangement from being binding as between the tenant and his under tenant.

On this point, see the case of *Tayefa Khatun v. Surendrakumar Sen* (6). That in these circumstances, S. 29 or S. 113, Ben. Ten. Act, has no application derives support from the case of *Rampadarath Singh v. Sohrai Koeri* (7), which I think applies to the facts of the present case, in any case as the learned advocate for the appellant has pointed out, the later compromise of 1925, was certainly more than 15 years after the previous settlement of

3. (1913) 18 I C 809.

4. A I R 1928 Cal 518=114 I C 558=55 Cal 1315.

5. A I R 1938 Cal 66.

6. A I R 1932 Cal 165=138 I C 99=59 Cal 26.

7. (1919) 4 Pat L J 667=52 I C 20.

1. A I R 1929 Cal 163=114 I C 129.

2. A I R 1926 Cal 1101=97 I C 770.

1907. This compromise was embodied in a decree and it is upon this decree that the present claim is based. On these grounds I think that it must be held that the present suit is one for recovery of rent. Consequently there was an appeal to the District Judge. I therefore reverse the decision of the lower appellate Court and remand the case for hearing on merits. The present appeal is allowed with costs. No order is necessary on the application.

K.N./R.K.

*Order accordingly.***A. I. R. 1933 Calcutta 72**

GUHA AND M. C. GHOSE, JJ.

Provabati Debya and others—Plaintiffs
—Appellants.

v.

Sarojini Devi and others—Defendants
—Respondents.

Appeal No. 3051 of 1930, Decided on 11th May 1932, against appellate decree of Dist. Judge, Pabna, Bogra, D/- 22nd August 1930.

(a) Will—Construction — Absolute estate granted to daughters of testator.

A devise in general terms, where the testator simply intends that the estate shall vest in the daughters in the event of the widows not exercising their power of adoption, without the addition of words of inheritance, will pass the entire estate of the testator, unless a contrary intention appears from the context.

A clause in a will ran as follows : "If you do not exercise the right to adopt given, both of you shall enjoy my properties, and on your death, all the properties shall vest in my two daughters. The said two daughters shall live in my homestead and shall perform the devsheba and other ceremonies. If they do not do so, whoever shall perform the said sheba, etc., the properties shall vest in him."

Held : that the testator intended to give the daughters an absolute estate. [P 72 C 2, P 73 C 1]

(b) Hindu Law—Will — Daughters—Presumption.

There is no presumption in regard to a daughter that in every case she takes less than what would be taken by a male [P 73 C 1]

(c) Will—Construction — Absolute estate conveyed by words—Words cannot be cut down by supposed presumptions.

When the words in a will convey an absolute estate they cannot be cut down by any supposed presumption. Such presumption only arises when the document is uncertain or ambiguous.

[P 73 C 1]

(d) Will—Construction—Meaning of testator is to be found out from document as whole.

In construing a will, one has to try and find out the meaning of a testator, taking the whole of the document together and to give effect to his meaning. The primary duty of a Court is to ascertain from the language of the testator what are his intentions. [P 73 C 1]

(e) Deed—Construction—Decision in other cases do not afford sufficient guidance.

In matters of construction of documents, decisions in other cases, do not and cannot afford sufficient guidance. [P 73 C 1]

Radha Binode Pal and Prem Ranjan Rai Choudhury—for Appellants.

Sitaram Banerji—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for possession on establishment of title to the properties mentioned in the plaint. The plaintiffs' claim based on their right of inheritance as the agnates and reversionary heirs of one Krishna Sundar Adhikary, was resisted by the contesting defendants in the suit. According to the defendants, Krishna Sundar died leaving a will, under which his daughter Kumudini got an absolute estate in the properties in suit, and the plaintiffs could not have any title to the same. It may be mentioned that the first three defendants are the daughters of Kumudini, while defendant 4 is the husband of defendant 1. The clause in the will of Krishna Sundar, most material for the purpose of the decision of this case is the sixth, and it runs as follows :

"If you do not exercise the right to adopt given, both of you shall enjoy my properties, and on your death, all the properties shall vest in my two daughters. The said two daughters shall live in my homestead and shall perform the devsheba and other ceremonies. If they do not do so whoever shall perform the said sheba &c. the properties shall vest in him."

The Courts below have differed in the construction of this clause in the will. According to the learned Subordinate Judge in the trial Court, no absolute right to the properties was conferred by the will to Krishna Sundar's daughter. The learned District Judge, in the Court of appeal below, has however held that an absolute title had vested in the daughter of Krishna Sundar, and in that view of the case the plaintiffs' suit has been dismissed. The decision of the Court below has been challenged by the plaintiffs appellants; and it has been urged on their behalf that the construction placed by the Court below upon Cl. 6 of the will, which has been set out above, was erroneous.

The will before us is a very simple document. The testator gave life estates to his two widows: the widows were given the power of adoption, which was not exercised. On failure of adoption by the widows, the testator's properties

vested in the daughters. Upon the findings arrived at by the learned District Judge, the daughters lived in the testator's homestead and carried on debshoba as enjoined by the father for a pretty long time. The only question arising upon the finding so arrived at, is whether there was intention in the testator to give the daughters an absolute estate, and that question must, upon a plain reading of Cl. 6 of the will, be answered in the affirmative. It is well settled now that there is no presumption in regard to a daughter that in every case she takes less than what would be taken by a male. When, in a case like the present, there are words conveying an absolute estate, they could not be cut down by any supposed presumption, such presumption only arising when the document is uncertain or ambiguous. The rule of construction in the case of a will is very well known. One has to try and find out the meaning of a testator, taking the whole of the document together, and to give effect to his meaning. In all cases the primary duty of a Court is to ascertain from the language of the testator what are his intentions. A devise in general terms, as in the present case, the testator simply intending that the estate shall vest in the daughters in the event of the widows not exercising their power of adoption, without the addition of words of inheritance, will pass the entire estate of the testator, unless a contrary intention appears from the context. Taking these principles of general application, as our guide in the matter of construction, we have no hesitation in coming to the only possible conclusion that the will of Krishna Sundar Adhicary conferred an absolute right on his daughters.

Reliance has been placed on behalf of the appellants before us, on the decisions of this Court in *Surendra Nath v. Saroj Bandhu* (1) and *Hara Kumari Dasi v. Mohim Chandra Sarkar* (2), for the purpose of construing the will before us. In matters of construction of documents, decisions in other cases, do not, and cannot afford sufficient guidance; and the cases to which our attention has been drawn do not lay down any principle of general application, or any rule of construction other than those to which re-

ference has been made above. In our judgment, the decision arrived at by the Court of appeal below is right, and must accordingly be affirmed. The appeal fails, and it is dismissed with costs.

R.M.

*Appeal dismissed.***A. I. R. 1933 Calcutta 73**

RANKIN, C. J. AND C. C. GHOSE, J.

Aktar Hossain and others—Appellants.

v.

Sm. Hussemi Begam, and others—Respondents.

Appeal No. 511 of 1930, Decided on 1st March 1932, against original order of Second Addl. Sub-Judge, Dacca, D/- 25th August 1930.

(a) Civil P. C. (1908), O. 17, Rr. 2 and 3—Suit decided on evidence of plaintiff and defendant in absence of plaintiff—Judge should act under R. 2—If suit is dismissed, decree is ex parte within Civil P. C. (1908), O. 9.

Where in the absence of the plaintiff a suit has been decided on merits upon some evidence given by the plaintiff and the evidence given by the defendant, the right of appeal depends upon what the Court did and not upon what the Court should have done. In such a case the Judge is not entitled to act under R. 3 but should act under R. 2, O. 17. Where however in such a case he dismisses the plaintiff's suit on merits the decree of dismissal made is ex parte within O. 9 : (Cases referred). [P 74 C 1,2]

(b) Civil P. C. (1908), O. 9, R. 13—Plaintiff's strenuous attempt to get witnesses to Court is sufficient cause.

Where the plaintiff was doing his best and acting very strenuously in collecting his witnesses and bringing them in Court and was therefore late in attendance and his suit was dismissed on merits in his absence under O. 9, R. 13, he need not be debarred from having his remedy, although in a wrong headed and muddle-headed way he was doing his best to have his witnesses in Court and his suit should be restored. [P 74 C 2]

Jotindra Nath Sanyal—for Appellants.

Abdul Ali—for Respondents.

Rankin, C. J.—In this case there was a suit brought by the plaintiff to set aside a compromise decree which had been entered into on his behalf by his mother when he was a minor. The decree was in September 1926, the plaintiff attained majority in 1927 and the events that we are concerned with happened in January and February 1930. The suit was in the Court of the Additional Subordinate Judge of Dacca. On 31st January 1930 the plaintiff wanted time because of communal disturbance in the town and he was given time till next

1. A I R 1921 Cal 408=70 I C 928.

2. (1908) 7 C L J 540=12 C W N 412.

day. Then he filed a petition saying that his pleader had not come to Court and he was given an adjournment till 5th February. On the 5th he filed another petition asking for examination of a witness on commission. The Judge was not willing to give him an adjournment on that ground though he was prepared, if necessary, to consider whether that should be done during the trial. Consequently on 5th February the suit was taken up. The plaintiff was examined but his examination was not concluded and as it was late in the day the suit was adjourned to the next day. There seems to be no doubt that the plaintiff had not been attending diligently to this matter and when the suit was called on on the 5th he made up his mind to do what he could and it seems and we accept it as a fact that to get his witnesses he went off that very day to the district of Mymensingh and came back with some witnesses on the morning of the 6th; but he must have been something like an hour late in attending the Court because the learned Subordinate Judge waited 40 minutes and then took some evidence and then dismissed the suit on the merits.

The plaintiff applied to have the suit restored and the first question is whether he was entitled to do that or whether his only remedy was to appeal from the decree. I confess there is a good deal to be said in favour of the view that where a suit has been decided upon some evidence given by the plaintiff and the evidence given by the defendant the right of appeal depends upon what the Court did and not upon what the Court should have done and on those lines there is a good deal to be said in favour of the view that the proper remedy is by way of appeal. It seems however that, in a number of cases a different view has been taken not always in cases exactly on all fours. Cases where a different view has in substance been taken are the cases of *Enatulla Basunia v. Jiban Mohan Roy* (1), *Ram Charan Lal v. Ragubir Singh* (2) and *Shashi Bhusan Kumar v. Dwarka Prosad Marwari* (3), and in other cases. It seems quite clear that the learned

Judge was not entitled to act under R. 3, O. 17, Civil P. C., but he, it seems, should have acted under R. 2 of that order and as he dismissed the plaintiff's suit I am disposed to treat it on the line of the authority to which I have referred, as though the decree of dismissal had been a decree made *ex parte*. The plaintiff's evidence had not been completed and the suit was dismissed in his absence. So although the learned Judge has wrongly proceeded to call the defendant's evidence, I think we may treat it as a case coming within O. 9.

That being so, the question is whether there is sufficient cause for the plaintiff being late. Now, in a sense there is not sufficient cause because the plaintiff ought to have done his work of collecting his witnesses earlier and he ought to have got before the learned Judge sooner than he did. But it is evident that the man was doing his best and acting very strenuously in collecting his witnesses and bringing them in Court on the morning of the 6th and I do not think that we are debarred by terms of O. 9, R. 13, Civil P. C., from giving him his remedy when in a wrong-headed and muddle-headed way he was doing his best to have his witnesses before the Court. That being so, I am of opinion that we ought to allow the appeal, set aside the decree dismissing the plaintiff's suit and direct that the plaintiff's suit be restored. I think however that the appellant ought to pay the respondents' costs of this appeal but we do not make it a condition precedent. We assess the hearing-fee at three gold mohurs. There will be no order for costs in the Court below on the application.

C. C. Ghose, J.—I agree.

K.N./R.K.

Appeal allowed.

A. I. R. 1933 Calcutta 74

MUKERJI AND BARTLEY, JJ.

Banga Chandra De and others—Appellants.

v.

Sm. Menaka Sundari De—Respondent.

Appeal No. 108 of 1930, Decided on 15th June 1932, against original decree of Dist. Judge, Chittagong, D/- 17th March 1930.

Probate and Administration Act (1881), Ss. 50 and 69—Only some persons mentioned as relatives of testators—Names of some

1. A I R 1914 Cal 360=41 Cal 956 = 29 I O 769.

2. A I R 1923 All 551=45 All 618 = 75 I C 887.

3. A I R 1922 Pat 2=6 P L J 313 = 61 I O 597.

relatives omitted—Omission amounts to sufficient defect so as to revoke probate.

It is the duty of the person applying for grant of probate to bring to the notice of the Court who are the persons who *prima facie* have a claim on the estate. Where the applicant only mentions the names of some persons as having such claim but omits to mention the names of other relatives having claim on the estate of the testator and in consequence of the omission they are not cited, the proceedings are radically defective in substance. The failure to mention the existence of the relatives and to have them represented and cited is defect sufficient to revoke the probate.

The person to whom probate is granted under such circumstances cannot contend that a long series of years have elapsed from the grant of probate and it would be well nigh impossible to prove the will by reason of lapse of time, death of parties and witnesses and destruction of records, as the difficulties could have been avoided by prudent action on his part: *A I R 1931 Cal 713* and *A I R 1928 P C 2, Foll.*

[P 76 C 1]

Narendra Kumar Das—for Appellants.

Chundra Sekhar Sen—for Respondent.

Judgment.—The will concerned in this case is alleged to have been executed by one Ganga Bishnu De on 17th September 1888. He died about a month after, leaving a brother named Ram Gobinda De and a widow, a widowed sister and three infant daughters who were then residing with their mother in the house of Ram Gobinda. On 17th December 1889 Ram Gobinda as executor made a petition for probate giving in the petition the names of the widow and the widowed sister and stating that they were under the will entitled to enjoy the profits of the estate left by Ganga Charan and also saying that his own son Jagatbandhu was the owner of the said property by virtue of the will. Citation was issued on the widow and the widowed sister. There was no contest and on the other hand there was a petition purporting to have been made by the widow and the widowed sister consenting to the grant. On 11th August 1890 letters of administration were ordered to issue on the footing that there was no opposition, but there was *prima facie* proof of the will, and that the applicant was a legatee under the will. There is some doubt however whether the grant was of letters of administration or of probate, because in the order by which the grant was issued it was said that letters of administration were to issue, while an endorsement

in the order sheet of the case states that it was probate that was granted.

Ram Gobinda died soon after, and thereupon his son Jagatbandhu applied for letters of administration on 5th December 1890, and obtained the same on 28th January 1891. The records of this case have been destroyed and there is nothing to show what proceedings took place in it. On 19th December 1928 Menaka Sundari, one of the daughters, applied for revocation of the probate and the letters of administration, obtained respectively by Ram Gobinda and Jagatbandhu. The main ground alleged was that the three daughters had no notice or knowledge of the cases and that though they were infants, no guardian had been appointed on their behalf, nor any citation issued, so far as they were concerned. The Judge has upheld the objection and revoked the grant. The sons of Jagatbandhu have preferred this appeal and Menaka Sundari is the respondent. We called upon the appellants to produce the probate and the letters of administration but they have not been produced, it being said that they cannot be found.

As regards the probate it has been argued before us on behalf of the appellant that no citation was necessary because S. 62, Probate and Administration Act (5 of 1881) which states what the petition for probate or letters of administration with the will should contain does not require the names of the relatives of the testator to be given, while S. 64 which deals with the contents of a petition for letters of administration on the footing of intestacy expressly requires such particulars to be given. There is no force in this contention because though there is this difference between the two sections, which merely describe what the respective petitions should contain, S. 69 says:

"It shall be lawful for the District Judge or District Delegate . . . to issue citation calling upon all persons having or claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate on letters of administration,"

and S. 50, Illus. (b) shows that a grant made without citing parties who ought to have been cited is fit to be revoked. It cannot be seriously urged that, it is not the duty of the applicant to bring to the notice of the Court who are the persons who *prima facie* have a claim on

the estate. If the applicant says in his petition, as the applicant in the present case did, that the widow and the widowed sister were such persons and omitted to state that there were three minor daughters left by the testator and in consequence of the omission they were not cited the proceedings were radically defective in substance.

Arguments were then advanced on behalf of the appellants to show that a long series of years have elapsed since the probate was granted, and so it would be well nigh impossible to prove the will at this distance of time, that the daughters had in fact knowledge of the proceedings and that as they were living under the guardianship of their mother who herself was cited and had appeared and consented to the grant, no other result would have followed even if they had been cited. We agree with the findings of the Judge that it has not been proved that the respondent was aware of the will at any time before when she alleges she came to know of it or has taken any benefit under it or that the estate has been dealt with in a way inconsistent with its being joint family property. It is not necessary to go into the question whether the widow or the widowed sister was duly served or whether the consent that purported to be given by them was really their consent because the failure to mention the existence of the daughters and to have them represented and cited was a defect sufficient to revoke the probate: see *Haimabati Mitra v. Kunja Mohan Das* (1), and the cases cited in it. The other arguments noted above are mostly met by the observation of their Lordships of the Judicial Committee in the case of *Ramananda Kuer v. Kalawati Kuer* (2) by which very similar arguments were overruled and which were as follows:

"And as against the difficulties in the defendant's way by reason of lapse of time, death of parties and witnesses and destruction of records it has to be remembered that much of it might have been avoided by prudent action on the part of the propounder e.g., by taking proper and necessary steps to have the will proved per tests in the presence of an independent guardian for the infant daughters."

As regards the argument that the mother would have been appointed then guardian we are not prepared to place

1. A I R 1931 Cal 713=135 I C 242.

2. A I R 1928 P C 2=107 I C 14=55 I A 18=7 Pat. 221 (P C).

much weight on it. As regards the grant of letters of administration to Jagat-bandhu it has already been stated that the records relating to this matter are not available. The appellants have not produced the grant on the allegation that it is missing. There is little doubt however that the grant was a *de bonis* grant such as is made in favour of a universal or a residuary legatee or a new representative. The practice in such cases is to file a petition disclosing the fact of the former grant and to annex the grant if possible with the petition. There is no reason to suppose that this was not done. Citations have to be issued, but the respondent says she never got any notice of the proceedings, ordinarily her own denial would not have been sufficient, but judging from the short interval that elapsed between the grant of the probate and the application for letters of administration, we think we shall not be wrong in supposing that her denial is true.

The result is that, in our opinion, the appeal ought not to succeed. It is accordingly dismissed with costs, three gold mohurs.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 76

RANKIN, C. J. AND C. C. GHOSE, J.

Sm. Mirinalini Dassi — Claimant—Appellant.

v.

Harihar De (Receiver) and others—Respondents.

Appeal No. 415 of 1930, Decided on 10th March 1932, against original order of Dist. Judge, Hooghly, D/- 2nd August 1930.

Provincial Insolvency Act (1920), S. 21—House not declared by insolvent as asset—Dispute between creditor and insolvent as to whether it belonged to insolvent or his wife — House cannot be attached under S. 21.

Where the insolvent has not declared a house as an asset, merely because there is a dispute between the creditor and the insolvent as to whether it belonged to the insolvent or his wife, to pass an order to attach that house under S. 21 is an unreasonable proceeding.

[P 77 C 2]

Gopendra Nath Das and *Byomkesh Bose*—for Appellant.

Bijan Kumar Mukerji and *Apurbandhan Mukerji*—for Respondents.

Rankin, C. J.—In this case it appears that one Sarat Kumar Roy presented his

own petition for adjudication in insolvency on 25th September 1929, and that on that date the usual order was made to admit the petition. On 4th December a certain creditor who appears to have been No. 1 in the list of creditors filed by the debtor asked the Court to appoint an interim receiver. The Court did on that day appoint an interim receiver and notice of the application was given to the debtor. On 3rd January 1930, the same creditor applied to the Court for an order upon the receiver directing him to serve notice on the tenant at Calcutta "for paying rent of the house to him" and for certain other matters. It may here be explained that there was a certain house at Chandernagore which the insolvent's wife claimed as her own she having purchased it with her own money.* There was also a house in Calcutta which was the occupation of a tenant with reference to which, as I understand there was a claim by the wife under a deed of gift from insolvent. But from the beginning the position was that these two houses were claimed by the wife. Now the creditor's application that the receiver should be directed to serve notice on the tenant was entirely a harmless application.

I should have thought that the receiver under his ordinary powers would give notice of any claim—if he thought there was any claim—to the tenant and after that if the tenant paid any rent to the wife he would be under a liability when the receiver established that the properties belonged to the insolvent to pay the rent over again. The Court made an order directing notice to be served upon the tenant not to pay rent to any other person excepting the receiver. The tenant was not obliged to obey that order at all; merely he was under the risk that if he paid to a wrong person he would have to pay twice. That being so there was nothing wrong with that order even considering the fact that the wife had not been a party. The order was merely for giving a notice to the tenant such as the receiver might perfectly well issue without any order from the Court. Then the matter proceeded and the creditor asked the Court for attachment of the house of the petitioner for insolvency purchased in the *benami* of his wife. What this proceeding was supported to be I confess I did

not at first understand, but it has been explained to us that it was supported to have been made under S. 21, Provincial Insolvency Act. If so I can only say that it was an abuse of the section. That is a section which gives powers to the Court which it may exercise at the time of admitting the petition and at any other time. It may, for instance, order the debtor to give security for his appearance if he is expected to abscond; that might be a reasonable thing to do. In the same way it may order the attachment by actual seizure of the whole or any part of the property in the possession or under the control of the debtor excepting such things as are exempted from execution by the Civil Procedure Code; and the proviso is to the effect that an order under Cl. (2) is not to be made unless the Court is satisfied that the debtor with intent to defeat or delay his creditors or to avoid any process of the Court has absconded or has failed to disclose or has concealed, destroyed or removed any documents likely to be of use to his creditors or any part of his property. To apply that provision to the case of an immovable property where the Court knows that the property is claimed by the wife and that the petitioner and his wife are both saying that the property does not belong to the insolvent on the mere ground that the insolvent has not declared it as an asset is of course a thoroughly unjust and absurd procedure.

These summary powers are intended to prevent the debtor from making away with what is his property; documents and books of account which might be used against his property that he might run away with and take away out of the reach of the creditors. Merely because there is a dispute between the creditors and the insolvent as to whether certain property belongs to the insolvent or his wife to pass an order to attach a house under S. 21 is an unreasonable proceeding. Property in the possession of the wife and claimed by the wife having been attached the wife had only to appear before the learned Judge and she was entitled to an order cancelling that attachment as a matter of right. The phrase "property in the possession or under the control of the debtor" was never intended to apply to a house claimed by the wife because the debtor

and his wife are living together. Now this order having been made, the wife on 29th January 1930 did apply in substance to have these proceedings cancelled. As regards the Calcutta house, apparently by some confusion it was thought that the order of 3rd January 1930, amounted in some way to an attachment of the rent. In any case the lady applied and she was treated as a person making a claim. It appears that she prayed for an inquiry of her claim petition by the receiver and though her property had been attached in her absence and she wanted the receiver to inquire and find out after all it was her property she was ordered to deposit certain costs before the receiver would begin the inquiry.

Then the claimant filed her sale-deed and the receiver appears to have made a report on or about 10th June. On 24th June the lady applied for an order directing the receiver not to take delivery of possession or realize rent of the premises mentioned in the petition. The receiver was directed by the learned Judge on the 27th to proceed to Calcutta and realize the outstanding arrears of rent and apply a portion towards necessary repairs. All this was done before there was any adjudication as to whether this property belonged to the insolvent or not. The tenant was ordered to pay the whole of the arrears by a certain time. What obligation the tenant was under to obey that order I do not know. However it appears now that the tenant has paid a certain amount of rent to the receiver and that that amount is now in Court and the tenant is apparently continuing to pay his rent into Court. Lastly the claimant asked that the investigation of the claim matter by the receiver be stayed and the matter be dealt with by the Court on evidence. By an order of 2nd August, the learned Judge declared that the receiver was already in possession of the property and the receiver was directed to continue his inquiry into the question of ownership. From that order the wife appeals to us. In my judgment the proper order is to put the matter back into the position from which it never ought to have been changed in the absence of a proper adjudication as to whether the property belongs to the insolvent's estate or not. I propose to set aside the order

of attachment of 13th January 1930; I propose to declare that the lady was in possession of the Chandernagore house and by her tenant of the Calcutta house at the time of the insolvency; and I propose to declare further that unless and until a creditor or the receiver at his own risk as to costs brings a proper motion before the learned Judge or a proper suit for a declaration that those two houses do not belong to the lady but belong to the insolvent, the possession which she originally had is not to be disturbed.

As the tenant of the Calcutta property is paying his rent into Court that arrangement for the present need not be interfered with; but unless within six weeks from today a proper motion against the lady is filed before the learned Judge or other proper proceedings to make a claim on behalf of the estate against the lady are instituted, then at the end of six weeks the lady is to be entitled to receive the rent out of Court subject to any right that the receiver may have to bring a motion to recover the money from her upon establishment of title of the insolvent. This appeal must succeed with costs against the creditor No. 1; hearing fee three gold mohurs.

C. C. Ghose, J.—I agree.

S.N./B.K.

Appeal allowed.

'A. I. R 1933 Calcutta 78

SUHWARADY AND COSTELLO, JJ.

Hridoy Ranjan Sen—Plaintiff—Appellant.

v.

Mymensingh Municipality — Defendants—Respondents.

Appeal No. 2259 of 1928, Decided on 30th June 1932, against the appellate decree of First Addl. Sub-Judge, Mymensingh, D/- 13th June 1928.

(a) Bengal Municipal Act (1884), Ss. 85 and 89—Imposition of personal and property tax in same ward is legal.

As regards the proviso to section prohibiting the realisation of both kinds of tax in the same ward, S. 85 must be read in conjunction with S. 89 of the Act. S. 89 is an exception to the general rule stated in S. 85. Where in the same ward of a Municipality a personal tax is realised from private persons living in that ward as from those living in the other wards of the Municipality but there being some Government buildings in that ward, rates on the values of those buildings were realised from Government, in such a case there is no contravention of the provision of S. 85. [P 79 C 2; P 80 C 1]

(b) **Bengal Municipal Act (1884), S. 7—Personal tax under old Act—Increase in rate—Sanction of Government is not necessary.**

Sanction of Local Government is not required for increasing the rate of the personal tax imposed under the old Act. The sanction mentioned in S. 7 relates to the removal of taxes realised under the old Act or to a change of one kind of rate to another kind of rate. It has no application to an increase of the rate of the old tax. [P 80 C 1]

(c) **Bengal Municipal Act (1884), S. 85—Personal tax does not attach to any holding.**

The personal tax imposed under S. 85 does not attach itself to any particular holding but it is a tax imposed upon a person occupying a holding within the Municipality according to "circumstance and property." [P 80 C 2]

Amulya Chandra Chatterji and Probooth Kumar Das—for Appellant.

Ramendra Chandra Roy—for Respondents.

Judgment.—This is an appeal by the plaintiff, who is a Deputy Magistrate and was posted in Mymensingh during the period in suit, against the order of dismissal of his suit for recovery of Rs. 168 (being the amount which according to him he had to pay to the Mymensingh Municipality "illegally and inequitably") the amount of tax realised from him at the rate of Rs. 9 per quarter during the first two quarters of the year 1920-21 and at the rate of Rs. 15 per quarter during the last two quarters of the same year and all the four quarters of each of the two following years. Both the Courts below have concurrently found against the plaintiff and dismissed the suit.

The facts are that the plaintiff was a Deputy Magistrate living in the town of Mymensingh and originally drawing Rs. 300 a month. His salary was subsequently raised to Rs. 500 a month. He was assessed originally at the rate of Rs. 9 per quarter, that is, one per cent. on the annual income and from October 1920 he was assessed at Rs. 15 a quarter it being alleged that his salary was Rupees 500 a month. The tax realised from the plaintiff was what is called in the Bengal Municipal Act, a personal tax. The points taken in this appeal are the following which may be considered in their order. The first is that personal tax could not be imposed without the sanction of the Government under S. 85, Bengal Municipal Act (3 of 1884 B. C.). This objection is founded on the ground that in Ward No. 1 where the plaintiff resided for the greater part of the period

in suit there were Government buildings which were taxed on their annual value and in view of the last proviso to S. 85 the Municipality had no jurisdiction to impose personal tax as well as a rate on the annual value of the holdings in one and the same ward. It has also been argued that the Municipality could not impose personal tax without the previous sanction of the Local Government under that section. This objection must be overruled. The Mymensingh Municipality was formed under Act 6 of 1868 which empowered it to impose personal tax and this form of tax has been imposed since its creation. The Act of 1868 was repealed by Act 5 of 1876 by Ss. 2 and 7 by which all impositions made under the previous Act were allowed to stand and to be considered to be made under that Act. Act 5 of 1876 in its turn was repealed by the present Bengal Municipal Act, Ss. 2 and 7 of which make the same reservation with regard to the impositions made under the previous law S. 85 of the present Act contemplates the imposition of a personal tax or a rate on the annual value of the holdings for the first time since the creation of the Municipality. It says that the Commissioners may, with the sanction of the Local Government, impose one or other or both of the following taxes: namely, a tax upon persons and a rate on the annual value of holdings. It has no retrospective effect and if it has any, the imposition of such tax under the previous Act has been sanctioned by the present Act of 1884. As regards the proviso to the section prohibiting the realisation of both kinds of tax in the same ward, S. 85 must be read in conjunction with S. 89 of the Act. S. 85 lays down that in the same ward the Municipality cannot realise personal tax from some persons and tax on property from some other person. This is a general rule. S. 89 however says that in any municipality in which tax on persons is imposed, no tax shall be assessed on any person in respect of his occupation of a holding in any building the property of Government. This section apparently is an exception to the general rule laid down in S. 85.

It relates to the part of the municipality in which tax on persons is imposed. It says where tax on persons is imposed such tax would not be realised from a

person in occupation of a Government building. Instead of that the municipality has to levy on such building a rate on their annual value to be ascertained in the manner prescribed in S. 101. In Ward No. 1 of the Mymensingh Municipality it so happens that personal tax is realised from private persons living in that ward as from those living in the other wards of the municipality but there being some Government buildings in that ward rates on the values of those buildings were realised from the Government. In our opinion in such a case there is no contravention of the provision of S. 85.

It is argued in the second place that under the old Act personal tax was at the rate of 8 as. per cent. whereas the present Municipality enhanced it to Rupee 1 per cent. It is said that under S. 7 rate, tax, fee or tolls that had been duly imposed under the previous Act should be deemed as duly imposed under the present Act and such rate, tax, fee or tolls shall continue to be levied until the Commissioners at a meeting, with the sanction of the Local Government, shall otherwise direct. On this language of the section it is argued that the tax at the rate of 8 as. per cent. ought to be continued under the present Act and that the Municipality had no power to increase it from 8 as. to Re. 1 per cent. without the sanction of the Local Government. We do not think that this is the meaning which can be given to the words: "until the Commissioners at a meeting with the sanction of the Local Government shall otherwise direct."

These words are intended to enable the Commissioners with the sanction of the Government to make such alteration in the rate, tax etc., that were realised under the old Act as to remove them altogether or as has been provided in the Act itself, change one kind of rate to another kind of rate. Even if there be any force in this argument in the present case it must be deemed to have none because it was not taken at the trial like some other points that will be noticed later. There are no findings of fact by the Courts below to support the objection.

The third contention is that the respondent Municipality had no power to increase a tax within the period of assessment of 3 years from Rs. 9 to

Rs. 15. There is a great deal of force in this argument; but unfortunately this objection too was not taken at the trial. S. 93, Bengal Municipality Act, contains provision which empowers the Municipality to enhance an assessment upon the ground that it appears to them to be inadequate and to have been so made owing to mistake and fraud. The power is curtailed by the limitation that not only the present assessment should appear to the Municipality to be inadequate but it must also be shown to have been made owing to mistake or fraud. As the learned appellate Court remarked, if this objection were taken at the trial we do not know what the defendant would have proved were he called upon to meet such a case. We cannot allow this objection to be raised at a subsequent stage of the suit when no issue and consequently no evidence were directed towards it. The same must be said with regard to the second contention noted above. If it were raised before the trial Court, the Municipality would have been able to show that there had been no illegal increase in the tax realised under the old Act.

The next contention is that there is no holding in respect of which the plaintiff has been taxed. It is not very easy to understand this objection. It seems that the plaintiff had changed his residence from one place to another but no particular holding was taxed. The personal tax imposed under S. 85 does not attach itself to any particular holding but it is a tax imposed upon a person occupying a holding within the Municipality according to "circumstance and property." These are all the main grounds taken on behalf of the appellant in this case some of which undoubtedly have great force and would have met with better result if they were raised at the trial.

In the result the appeal fails and must be dismissed with costs.

As the appeal fails on the merits we have not considered the question as to whether or not a second appeal lies in this case under S. 102, Civil P. C.

K.N./R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 81*

MUKERJI AND GUHA, JJ.

Abbas Naskar and another—Defendants—Appellants.

v.

Chairman, District Board, 24-Parganas and others—Plaintiffs—Respondents.

Appeal No. 265 of 1928, Decided on 23rd July 1931, against original decree of 3rd Addl. Sub-Judge, 24-Parganas, D/- 21st December 1927.

Mahomedan Law—Debts—Liability—Suit against heir in possession of assets of debtor without joining others—Decree can be enforced against entire assets in hands of heir.

Where on the death of a Mahomedan, there has not been a distribution of assets, a creditor may sue any heir or heirs in possession of the whole or any part of the estate without joining the other heirs as defendants, for realization of the entire debt, and the entire assets in the hands of such heir or heirs will be liable; but where the heirs sued are in possession of the shares of their inheritance only, the heirs shall be liable only for the proportionate share of the debt: 8 Cal 370; 24 W R 3; 4 Cal 142 (F B) and 1 Mac Sel Rep 33, Foll; (Case law discussed.) [P 82 C 2]

Nasim Ali—for Appellants.

Santosh K. Bose and Santimoy Mozumdar—for Respondents.

Judgment.—This is an appeal by defendants 3 and 5 from a decree by which the plaintiffs' claim for recovery of arrears of rent for a certain ferry alleged to have been leased out to their father by the plaintiffs has been decreed against them and some others. One of the contentions which was attempted to be urged on behalf of the appellants was that no lease was taken and so no money was due; but in view of the evidence, oral and documentary that there is on the record and which amply establishes the fact that such a lease was taken and that the amount claimed was due under it, this contention was not eventually pressed. The other contention, which is of considerable substance, is that the decree, such as it is, is not supportable. The appellants' father Tamizuddin died leaving his mother, a widow, three sons and three daughters. All these heirs were impleaded in the suit as defendants. Two of these heirs, namely, defendants 6 and 8, were minors and as they were not properly represented, the suit as against them was dismissed. It was decreed against the others, on contest against defendants 3 and 5 and ex parte as against the rest. The entire amount

due from Tamizuddin as claimed was decreed against these defendants, they being held "liable for the aforesaid decretal amount to the extent of the assets of Tamizuddin inherited by them."

Now, all authorities are agreed that if the estate of Tamizuddin had been distributed after his death each of his heirs would have been liable for his debts to the extent only of a share proportionate to his own share of the estate (*Pirthipal Singh v. Husaini Jan* (1), *Amba Shankar v. Sayad Ali* (2), *Bussunteram Marwary v. Kamaluddin Ahmed* (3) (at p. 428). What we are concerned with here is a case in which there has, in fact, been no distribution. Two questions arise: 1st. Whether the creditor may sue any heir in possession of the whole or any part of the estate without joining the other heirs as defendants, for realization of the entire debt, and if so, whether a decree for the entire debt passed in such a suit may be enforceable against all the assets that are in his possession or only against that particular heir's share in the estate; and 2nd. What sort of decree should be passed in the present case. So far as the first question is concerned the opinion of this Court has been consistently in the affirmative. Two decisions in support of this view may be cited. In the case of *Muttyjan v. Ahmed Ally* (4), three earlier decisions, amongst others, were referred to, viz., *Mt. Nuzeerun v. Ameerooddeen* (5), in which the analogy of a Hindu widow sued in her representative character was applied, *Assamathennessa Bibi v. Roy Lutchemput Singh* (6), in which such analogy was ignored but the procedure prescribed in the Hedaya for the guidance of Mahomedan Law officers was relied upon, and a much earlier decision of the Sudder Dewany Adawlut in *Kishwur Khan v. Jewan Khan* (7), in which neither of the aforesaid two views was adopted but it was held that creditors' suits were to be regarded as administration suits. The learned Judges held that the proper principle to apply was to treat the creditors' suit as an administration suit, and as such an heir in possession is bound to account for any

1. (1882) 4 All 361=(1882) A W N 70.

2. (1896) 19 Bom 279.

3. (1886) 11 Cal 421.

4. (1882) 8 Cal 370=10 C L R 346.

1875) 24 W R 8.

1879) 4 Cal 142=2 C L R 223 (F B).

1799) 1 Mac Sel Rep 33.

assets that may have come into his hands and to that extent he is liable to pay the creditors and that the residue, if any, is to be divided amongst the heirs. The case was very unfavourably commented on by Mahmud, J., in a very exhaustive judgment in the Full Bench case of *Jafri Begum v. Amir Muhammad Khan* (8), notwithstanding that it was followed in a later decision of this Court in the case of *Amir Dulhin v. Baij Nath Singh* (9). The learned Judges appear to have felt the force of the contention that was urged against the view. They observed :

"If we rightly apprehended his argument, it was directed to this, that the amount decreed ought to be proportionate to the interest in the estate of the particular heir, and that when it is sought to recover the whole of the debt all the heirs ought to be before the Court. Stated in that form, the proposition is one of which there is much in favour. An individual heir cannot be said with strict propriety to represent his co-heirs in a suit brought by a creditor to enforce his claim against the property of the deceased proprietor. The right of each heir is several and distinct, and arises, as has been said, immediately on the death of the person whose heir he is. There is no intermediate vesting and no rule of Mohamedan law by which an individual heir, as such, may be taken to represent either the estate or the heirs generally."

Having made these observations and quoted *Jafri Begum's* case (8), and other cases in support of them, the learned Judges referred to the case of *Amir Dulhin's* case (9), and followed it giving some additional reason in support of the decision in that case. The reason why they did so was put in the following words :

"And we think that apart from the consideration that it is an authority of this Court which has remained unquestioned now for several years, it embodies a salutary rule and one to which effect ought to be given."

The principle enunciated in *Jafri Begum's* case (8) which, as already stated, was also acknowledged as correct, in *Amir Dulhin's* case (9), though not acted upon therein has been adopted in later decisions in Allahabad : see *Dullu Mal v. Hari Das* (10), and the more recent decisions in Bombay : see *Bhagirathibai v. Roshanbai* (11), *Shahasaheb v. Sadas Shiv* (12) and *Lala Miya v. Manu-*

bibi (13), and has also been approved of in Madras *Abdul Majeeth v. Krishnama-chariar* (14). In a recent decision, this Court has re-affirmed the proposition that in Mahomedan law there is no representation of the family as under the Hindu Law by one or more members of it, and expressed an opinion that the decisions of this Court which have proceeded upon an assumption that the doctrine of representation is applicable to Mahomedan families may require reconsideration. Notwithstanding all this we should not be prepared to make a reference to the Full Bench to examine a settled view of law as propounded in this Court ever since the days of the Sadar Dewany Adwlt: *Kishwar Khan v. Jewun Khan* (7), and which was upheld in *Amir Dulhin's* case (9), in a considered judgment in which the force of the observations in *Jafri Begum's* case (8) was fully recognized.

We now arrive at a point where it becomes necessary to consider the second question formulated above. The principle which this Court has acted upon, treating the creditors' suit as an administration suit, in our opinion, cannot, and should not, be applied indiscriminately to all cases in which some only of the heirs are sued for recovery of the entire debt. It has its limitations. There are weighty reasons why it should not be applied to suits other than those in which some only of the heirs are sued, as being in possession of a part or the whole estate or assets not merely for themselves but on behalf of all the heirs. The decisions of this Court, to which we have referred as adopting this principle, sufficiently show that the suits concerned therein were against some of the heirs who were in possession of the whole or the part so as to be bound to account for the same to the rest, or in other words were against some of the heirs who were in possession of more than their share of the inheritance. It is only on such a footing that the analogy of an administration suit can, with any show of reason, be invoked. Where however that is not the case, but the heirs are made parties as being in possession of their shares of inheritance only, the principle cannot possibly be of any application. In the

8. (1885) 7 All 822=(1885) A W N 248 (F B).
9. (1894) 21 Cal 811.
10. (1901) 28 All 268=(1901) A W N 75.
11. A I R 1919 Bom 61=51 I C 18=48 Bom 412.
12. A I R 1919 Bom 185=51 I C 223=48 Bom 575.

13. A I R 1923 Bom 411=73 I C 246=47 Bom 712.
14. (1917) 40 Mad 248=40 I C 210 (F B).

present case all the heirs were made parties, suggesting that each was in possession of the share he or she had individually inherited. In our opinion it would be wholly wrong to apply this principle to such a case. Here, two of the heirs, namely, defendants 6 and 8 have been absolved, the suit against them being dismissed because they were not properly represented; and the other heirs if they are made liable for the entire debt, will have no right of contribution as against them. Either under the Mahomedan law or according to the principles of justice, equity and good conscience which we are bound to look to where, as here, both the parties to the suit are not Mahomedans: see S. 24, Act 6 of 1871, the plaintiff should not recover from the remaining defendants anything more than their proportionate share of the debt from out of the assets they have inherited in their shares. This view is supported by the decision of this Court in the case of *Bussunteram Marwary v. Kamaluddin* (3). A Hindu creditor of a deceased Mahomedan sued his heirs four in number to recover money due from him alleging that they were in possession of the estate left by him; the debt was barred against three of the heirs but not against the fourth, one Kamaluddin who had made a part payment. In the Court below the entire claim was decreed against the fourth heir, the suit against the other three being dismissed. It was held that under the circumstances of the case and having regard to the rule of Mahomedan law, the creditor was not entitled to a decree against Kamaluddin for more than his own proportionate share of the debt and that on principles of justice, equity and good conscience it would not be equitable to hold him liable for the whole of the debt. The learned Judges observed:

"What the Mahomedan law says is that only when the estate is completely involved that the heirs cannot take the estate and a decision amongst them cannot be allowed before the debts are discharged. We therefore hold that in the circumstances of the present case the plaintiffs, under the Mahomedan law, can only obtain as against the two-fifth share of Kamaluddin a proportionate share of the money due to him... The debt due to the plaintiff is indeed an indivisible one; and the plaintiff would, under ordinary circumstances, be entitled to realise his dues from the whole estate, or from any portion of it, as he might choose. But the circumstances that have occurred in the present case are such that it would be

inequitable to insist that Kamaluddin's share should bear the whole of the debt. The claim of the plaintiff as against the heirs is now barred by the law of limitation and their shares having been exempted Kamaluddin would not be entitled to demand contribution from them, in the event of the whole debt being realized from him or from his share. That being the case, it would not be just or equitable to hold the share of Kamaluddin answerable for the whole claim... If Kamaluddin was in a position to call upon the other heirs for contribution, there would be no difficulty in decreeing the whole claim as against his share. But, in the circumstances of the case, we are of opinion that the plaintiff is entitled to charge the share of Kamaluddin with any more than a proportionate share of his dues."

The result is that in our opinion the appeal should be allowed in part and the decree made by the Court below in favour of the plaintiff and as against the defendants other than defendants 6 and 8 should be modified by reducing the amount of the claim to $71/88 \times \text{Rs. } 6,479.2.9 = \text{Rs. } 5,227.8.3$, representing the share of the debt proportionate to their share of inheritance. In other respects, the said decree will stand. The costs of this appeal will be awarded to the parties in proportion to their success.

V.B./R.K.

Appeal allowed.

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RANKIN, C. J. AND C. C. GHOSE, J.

Bansi Dewan and others—Defendants—Appellants.

v.

Majaharuddin Talukdar and others—Plaintiffs—Respondents.

Appeals Nos. 9 and 10 of 1931, Decided on 25th February 1932, against order of Sub-Judge, Rajshahi, D/- 23rd July 1930.

(a) Practice—Retrial—Two rent suits decreed—Lower appellate Court remanding suits for retrial but making retrial dependent upon plaintiff paying costs within two months from arrival of record in trial Court—Costs not deposited within given time but allowed to be deposited subsequently—In one case deposit allowed to be taken out by defendant, and also to be returned at defendant's risk—Retrial held conditional and as costs were not paid in time suits stood dismissed—Although in one case deposit was allowed to be taken out and returned, that mistake could not revive suit once dismissed.

Two rent suits were decreed by the trial Court but on appeal the lower appellate Court remanded the cases for fresh trial upon payment of Rs. 15 in each case for costs, and went on to say: "If this cost is not paid within two months from the date of arrival of the record in the original Court, the suits shall be dismissed. If this cost is timely paid, there shall be a retrial." Cost however was not paid by plain-

tiff within the given time. Subsequently Court allowed the same to be deposited in Court. In one of the two cases the deposit was also allowed to be taken out by defendant and to be returned by defendant at his own risk.

Held: that the retrial order was conditional upon payment of costs within time proscribed in the order and the suits stood dismissed as the costs were not deposited within that time:

Held further: that although in one suit the deposit was allowed to be taken out and returned, such a mistake in the proceedings could not revive the suit which was once dismissed. [P 85 C 1, 2]

(b) Practice—Retrial—Although ordinarily one can rely upon Court and its clerk being sufficiently diligent to give notice when record is returned duty of making inquiry is on party.

It may be very natural in an ordinary case of retrial on remand to rely upon the Court and its clerks being sufficiently diligent to give notice of the return of the record, but the duty must be upon the party to make inquiry and if he makes no inquiry he has only himself to blame.

[P 85 C 1]

Bireswar Bagchi—for Appellants.

Krishna Kamal Moitra—for Respondents.

Rankin, C. J.—In this case the defendants appeal from an order of the learned Subordinate Judge of Rajshahi whereby he reversed an order of the Munsif of Naogaon. It appears that the plaintiff brought two rent suits against different defendants, that in April 1925 these suits were decreed by the trial Court, that appeals were brought to the Subordinate Judge against the decrees and that on 14th February 1927, the Subordinate Judge first of all allowed the appeals, set aside the decrees and remanded the cases for fresh trial on the lines laid down by his judgment upon payment of Rs. 15 in each case for costs by the plaintiff to the defendants. His order went on to say:

"If this cost is not paid within two months from the date of arrival of the record in the original Court, the suit shall be dismissed. If this cost is timely paid, then there shall be a retrial."

It seems that the record was not received in the trial Court until 8th April 1927. Two months elapsed without the plaintiff paying the Rs. 15, but on 27th June Rs. 15 was deposited in Court in each case. That payment was made under an order to which the defendants were not parties. The plaintiff applied to the trial Court and he called the attention of the trial Court to the fact that he was out of time. The trial Court took the view that there was some

excuse for being out of time and that the clerk in the office ought to have drawn the attention of the plaintiff's pleader at the time when the record was received back by the trial Court. It therefore made the order that the plaintiff should be allowed to deposit the money and it was deposited and the fact of the deposit was a few days afterwards brought to the notice of the pleader for the defendants. From time to time the question of rehearing of the suits was on the trial Court's list and the hearing was adjourned until some time in June 1928. In the meantime the Rs. 15 for costs was lying in the trial Court and it appears that on 18th November 1927, the pleader for the defendants got an order entitling him to take it but, and just a few days before the hearing was coming on, another order was made enabling the money to be returned by the defendants at their own risk. This incident of taking out and returning was in one of the two suits before us only and not in the other.

In these circumstances the learned Munsif, when the matter came before him on remand, held that the condition upon which alone the retrial was directed had not been complied with, that he had no jurisdiction to proceed with the rehearing of the suits, that the order allowing the costs to be deposited had done no harm in itself but it certainly could not amount to a valid order having regard to the terms upon which the retrial was directed. That matter came on appeal before the learned Subordinate Judge who took another view. He appears to have considered the original order of 14th February 1927, as a direction to the Court below would dismiss the suits if something was not done. He also considered that the fact that the return of the record was not brought to the notice of the plaintiff's pleader was an almost complete excuse for the plaintiff's pleader and the plaintiff for not complying with the term of the order. He therefore directed the trial Court to proceed with the hearing of the suits. From that order the present appeals have been brought. The first question is as to the meaning of the order of 14th February:

"If this cost is not paid within two months from the date of arrival of the record in the original Court, the suit shall be dismissed,

this cost is timely paid, then there shall be a retrial."

It appears to me quite clear that the only right of the plaintiff to have a retrial was conditional upon his making the payment in time and that it was not necessary for the lower Court to exercise any sort of discretion in the matter. If the payment was not made within that time, the intention was that the suits should stand dismissed without further order. On that view it appears to me that the view taken by the learned Munsif was correct. The learned Subordinate Judge appears to think that, because it is inconvenient for pleaders to have to come and to ask from time to time whether records have been returned, and therefore to assist them the Court makes the practice of calling the fact of the return of the record and many other things to the notice of the pleaders, any failure of this endeavour on the part of the Court is a complete excuse in such a case as the present for the parties in not complying with their obligations under the decree. That seems to me to be entirely wrong. I cannot agree with the learned advocate for the respondent that the facts here show a great hardship so far as the plaintiff is concerned. It is true that there was a delay of two months in the return of the record. Accordingly the plaintiff had something like four months after the order in which to make the deposit. It may be very natural in an ordinary case to rely upon the Court and its clerks being sufficiently diligent to give notice of the return of the record. But the duty must be upon the party to make inquiry and if he makes no inquiry for a period of over four months he being the person whose right to a retrial is dependent upon making timely payment, I cannot say that he has any none except himself to blame. However that may be, it does seem to me that on the lapse of two months the plaintiff had lost his chance except possibly by proceeding to the Court which made the appellate decree and asking it in review for an extension of the time limited in the circumstances of the case. If the order was not a decree it may be that by going to the appellate Court he could have got the time extended under S. 148, Civil P. C., but that perhaps is a very doubtful question. He did nothing of the

sort. He got an order *ex parte* for paying the money into Court and then the cases drifted on until this point which went to the jurisdiction was taken in Court.

In one of the two suits we have to consider whether the fact that the pleader could not resist taking the money out of Court on 18th November 1927 and returned it on 27th July 1928, is a fact which can operate to give the plaintiff a right to retrial. I have some difficulty in this matter but, on the whole, it does not seem to me possible that a suit which has been dismissed can be revived by such a mistake in the proceedings as that. If it were a question of appealing from the order of the appellate Court, no doubt by taking out this money he would have debarred himself from any right of appeal; but if the suit stood dismissed on a previous date some months before, it does not seem to me that the taking out of the money and returning it could possibly revive the suit or give jurisdiction to the trial Court when the decree of the appellate Court or the order of the appellate Court no longer justified a retrial. In these circumstances it appears to me that these appeals should be allowed, that the order of the Subordinate Judge should be set aside and the order of the Munsif restored with costs in this Court and in the lower appellate Court. The hearing fee is assessed at two gold mohurs in each case. No order is necessary on the applications.

C. C. Ghose, J.—I agree.

S.N./R.K.

Order set aside.

*** A. I. R. 1933 Calcutta 85**

COSTELLO, J.

Kali Charan Singha—Petitioner.

v.

Bibhuti Bhusan Singha — Opposite Party.

Civil Rule No. 328 of 1932, Decided on 8th June 1932, against order of Munsif, First Class, Rampurhat, D/- 17th March 1932.

* Civil P. C. (1908), S. 47 — Executing Court cannot go behind decree and question its validity except when lack of jurisdiction is obvious—Decree against person under disability without proper representation cannot be challenged on that ground in execution.—Execution, Decree binding.

A subsisting decree passed by a duly constituted Court that has not been set aside in proceedings by way of appeal, revision, or otherwise by

due process of law, is not to be treated as a mere nullity, but is binding and conclusive against the parties thereto duly impleaded in the suit. A Court to which such a decree has been transferred for execution must take the decree as it stands and is not entitled to question the validity of the decree on the ground that the decreting Court had no jurisdiction territorial, personal or pecuniary, to pass it, except when on the face of the decree it would appear that the decreting Court had no jurisdiction: *A I R 1925 Cal 907 (F B), Dist.*; *A I R 1932 Cal 880, Rel. on*; *44 Cal 627* and *A I R 1931 Rang 252 (F B), Appr.*; *A I R 1920 Mad 1019 (F B), Ref.* [P 89 C 1]

A proceeding to enforce a judgment is collateral to the judgment and therefore no inquiry into its regularity or validity can be permitted in such a proceeding. Hence a judgment against a person who was non compos mentis at the time of the trial and yet was not represented by a legal guardian, is not to be impeached in execution but reversed or annulled in some direct proceeding taken for the purpose

[P 89 C 2]

Peari Mohun Chatterjee, Hari Prasanna Mukherjee and Bankim Chandra Roy—for Petitioner.

Bijan Kumar Mukherjee—for Opposite Party.

Judgment.—This rule is directed against an order of the Munsif of Rampurhat, dated 17th March 1932. For the purpose of making it clear how that order came into existence, it is necessary to recite certain facts. The present petitioner, Kali Charan Singha, on 6th December 1923, obtained decrees in his favour in eighteen suits which he had brought against a lady named Kiranbala and another lady named Bindubashini. A number of different bargadars holding under them were also defendants in the suits. The suits were for the recovery of khas possession and mesne profits in respect of a two-thirds share in certain properties, the plaintiff's right to that two-thirds share having already been established in antecedent litigation. It is to be observed that in those eighteen suits both Kiranbala and Bindubashini appeared and made various defences to the plaintiff's claim. The decrees having been made in favour of the plaintiff the defendants appealed and ultimately the matters in issue between the parties came before this Court in second appeal and the original decrees were affirmed by this Court on 9th August 1928, it being declared that the plaintiff was entitled to the possession which he was claiming and also to mesne profits at the rate of Rs. 4 until recovery of possession.

Early in the year 1929 the present

petitioner Kali Charan Singha, as the decree-holder in the eighteen suits, applied for execution of those decrees and as a result of the execution proceedings he obtained khas possession of the lands claimed by him, but the matter of payment of the amount awarded by way of mesne profits was not proceeded with at that time, as negotiations were opened between the parties with regard to the payment of the mesne profits and costs. Eventually the execution proceedings aforementioned came to an end for want of prosecution. The parties however did not come to any settlement in the matter of the mesne profits and accordingly Kali Charan Singha, on 10th November 1930, instituted eighteen fresh execution cases and these are the cases out of which the order now complained of arises. Those cases were described as Title Execution Cases Nos. 117 to 134 of 1930, in the first Court of the Munsif of Rampurhat and in them the petitioner as decree-holder sought to recover mesne profits at the rate awarded to him for the period of three years prior to the institution of the suits and up to the date of delivery of possession.

In those execution cases Kiranbala, as one of the judgment-debtors lodged objections under S. 47, Civil P. C. and the whole matter was then registered as Miscellaneous Judicial Case No. 37 of 1932. Kiranbala's objection took the form of an allegation that the decrees could not be put to execution because the amount due under them in respect of mesne profits had already in effect been paid upon an adjustment between the parties. The objection was eventually dismissed in default of prosecution. Subsequently (according to the statements made by the petitioner in his present petition) a man named Surendra Narain Singha who is said to be the reversionary heir of Shyama Charan, the husband of Kiranbala and who had been looking after and managing her affairs and conducting all the litigation on her behalf caused his sister Bindubashini (who as already mentioned was one of the defendants in the original suits) together with one Sushila Sundari, the widow of his predeceased brother Ashutosh Singha, to institute Proceedings in Lunacy (numbered 14 of 1931) under the provisions of Act 4 of 1912, in the Court of the District Judge, Murshidabad,

praying that the judgment-debtor Kiranbala should be adjudged a lunatic and also praying for the appointment of Surendra Narain as guardian of her person. At the time when the order now complained of was made the lunacy matter was still pending though one Bibhuti Bhusan Singha, a pleader practising at Barhampur, had been appointed interim receiver of the estate of Kiranbala. Bibhuti Bhusan Singha as such receiver on 15th January 1932 put forward a further objection in the eighteen execution cases under S. 17, Civil P. C., alleging therein that Kiranbala had been a lunatic and of unsound mind from a time long antecedent to the institution of the eighteen suits brought against her by the present petitioner and that therefore all the decrees made in those eighteen suits including apparently the final decrees made by the High Court were made without jurisdiction and void inasmuch as the judgment debtor Kiranbala had not been properly "represented" as a lunatic at the time when those decrees were made.

It appears that since the date of the order now complained of, that is to say, on 21st April 1932, the lunacy proceedings have been determined. Kiranbala has been adjudged a lunatic and Bibhuti Bhusan has been appointed permanent manager of her property. The objections lodged by Bibhuti Bhusan were registered as Miscellaneous Judicial Cases Nos. 37 to 51 of 1932, and upon those cases coming on for hearing the petitioner Kali Charan Singha as the decree-holder in the original suits out of which the execution and Miscellaneous Judicial cases arise contested the objection put forward by the manager, on the ground inter alia that the validity of the original decrees could not be challenged in the execution cases and he contended that the decrees were valid and binding on Kiranbala and that the executing Court was not competent to enter upon any investigation into the question of whether or not Kiranbala was a lunatic at the time when the decrees were made. The present petitioner further contended that the objection put forward by the manager could not be put forward by him as such under S. 47, Civil P. C., in execution proceedings and that it was one that could only be raised by way of a suit. These contentions of the present peti-

tioner as decree-holder were overruled by the learned Munsif of Rampurhat by his order dated 17th March 1932, that is to say, the order now complained of, and he decided that the petitions made by the manager were maintainable under S. 47, Civil P. C., and he fixed 9th April 1932 as a day for taking evidence to enable himself to come to a finding as to whether or not the judgment-debtor Kiranbala was of unsound mind at the date of the decrees in the original suits.

The main question which I have to determine is whether it was right for the learned Munsif to take it upon himself to go into the question of whether or not the eighteen decrees originally made on 6th December 1923, even though they were affirmed by this Court on 9th August 1928, were valid and binding on Kiranbala. In my opinion the law is that, broadly speaking, a Court executing a decree cannot go behind that decree and it must take the decree as it stands. Such a Court has no power to entertain any objection as to the validity of the decree (even if the decree is said to have been obtained by fraud) or as to the legality or correctness of the decree. There are a number of reported cases giving ample judicial authority for those propositions and I do not propose to refer to them in detail. The reason for that legal position is that a decree, even though it may not be according to law, is binding between the parties, unless and until it is set aside by way of appeal or revision or if it has already been dealt with by way of appeal or in revision then by an appropriate suit brought for the express purpose of questioning the validity of the decree. It seems to me difficult to say that the Court charged with the duty of executing a decree can even go into the question of whether that decree was made by a Court without territorial jurisdiction having regard to the terms of S. 21, Civil P. C., which says:

"No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

If no objection as to the territorial jurisdiction of the Court trying the case is to be allowed by any appellate or revisional Court a fortiori the matter cannot be canvassed before the Court which is

merely concerned with the execution of the decree after it has been made: see per Wallis, C.J., in *Zamindar of Ettiyapuram v. Chidambaram Chetty* (1). There is however on this point a decision of the Full Bench of this Court in the case of *Gora Chand Halder v. Prafulla Kumar Roy* (2); and the learned Munsif in making the order now challenged, seems to have misinterpreted the effect of that decision and also to have relied on the case of *Jungli Lall v. Laddu Ram Marwari* (3), where it was held that the proposition that an inquiry into the validity of a decree is outside the functions of an executing Court, is subject to the proviso that there is a valid decree which it can execute. In *Gora Chand's* case (2) the view taken was that:

"where a decree presented for execution was made by a Court which apparently had not jurisdiction either pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction."

Walmsley, J., in delivering the judgment of the Court was however careful to indicate that only within these narrow limits is the executing Court authorized to question the validity of a decree. In other words Walmsley, J., was manifestly of opinion that except in connexion with matters of the kind expressly enumerated by him, an executing Court has no jurisdiction to question the validity of a decree sought to be executed. I am bound to say, with all possible respect to Walmsley, J., and the other learned Judges who subscribed to his judgment that I think the decision in *Gora Chand's* case (2) is not altogether consistent with the majority of the decided cases upon the question whether or not an executing Court can go behind or question the validity of the decree which it is called upon to execute. A large number of those cases were reviewed and discussed by Sir Arthur Page, C.J., of Burma, in the case of *S. A. Nathan v. S. R. Samson* (4), which was a decision of the Full Bench of the Rangoon High Court. In the course of

his very exhaustive judgment the learned Chief Justice said (at p. 500 of 9 Rang.) referring to *Gora Chand's* case (2):

"Was it rightly decided? With all respect to the learned Judges who were parties to it, in my opinion, it was not. No reasons are given in support of the decision, and the law laid down in that case rests solely upon the ipse dixit of the learned Judges who decided it. The judgment is one that I do not find it altogether easy to understand. What is meant by the word 'apparently' in the passage that I have cited? Does it mean that where the want of jurisdiction in the decretal Court is patent the executing Court can question it, but where it is latent, the executing Court possesses no such power, and must execute the decree? But if the fact is that the decretal Court had no jurisdiction to pass the decree I ask, with all due respect to the learned Judges who decided *Gora Chand's* case (2) what difference does it make in principle or as a matter of common sense whether the executing Court ascertains that fact by perusing the decree, or after hearing evidence or holding an inquiry? In my opinion, none whatever. If there was a want of jurisdiction in the decretal Court the fact exists and remains whether the absence of jurisdiction is apparent or not. Indeed, if it is only a patent want of jurisdiction that can be questioned, the executing Court would not be entitled to question the validity of a decree passed against a dead person, for the only documents before the executing Court would be those set out in O. 21, R. 6, and from a perusal of those documents the want of jurisdiction in the decretal Court in such a case would not 'be apparent'; and it is only after it has been ascertained allunde by evidence or otherwise that the judgment debtor was not alive, when the "decree was passed that it is possible to hold that the decree was made without jurisdiction and therefore is inexecutable."

With the views expressed in that passage I respectfully agree. The use of the word "apparently" in the judgment of *Gora Chand's* case (2) does indeed create considerable difficulty in the way of understanding the reasons underlying the judgment of Walmsley, J., especially as in the case then before the Court, there had it seems already been a finding of fact affecting the question of jurisdiction. Some light however is thrown on the ambiguity created by the use of the word "apparently" as it appears in the judgment in *Gora Chand's* case (2) by a recent decision of this Court given by Mukerji and Guha, JJ., in *Amalabala Dasi v. Surat Kumari Dasi* (5), where it was held that the proposition laid down by the Full Bench in *Gora Chand v. Prafulla Kumar* (2) was that an executing Court would be competent to refuse to execute a decree only when on the face of the decree it would appear that the Court

1. A I R 1920 Mad 1019=58 I C 871=43 Mad 675 (F B).

2. A I R 1925 Cal 907=89 I C 685=53 Cal 166 (F B).

3. A I R 1919 Pat 480=50 I C 529=4 Pat L J 940 (F B).

4. A I R 1931 Rang 252=135 I C 65=9 Rang 480 (F B).

5. A I R 1932 Cal 880=187 I C 875.

which passed it had no jurisdiction. The Court then surmounted the difficulty discussed by Sir Arthur Page in the Rangoon case by holding that the expression "the decree" signifies "the decree and the papers relevant for the purpose of understanding it." It is to be observed that this decision was given independently of the Rangoon case and at a time when the report of it had not been published. The Rangoon case decided in terms that

"a subsisting decree passed by a duly constituted Court, that has not been set aside in proceedings by way of appeal, revision, or otherwise by due process of law, is not to be treated as a mere nullity, but is binding and conclusive against the parties thereto duly impleaded in the suit. A Court to which such a decree has been transferred for execution, must take the decree as it stands and is not entitled to question the validity of the decree on the ground that the decreting Court had no jurisdiction, territorial, personal or pecuniary, to pass it."

I entirely agree with the reasoning upon which that decision of the Rangoon High Court is based and I think it represents a correct enunciation of the law. But even if the decision of the Full Bench of this Court in *Gora Chand's* case (2) is to be taken as correct and authoritative that decision as interpreted in *Amalabala Dasi v. Surat Kumari Dasi* (5) does not cover the exact point now before me and therefore it constitutes no authority or justification for the order which the Munsif of Rampurhat thought fit to make. The actual decision in *Amalabala Dasi v. Surat Kumari Dasi* (5) on the other hand seems to furnish sufficient authority for holding that the learned Munsif was altogether wrong in making any such order seeing that neither the decrees themselves nor any of the pleadings and other documents forming the record in the original eighteen suits and in the appeals would on the face of them have revealed or indeed given the slightest indication of the fact that one of the defendants in the suits was a lunatic (if indeed she was) at the time of the institution of the suits and therefore not "duly impleaded." On the contrary seeing that Kiranbala not only entered appearance in the original suits, but actually put in defences to the plaintiff's claims and contested these claims right up to the High Court and in the execution proceedings, any "apparent" irregularity in the constitution of the suit or any defect manifest "on the face" of the proceedings was entirely non-existent.

With regard to the question of the powers of an executing Court when a decree has been passed against a person under disability who was not properly represented in the suit in which the decree was passed, Sir Arthur Page in the Rangoon case said at p. 492 of 9 *Rang.* in *S.A. Nathan v. S.R. Samson* (4), in such circumstances the decree as against the person under disability would be set aside *ex debito justitiae* in a regular suit though he added that :

"it might also reasonably be contended although in the present case it is not necessary to express a definite opinion on the matter that inasmuch as in the eye of the law such a decree is not a decree which has been passed against a party to the suit the executing Court also would be competent to regard to execute it."

In my judgment however it would not be right in law to hold that an executing Court has any power whatever of questioning the operative effect of a decree outside the narrowly circumscribed limits betokened by the judgment of Mukerji and Guha, JJ. I am fortified in that view by another decision of this Court which has a direct bearing on the present case. I refer to the case of *Kalipada Sarcar v. Hari Mohun Dalal* (6). In that case it was held that :

"the Court executing the decree must take the decree as it stands and has no power to go behind the decree or entertain an objection as to the legality or correctness of the decree. The validity of a decree cannot be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no decree for costs would have been made against him. A proceeding to enforce a judgment is collateral to the judgment and therefore no inquiry into its regularity or validity can be permitted in such a proceeding. On this principle it can properly be held that a judgment against a person who was non compos mentis at the time of the trial and yet was not represented by a legal guardian, is not to be impeached in execution reversed or annulled in some direct proceeding taken for the purpose. Such a judgment can be attacked, for instance, by way of an application for review to the Court which made it or by way of an appeal or by an application for revision to a superior tribunal, or by way of a regular suit in a Court of competent jurisdiction, but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made."

The matter has been very tersely and clearly put in the judgment of Mookerjee and Cuming, JJ., at p. 638 of the Report, where they said :

"We are of opinion that the safest course to follow is to adhere rigidly to the established principle that every order and judgment however

erroneous is, in the words of Lord Cottenham in *Ghuck v. Cremer* (7) at p. 115, good until discharged or declared inoperative, and that the executing Court cannot enquire into the validity or propriety of the decree."

That proposition in my view is eminently a sound one and is applicable to the present case. I accordingly hold that the order made by the learned Munsif was wrong and made without jurisdiction. This rule is accordingly made absolute and the order of the learned Munsif is set aside. The petitioner is entitled to the costs of this rule; hearing-fee two gold mohurs.

M.N. *Rule made absolute.*

7. (1846) 2 Phil 113=1 Coop C C 338=16 L J Ch 92.

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RANKIN, C. J. AND MITTER, J.

(Moulvi) Wazed Ali Khan Pance and another—Defendants—Appellants.

v.

Brojendra Kumar Bandopadhyaya and others—Plaintiffs—Respondents.

Appeal No. 128 of 1929, Decided on 11th May 1932, against original decree of Second Class Sub-Judge, Pabna, D/- 25th January 1929.

(a) Limitation Act (1908), S. 21 (2)—Cases of joint debtors should be considered separately.

Under the Limitation Act the cases of joint debtors by virtue of S. 21 may have, as a matter of law to be considered separately, the limitation law being plain to the effect that one joint debtor may have an answer on a point of limitation and another joint debtor may not have. [P 91 C 2]

(b) Bengal Tenancy Act (1885), S. 184 and Sch. 3—Suit for rent of putni falls within S. 184.

Section 184 applies Sch. 3 to a suit for rent of putni. Such a suit falls within S. 184. [P 92 C 1]

(c) Limitation Act (as amended by 10 of 1922), Ss. 19, 20 and 29—S. 29 does not cut down whatever is provided by special or local law either by express words or clear intention—Bengal Tenancy Act (1885), S. 184.

The amendment in S. 29 by Act 10 of 1922, merely means that such sections as Ss. 19 and 20 are not to apply by virtue of the Limitation Act; and if they are to apply, the grounds for applying them are to be found in the local Act itself; but S. 29 is not to be construed as intending to cut down whatever is provided by any special or local law, either by express words or by clear intention: A I R 1930 Pat 301, *Foll.* [P 92 C 2]

(d) Bengal Tenancy Act (1885), Ss. 184, 185 and Sch. 3—Cases under Sch. 3—Period between 1922-28—Applicability of Ss. 19 and 20, *Lim. Act.*

By virtue of the Bengal Tenancy Act, Ss. 19 and 20, *Lim. Act.*, did apply to cases under

Sch. 3, *Ben. Ten. Act.*, even between the years 1922 and 1928: A I R 1930 Pat 301, *Foll.*

[P 92 C 2]

(e) Limitation Act (1908), S. 19—Acknowledgment—Letter addressed by lessee to lessor held to be acknowledgment.

A letter in respect of the rent of a putni lease written by the manager after stating that certain sums had been sent, asked for a correct account. It said that the manager desired to send a further sum, that two letters had been written to the lessor as how much amount had been paid but got no answer; it further asked what amount had been recently paid. In another letter the manager said that he had not been sending money because the amount of the claim as made by the lessor was at variance with the accounts of the lessee.

Held: that the letters amounted to acknowledgments. The letters showed that a certain amount was outstanding on account of the putni lease, and the amount, whatever it was, thereby acknowledged. [P 93 C 1]

Nasim Ali, Prafulla Chunder Nag, Haridas Gupta, Diptendra Mohan Ghose and Paresh Chunder Sen—*for Appellants.*

Amulya Chunder Chatterji *for Prokash Chunder Pakrasi—for Respondents.*

Rankin, C. J.—In this suit which was brought on 22nd June 1928, the plaintiffs sued for the rent of a putni which under a deed dated 20th March 1876 was payable in six instalments every year and amounted to Rs. 1,920-14-0 per annum. There was a stipulation that in default of due payment of any kist for money outstanding should carry interest at 12 per cent per annum. There is no longer any dispute about the sum of money which the putnidars have paid. The plaintiffs brought the suit for rent for the period from Jyoisto 1327 to Jyoisto 1335 B.S., that is to say, from some time in 1920 to some time in 1928. It may here be noticed that the suit was not brought in 1928 until the month of June. Accordingly, in the ordinary way, under the Bengal Tenancy Act, Sch. 3, the plaintiffs would only be entitled to recover rent for a period of three years. It seems that, under the terms of the putni lease, the putnidars had, first of all, to pay the revenue that was due in respect of the property and the rest had to be paid to the plaintiffs; and, for the purpose of describing the amount of this residuo, the money which had to be paid to the plaintiffs was called the *malikana*. It appears that the putni is really held in two shares or accounts, though each share is liable for the whole of the putni rent.

These two shares are called the Bara Taraf and the Chhoto Taraf and at the time with which we are concerned the Chhoto Taraf's share was under the management of the Court of Wards. It appears that for the year 1926 B. S. a settlement of the dues was arrived at and there is certain correspondence put in evidence which shows the ultimate settlement of the rent for 1926. Not only that, but there are accounts which go to the same effect. I may refer for this purpose to the letter (Ex. A) written on behalf of the plaintiffs to the manager of the Bara Taraf on 27th March 1921. That letter shows that sums have been received from both the sharers of the putni, that a sum of Rs. 3,000 and a sum of Rs. 500 have been appropriated to clear off the dues for 1926 and that Rs. 2,000 being Rs. 1,000 sent by each of the sharers is credited towards payment of the amount of interest for breach of instalments from 1927. It is not shown that this letter was also sent to the Chhoto Taraf; but the probabilities are—and there is indirect evidence which makes the matter clear—that this settlement of the arrears of 1926 and the carrying over of money against the interest already due for 1927 came to the notice of both the sharers.

In that position, we have to consider whether there is any answer to the plaintiffs' claim for what is due to them for rent from Jyaisht 1927. The first thing to be noticed is that the plaintiffs when they received any sum of money on account invariably credited as much thereof as possible to the interest outstanding at that time. The result was that when this suit was brought in 1928 a large amount of interest had been wiped off right up to the time of the suit and the consequence of this method of accounting is that, if the plaintiffs are to recover what is really due to them, they have to recover rent for a longer period than three years before the suit. As the plaintiffs did appropriate the money to interest, it does not seem to be possible to reverse that position. Accordingly, in order to decide this suit, we have really to see whether the plaintiffs can recover rent for more than three years previous to the suit. On that matter, it has to be observed that the defendants in the lower Court filed one and the same written statement and they

were represented by the same pleader. In the same way, in this Court also they have joined in bringing one appeal together. In the issues taken in the lower Court, the question of limitation was not raised separately as regards each of the two shares and, in the memorandum of appeal to this Court, no grounds are taken distinguishing one case from the other. The fact, is of course, that under the Limitation Act the cases of joint debtors by virtue of S. 21 may have as a matter of law, to be considered separately, the limitation law being plain to the effect that one joint debtor may have an answer on a point of limitation and another joint debtor may not have. At the same time, in the present case, it is not pressed before us that, if either of these two sharers is liable, he should, as between them, be made liable for the whole amount with the result that the other escapes.

I propose therefore to consider this matter without distinguishing minutely between the cases of the two defendants. This is the way in which the learned Subordinate Judge has dealt with the matter. He has not separately dealt with the case of each defendant. The plaintiffs did not in their plaint state the reasons which took them out of the law of limitation and, in the present case, it turns out that they relied both upon acknowledgment under S. 19, Lim. Act, and upon part payment under S. 20. In this appeal, Mr. Nasim Ali on behalf of the appellants contends that Ss. 19 and 20, Lim. Act of 1908, do not apply to a claim for rent which is governed by Sch. 3, Ben. Ten. Act, and he further contends that, if they do apply, we have to see whether there is a proper acknowledgment and, if not, we have to see not whether the payments were made in such a way that the plaintiffs would be entitled to appropriate them in part payment of interest but whether the payments were made of interest as such: the matter being prior to the year 1928, they are governed by the Limitation Act before the recent amendment and payments of interest as such do not require evidence under the handwriting of the defendants at the time.

Now, on the first question whether Ss. 19 and 20 apply under the special limitation of the Bengal Tenancy Act, the position is this: Under the Act of

1885, the section which imposes a special limitation is S. 184 which applies Sch. 3 to cases of a certain class of which the present is one. It cannot be doubted that, if this is a suit for rent of a patni, it is within S. 184, Ben. Ten. Act. This is not a proceeding under any Patni Regulation but it is a proceeding under the general law for recovery of patni rent. In S. 185, the then Limitation Act of 1877 was referred to: Ss. 7, 8 and 9 were declared not to apply; but subject to the provisions of Ch. 16 the other provisions were declared to apply. There can be no doubt that under that law acknowledgment and payment of interest save the statute from running: *Kamal Krishna v. Kedar Nath* (1), *Rakhlal v. Hemangini* (2); and decisions to the effect that Sch. 3, Ben. Ten. Act, applies to suits for patni rents are *Burna Moyi Dassi v. Burna Mayi Choudhurani* (3), *Rash Behari Lal v. Tilak Dhari Ball* (4) and *Basant Kumar Bose v. Khulna Loan Company* (5). In 1908 however the Act of 1877 was amended and, by the operation of the General Clauses Act, the references to the provisions of the Act of 1877 must be taken as references to the corresponding provisions of the Act of 1908. In 1922 again the Limitation Act of 1908 was amended by an alteration of the provisions of S. 29 of the Act and S. 29 by its second clause dealt with the question of a special or local law which prescribed the period of special limitation.

In such cases, the Act as amended in 1922 said that the provisions of S. 3 should apply as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation, the provisions in certain sections should apply only in so far as they were not excluded by the local law and the remaining provisions of the Act should not apply. Accordingly, in this appeal Mr. Nasim Ali for the appellants contends that, by virtue of Cl. (b), sub-S. (2), S. 29 as it stood after 1922, Ss. 19 and 20 are not to apply in the case of special limitation under the Bengal Tenancy Act. It seems that until 1922 it had never been doubted in this Province that claims for rent were taken out of

the period of limitation by acknowledgment or part payment of interest; but it is said that that changed in 1922. In 1928, the local legislature amended S. 187, Ben. Ten. Act and made it quite clear that from that time Ss. 19 and 20, Lim. Act were to apply to cases within Sch. 3, Ben. Ten. Act. It is said however that between 1922 and 1928 the law was otherwise. As to that, it appears to me that the authority which has been quoted to us on the part of the respondents, *Hasan Imam v. Brahmddeo Singh* (6), is an authority which ought to be followed. It is there pointed out that the amendment made in S. 29, Lim. Act of 1922 merely means that such sections as Ss. 19 and 20 are not to apply by virtue of the Limitation Act and that if they are to apply the grounds for applying them are to be found in the special or local Act itself, but that that section is not to be construed as intending to cut down whatever is provided by any special or local law either by express words or by clear intention.

It seems to me, for example, that if S. 184, Ben. Ten. Act, stood by itself and no such provision as S. 185 had been added, then it would be quite right to apply S. 29, Lim. Act, and say that the mere S. 184 was not under the Limitation Act to import such sections as Ss. 19 and 20. But in the present case by the Bengal Tenancy Act, S. 185 means that certain sections of the Limitation Act should not apply and certain other sections should apply. It appears to me that the proper effect and result of that is that by virtue of the local Act Ss. 19 and 20 did apply to cases under Sch. 3, Ben. Ten. Act, even between the years 1922 and 1928. I propose therefore on that point to follow the Patna decision. Assuming therefore that the period of three years may be extended by acknowledgment or payment of interest, we have to see whether the plaintiffs have made out their case entitling them to recover arrears of rent from Jyoisto 1327 B. S., that is, from the year 1920. As to that, so far as the Bara Taraf is concerned, I think there is little difficulty. It has been conceded on behalf of the appellants that, if the payments can be taken to be payments of interest as such within the meaning of S. 20, the plaintiffs are en-

1. (1909) 8 I C 34.

2. (1906) 3 C L J 847.

3. (1896) 28 Cal 191.

4. (1916) 29 I C 797.

5. A I R 1916 Cal 24 = 26 I C 197.

6. A I R 1930 Pat 301 = 9 Pat 747 = 126 I C 299.

titled to the whole of their claim. It may be just as well, first, to deal with the question of acknowledgment. So far as acknowledgment is concerned, the Bara Taraf writing on 24th June 1924 states that it has sent Rs. 2,000 and Rs. 1,000 and asks for a correct account. It says that it desires to send a further sum, that it wrote two letters to the General Manager to find out how much was paid by the Court of Wards but got no answer and asks what amount has recently been paid by them. That seems to be a letter which is consistent with this that a certain amount is outstanding on account of the putni lease and that the amount whatever it may be is thereby acknowledged.

There are further letters of the same character; in particular, there is a letter of 1926 at p. 51 of the paper book where the Manager of the Bara Taraf says that he has not been sending money because the account of the claim as made by the plaintiffs is materially at variance with the accounts of the two different branches of the estate. He sent a copy of the account showing the dues of both the Tarafs and showing that a certain sum of money was due. In these circumstances so far as the Bara Taraf is concerned, apart altogether from the payment of interest, it appears to me that the matter is covered by acknowledgment. It does not appear however that there is any letter which can be claimed to be an acknowledgment sent by the Chhoto Taraf.

I come now to consider the payments and the circumstances in which they were made. It is quite clear from the very commencement of the negotiations about the rent due for 1327 that in 1924 the plaintiffs were saying that the dues for 1326 had only just been cleared off after crediting a large amount. They were further saying that Rs. 2,000 was being credited against interest already due for default of the 1327 rent. Now, that arrangement clearing off the 1326 rent has plainly been accepted by both the Tarafs as the learned Subordinate Judge points out and it certainly must have come to the notice of both of them. The Bara Taraf in its letter of June 1924 refers to another payment that it has made and it asks for a correct account to be sent. It says that it does not know how much has been

paid by the Court of Wards; but it is quite clear that any money that the Bara Taraf sent must have been sent both on account of interest as well as of principal. It knew that it would be credited against the interest first. On 10th September 1924, the Manager writes to the plaintiffs that Rs. 2,000 has been credited to interest on account of the year 1327. He asks for an account to be sent up to 1326. He says that there is no contract for anything except malikana rent and interest. He sends an account and he also sends a sum of money on account of malikana rent. He says that the Court of Wards promised that it would shortly send money and he demands a detailed and correct account for the years 1326 to 1330 and says that he will try to pay the balance of the dues as early as possible. In these circumstances every sum of money that was sent in that way was sent upon an admitted obligation to meet interest and was sent with the knowledge that the plaintiffs would not apply any part of the money in reduction of the principal until the interest had been first wiped out. When we come to 1331 we find that the Bara Taraf admitted that a large amount of malikana had remained unpaid. Indeed, from the beginning of the correspondence it is clear that neither Taraf was under any delusion to the effect that the payments that were being made were not payments for long standing arrears. In 1331 the Bara Taraf asks for an extension of time up to Sravan next and the correspondence goes on in that way.

The case of the Chhoto Taraf, if it were necessary to distinguish it in the present case, would not be quite as strong; but in that case it is to be remembered that in 1333 when the parties were minded to exchange accounts, the Chhoto Taraf sent in an account according to which the payments that had been made were all credited in the first place against interest. The form of the letters does not say anything about interest. It uses the phrase malikana or amount of rent, but the learned Subordinate Judge has come to the finding that the Chhoto Taraf is in no different position from the Bara Taraf in respect that the money was intended from the first to be applied to outstanding interest and then to the principal. Before the learned Subordinate

Judge the main contention of the defendants was that the language of the letters making remittances by both the Tarafs was such that the plaintiffs were not entitled to credit any part of the money to interest as distinct from principal. It appears to have been conceded on behalf of both the defendants that, if the plaintiffs were competent to credit portions of the payments made towards interest then no portion of the claim would be barred by limitation.

There can be no doubt that the plaintiffs were competent to credit portions of these payments to interest. But in this Court Mr. Nasim Ali has pointed out that it is not quite the same thing to say that the plaintiffs were entitled to appropriate the money to interest as to say that the money when sent was meant for payment of interest as such by the defendants. I think in an ordinary case it would be quite obvious that there might be a very considerable distinction between those two things. That matter however was not submitted to the learned Judge as a question for his determination upon the facts. We have to say as regards the evidence before us whether we think that these defendants can escape by reason of the payments being made without any statement about interest accompanying the payments. It is reasonably clear that the learned Judge was entirely right as regards the Bara Taraf and though as regards the Chhoto Taraf, the matter is not so plain, they too had no expectation that the principal would be reduced until the interest had first been fully paid off. The appeal fails and must be dismissed with costs.

Mitter, J.—I agree.

R.M./R.K. *Appeal dismissed.*

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GUHA AND M. C. GHOSH, JJ.

Haridas Sadhu Khan—Defendant 3—Appellant.

v.

Iswar Ratneswar and others—Plaintiffs—Respondents.

Appeal No. 64 of 1931, Decided on 24th May 1932, against order of Addl. Sub-Judge, Howrah, D/- 20th September 1930.

Civil P. C. (1908), O. 23, R. 3 and O. 43, R. 1 (m)—Appeal from order under O. 23,

R. 3—Decree made before presentation of appeal—Appeal is still competent.

An appeal from an order under O. 23, R. 3, is not incompetent if the decree is made before the appeal is presented. It is not necessary for a party aggrieved by an order under O. 23, R. 3 to appeal both from the order and the decree in order to maintain his appeal against order under O. 23, R. 3: *A I R 19 9 Cal 689 (F H), Foll.; 87 I C 248=A I R 1926 Cal 412, Held, Overruled.* [P 95 C 2]

Basak, Nani Bhusan Mukerji and Khagendra Nath Mitra—for Appellant.

Brojolah Chakravarti, Rupendra Coomarr Mitter and Khitindra Kumar Mitra—for Respondents.

Guha, J.—This appeal has arisen out of an application under O. 28, R. 3, Civil P. C., made by the plaintiff in a suit for recording a compromise. The suit was instituted by the plaintiff in the Court of the Additional Subordinate Judge, Howrah, for a declaration that the properties mentioned in the plaint were debuttar properties of the idols Sri Sri Iswar Ratneswar Kedar Nath Shiva and Sri Sri Iswar Sridhar Jiu, and for a further declaration that the plaintiff was a shebait of the idols. In view of the allegations made in the plaint that the defendants, three in number, had acted in contravention of the terms of the shebaitnama, dated 20th June 1874, the plaintiff prayed that the defendants might be declared unfit to continue as shebait. A permanent injunction was prayed for preventing the defendants from offering any resistance in case the plaintiff acted as a shebait of the said idols, and made repairs to the temples belonging to the idols. A prayer was made by the plaintiff as shebait for obtaining possession of the debuttar properties, and there was a further prayer for accounts to be rendered by the defendants in the suit. As it appears from the order sheet, the case was pending from 1924; on 18th August 1930, when it was about to come to a hearing, a representation was made to the Court by the plaintiff and defendants 1 and 2 that the parties wanted to come to an amicable settlement, and an application was filed in Court praying for a day's time to put in a solenama.

On that date pleaders were heard, and time was allowed as prayed for. On the next date the plaintiff and defendants 1 and 2 filed a joint application, stating that the solenama had not yet been signed by defendant 3, and prayer was

made for a day's further time, to file the petition of compromise. The Court granted time as prayed for. On 20th August 1930, the pleaders of the parties, presumably the pleaders appearing for the plaintiff and defendants 1 and 2, stated to the Court that defendant 3 was unwilling to join in the solenama. The case was on that date directed to be put up on 23rd August 1930, for enabling the plaintiff and defendants 1 and 2 to file the solenama, and for proceeding ex parte against defendant 3 who was absent on that date, viz., 20th August 1930. The next order recorded in the order sheet shows that on 23rd August 1930, plaintiff and defendant 1 filed a joint application praying for time to file solenama, and this prayer was granted, as the last chance; and the case was adjourned to 25th August 1930, for filing the solenama, for ex parte trial against defendant 3. At this stage of the proceedings, on 25th August 1930, the plaintiff filed the application under O. 23, R. 3, Civil P. C., for recording a compromise which, according to the plaintiff, had been entered into between all the parties to the suit. The defendants opposed the application so made by the plaintiff. The objections raised by the defendants have been negatived by the lower Court. There is no appeal to this Court by defendants 1 and 2. It is only defendant 3 who has preferred an appeal to this Court. (After discussing evidence his Lordship proceeded.) In the above view of the case, regard being had to the materials placed on the record, we have no hesitation in coming to the conclusion, that so far as defendant 3 was concerned, he was not a party to the compromise which was entered into as between the plaintiff and defendants 1 and 2 and which was sought to be enforced by an application made to the Court under the provisions contained in O. 23, R. 3, Civil P. C.

It is necessary to mention that a preliminary objection was raised on behalf of the plaintiff-respondent, as to the maintainability of the appeal to this Court, on the ground that no appeal had been preferred against the decree that was passed in the case, and which had been signed before the appeal to this Court was filed on 13th January 1931. It would appear that the order of the

learned Subordinate Judge recording the compromise under O. 23, R. 3 of the Code and directing the drawing up of the decree, the order against which this appeal is directed, was passed on 20th September 1930. The decree was actually signed on 4th November 1930. The appeal to this Court was filed on 13th January 1931. There is no doubt that on the date on which this appeal was filed, there was the decree passed by the Court below, in existence; and the preliminary objection relates to this that no appeal having been preferred against the decree, the appeal against the order dated 20th September 1930, made under O. 23, R. 3 was not maintainable. The objection so raised is based upon a decision of this Court in the case of *Bengal Coal Co. Ltd. v. Apcar Collieries Ltd.* (1). It appears to us that the decision in that case must now be taken to be superseded by the decision of a Full Bench of this Court in the case of *Talebali v. Abdul Aziz* (2). The case in *Bengal Coal Co. v. Apcar Collieries Ltd.* (1) was referred to in the course of the argument before the Full Bench and having regard to the principle upon which the decision of the Full Bench is based, it is impossible for us to hold that the rule laid down in the case in *Bengal Coal Co. v. Apcar Collieries Ltd.* (1) is still good law. It may also be mentioned that the decision in the case reported in *Bengal Coal Co. v. Apcar Collieries Ltd.* (1) does not take into account the effect of S. 96, Cl. (3), Civil P. C., and of the statutory right of appeal given by O. 43, R. 1 (m), so far as O. 23, R. 3 is concerned. In our opinion after the decision of the Full Bench to which reference has been made, an appeal from an order under O. 23, R. 3 is not incompetent if a decree is made before the appeal is presented.

It is not necessary for the party aggrieved by an order under O. 23, R. 3 of the Code to appeal both from the order and the decree in order to maintain his appeal against the order under O. 23, R. 3. We overruled the preliminary objection, and heard the appeal from order, as preferred to this Court, on the merits.

1. A I R 1926 Cal 419=87 I C 248.

2. A I R 1929 Cal 689=123 I C 305=57 Cal 1013 (F B).

In the result the appeal is allowed; the order of the Court below, so far as it relates to defendant 3 in the suit, is set aside. It will be open to the plaintiff-respondent now to proceed with the suit as against defendant 3 in accordance with law. We make no order as to costs in this appeal.

M. C. Ghose, J.—I agree.

R.K.

Appeal allowed.

A. I. R. 1933 Calcutta 96

COSTELLO, J.

Gahur Ali Karikar and others—Petitioners.

v.

Sm. Asia Khatun and others—Opposite Parties.

Civil Rules Nos. 171 and 172 of 1932, Decided on 2nd March 1932, against order of Sub-Judge, Faridpur, D/- 14th November 1931.

Civil P. C. (1908), O. 21, R. 32 (3)—Sale of property under O. 21, R. 32 (3) is for a person's wilful failure to obey the decree of Court and cannot be set aside under O. 21, R. 89 which is not applicable—Civil P. C. (1908), O. 21, R. 89.

The provisions of O. 21, R. 32 are intended chiefly to provide something in the nature of a penalty for breach of an order of the Court, though sub-R. (3) does provide that some portion of the price realized by the sale of the property may be allocated as compensation to the decree-holder in the suit. R. 89 can have no application where a sale takes place under the provisions of R. 32 (3) because proviso (b), sub-CI. (1), R. 89, cannot be complied with by the person applying to have the sale set aside. The proceedings under O. 21, R. 32 are clearly to be of a penal character designed to punish persons who have wilfully disobeyed the order of the Court. [P 97 C 2; P 98 C 2]

Jitendra Kumar Sen Gupta—for Petitioners.

Amrita Lal Mukherjee—for Opposite Parties.

Judgment.—These two Rules are the outcome and it is to be hoped to be the last stage in a protracted litigation between a man Gahur Ali Karikar on one side and his wife Asia Khatun, her mother Kokanu Bibi and her stepfather Misir Ali Karikar on the other. In the year 1927 Gahur Ali instituted a suit against his wife Asia Khatun, her mother Kokanu Bibi and her stepfather Misir Ali in which he claimed as against his wife restitution of conjugal rights and as against the other two defendants an injunction restraining them from obstructing the return of his wife to him. On 14th July 1927, a decree was made

in that suit whereby it was ordered that Asia Khatun should return and render conjugal rights to her husband, the plaintiff, and as regards the other two defendants that they be restrained from obstructing the return of the wife to the husband. Apparently that decree was not complied with by any of the defendants and accordingly the plaintiff made an application under O. 21, R. 32, for the attachment of certain property belonging to Kokanu Bibi and Misir Ali on the ground that they had wilfully failed to obey the decree which had been made against them. The property was in fact attached on 4th September 1927. After the lapse of one year an application was made under O. 21, R. 32, sub-R. (3) for the sale of the attached property. That move on the part of the plaintiff seems to have been countered by his wife, defendant 1, in the suit by the institution of a fresh suit in which she sought a declaration that the marriage between her and the plaintiff had been dissolved by her lawfully giving a talak to her husband under some delegated power conferred upon her at the time the marriage took place.

In answer to the application which was made on 2nd October 1928, certain objections were raised by the defendants including the objection that the suit for a declaration that the marriage had been dissolved was pending and that in fact the marriage had been dissolved on some date in July 1928, that is to say, on a date prior to the application for the sale. In consequence of such objections, various proceedings took place which I need not specify. Finally, an order was made directing the sale and the sale of the attached property took place on 16th December 1930. It does appear that the Subordinate Judge, when he dealt with an appeal from that application, was in some doubt as to whether or not the sale ought to take place in the circumstances as at that time there had been no decision in the suit for a declaration of the dissolution of the marriage. However he came to the conclusion that there was no reason why the sale should not take place under the provisions of O. 21, R. 32 (3). A month or so later, that is to say, on 9th January 1931, there was an application on the part of the defendants Kokanu Bibi and Misir Ali, to have the sale set aside. That appli-

cation purported to have been made under O. 21, R. 89. The matter came before the Munsif, 2nd Court, Chikandi on 2nd February 1931. In the course of his judgment he says:

"The properties were sold to compensate the decree-holder for judgment-debtor's disobeying the order of the Court and thus being guilty of contempt of Court. In such a case judgment-debtors 2 and 3 have no locus standi to apply to set aside the sale under O. 21, R. 89, Civil P. C. Their only remedy was to obey the decree and pay all costs of executing the same within full one year of the date of attachment as provided by O. 21, R. 32, Cl (4). Again O. 21, R. 89, Civil P. C., applies where immovable property has been sold in execution of a money or mortgage-decree. In the present case the properties in question were sold to compensate the decree-holder for judgment-debtors' wilfully disobeying the order of the Court passed in a decree for restitution of conjugal rights."

He came to the conclusion that judgment-debtors Nos. 2 and 3 had no locus standi to have the sale set aside and therefore the petition was rejected. A few days later, that is to say, on 13th February 1931, the learned Munsif proceeded to assess the amount of compensation to be paid to the decree-holder under O. 21, R. 32 (3). He was of the opinion that the decree-holder was entitled to get compensation to the extent of Rs. 600. One of the two Rules, with which I am now concerned, has reference to that order. Against both the decisions of the learned Munsif there was an appeal to the Subordinate Judge of Faridpur and he dealt with both matters along with another matter, that is to say, the appeal against the order of the Court of first instance refusing to set aside the decree which in the meantime, that is to say, on 2nd July 1930, had been obtained by Asia Khatun in her suit against her husband. That decree had been made *ex parte* and had declared that the marriage between Gahur Ali and Asia Khatun had been dissolved as from 16th July 1928. The learned Subordinate Judge of Faridpur was evidently of opinion that the litigation between these parties was not only very unfortunate but that some of the orders which were made in the course of the proceedings were the outcome of the applications which were in effect abuses of the process of the Court. The Subordinate Judge came to the conclusion that the sale of the property attached in the way I have described ought to be set aside not because O. 21, R. 89 was applicable to

the circumstances of this case, but because the order directing the sale in the first instance ought, in fact, never to have been made on the ground that the decree of 2nd July 1930, made in the wife's suit, contained an injunction restraining her husband from putting into execution the decree obtained by him in July 1927. The learned Subordinate Judge also allowed the appeal as regards the Munsif's order for payment of Rs. 600 by way of compensation for the same reason. He definitely came to the conclusion that O. 21, R. 89, has no application in the circumstances of this case and I am of opinion that the order was correct. There seems to be no doubt that the provisions of O. 21, R. 32 are intended chiefly to provide something in the nature of a penalty for breach of an order of the Court, though sub-R. (3) does provide that some portion of the price realized by the sale of the property may be allocated as compensation to the decree-holder in the suit.

It seems obvious that R. 89 can have no application where a sale takes place under the provisions of R. 32 (3), because R. 89 provides that a person, either owning immovable property which has been sold in execution of the decree or holding an interest therein by virtue of a title acquired before the sale, can apply to have the sale set aside on his depositing in Court, (a) for payment to the purchaser, a sum equal to five per cent of the purchase money and (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered (less any amount to which may, since the date of such proclamation of sale, have been received by the decree-holder). That rule requires a two-fold payment on the part of the person seeking to set aside the sale: one payment to the purchaser or purchasers and another to the decree-holder. This presupposes that there is some specified sum of money which is due from a person or persons who was or were defendants in the suit, to the decree-holder. In the present case from the very nature of the suit itself, no sum of money was due to the decree-holder at the time when the sale under R. 32 took place, and therefore proviso (b), sub-Cl. (i), R. 89, could not be complied with by the person applying to have the sale set aside. In the present case some two

months after the sale took place the Munsif, as I have already said, decided that Rs. 600 out of the purchase money realized by the sale of the attached property ought to be paid to the plaintiff as compensation. If it can properly be said that in effect the sale took place in order to provide for the recovery of the amount which might subsequently be ordered to be paid to the plaintiff, then on that footing it follows that the owners of the attached property, that is to say, Kokanu Bibi and Misir Ali in order to have the sale set aside would have to deposit in Court the sum of Rs. 600 for payment to Gahur Ali.

I have said that the decision of the Subordinate Judge was based upon the view that no proceedings in the nature of an execution proceeding with reference to the original decree ought to have taken place after the decree in the wife's suit, that is to say, after 2nd July 1930. But the fact remains that when the order for the sale of the property was made, objection was taken to the making of that order and there was an appeal against that order and the direction for sale was confirmed by the appellate Court and it was in accordance with the decision of the appellate Court that the sale in fact took place. In those circumstances it is clear that the sale did, in fact, take place under an order of Court which was subsisting at the time when the sale actually took place. The order, I have said, had been confirmed on appeal and no further steps were taken at that time with regard to it. It must, I think, further be taken that the sale validly took place under an order of the Court made by virtue of the provisions of R. 32, O. 21. I have already indicated the reasons why I think the appellate Court below was right in holding that O. 21, R. 89, does not apply. Moreover the proclamation of sale did not and could not contain as it should contain all the particulars required by R. 66, O. 21. If R. 89 does not apply there seems to be no other procedure appropriate for setting aside a sale of this character once it has been completed.

I therefore come to the conclusion, although I do so with great reluctance, that the learned Subordinate Judge was not justified in law in taking the course which he did in ordering the sale to be set aside and the order for the payment

of the compensation to the plaintiff rescinded. One must bear in mind, as I have indicated, that the proceedings under O. 21, R. 32, whatever the ultimate result may be, are clearly intended to be of a penal character designed to punish persons who have wilfully disobeyed the order of the Court. In that view of the matter and on the findings of the Courts below it appears that the defendants had disobeyed the orders contained in the original decree and therefore had rendered themselves liable to the consequences involved by the terms of R. 32, O. 21. It follows therefore that these rules must be made absolute, the orders of the Subordinate Judge be set aside and those of the Munsif be restored. By consent it is further ordered that if Kokanu Bibi and Misir Ali pay to Gahur Ali within two months from today's date Rs. 600 and Rs. 30 to the purchasers of the attached property then the sale will be set aside and the sale will be void and the parties will be restored to the position quo ante. If the sum of Rs. 130 deposited in Court at the time of the application for setting aside the sale is still available, it should be credited to the defendants and the amount of the purchase money Rs. 600 deposited by the auction-purchaser should be refunded to the purchaser and all further proceedings between the parties in respect of the sale of the said property will terminate. Nothing in this order contained will affect the validity or enforceability of the decree said to have been obtained by Asia Khatun in respect of her dower.

B.R./R.K. *Rules made absolute.*

A. I. R. 1933 Calcutta 98

GUHA AND M. C. GHOSE, JJ.

Harendra Chandra Das and others — Defendants—Appellants.

V.

Nanda Lal Roy and others—Plaintiffs —Respondents.

Appeals Nos. 851 and 898 of 1929, Decided on 2nd June 1932, against appellate decrees of Dist. Judge, Sylhet, D/- 6th October 1928.

(a) Specific Relief Act (1877), S. 27 (b)—Transferee for value without notice of original contract must prove that he fulfils that character.

Where a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character. If he was aware when he

purchased the property that negotiations for the sale of the property were already in progress between his vendors and the plaintiff, and purchases the property without making necessary enquiries as to whether any agreement to sell the property had been definitely concluded between his vendors and the plaintiff, he cannot claim to be a transferee without notice: 40 Cal 565, *Ref.* [P 100 C 2]

(b) Specific Relief Act (1877), Ss. 14 to 17—Contract, whether divisible, is question of fact.

The nature of a contract, whether it was divisible or not, must be determined upon the facts and circumstances of each particular case; and the question is essentially a question of fact. [P 101 C 1]

Defendants 6 and 7 as agents of defendants 2 to 5 who owned shares in certain family property went beyond the scope of their authority in agreeing to sell the property on behalf of their principals to the plaintiff. The contract was subsequently ratified by defendants 2, 4 and 5 but not by defendants 1 and 8.

Held: that the contract was one that was, on the face of it, and in view of the conduct of the parties and the intention to be gathered from such conduct, divisible in its nature, and was, in point of fact separated and divided by defendants 2, 4 and 5 ratifying the contract, and by the refusal of defendant 3 to do so, in respect of his own share in the joint property. It was therefore an agreement between the plaintiff and the defendants 2, 4 and 5 for sale, and did not come within the general rule that where a person is jointly interested in an estate with another person, and purports to deal with the entirety, specific performance will not be granted against him as to his share. The contract was after ratification a concluded contract in regard to the shares of the defendants 2, 4 and 5, and as such specific performance could be granted of the same: A I R 1932 P C 43; A I R 1925 P C 45, *Dist.* [P 101 C 2]

Basak, Chandra Sekhar Sen and Birendra Lal Das—for Harendra Chandra and Jagadishwari Dasi.

Brojo Lal Chackerbutty, Atul Chandra Gupta and Nikunja Behary Roy—for Nanda Lal Roy.

Braj Mohon Majumdar—for Deputy Registrar.

Judgment.—The plaintiff in the suit out of which these two appeals have arisen, prayed for a decree for specific performance of a contract for sale said to have been entered into by defendants 1 to 5 on 3rd Chaitra 1330 B. S. or in the alternative for refund of earnest money and recovery of damages. Defendants 2 to 5 had maliki right in the property which was the subject matter of the contract for sale, to the extent of certain definite shares owned by each of them as a member of a joint Hindu family; defendant 1 had a meadi ijara right in the property to the extent of the share of

defendant 3. Defendant 6 was the karta of the joint family of which defendants 1 to 5 were members, defendant 1 being the mother of defendants 2 to 5. Defendant 7 was an officer of the joint family estate. Defendants 6 and 7 acted as agents in the matter of the contract for sale, of which specific performance was prayed for by the plaintiff. Defendants 8 to 13 are purchasers from defendants 1 to 5, by kabalas dated 4th Ashar 1331 of the property in regard to which the plaintiff asked for specific performance. The plaintiff's claim in suit was resisted by all the defendants mentioned above. The contract for sale as alleged by the plaintiffs was denied; it was asserted that defendants 8 to 13 were bona fide purchasers for value, without knowledge or notice of any previous agreement for sale with the plaintiff as alleged by the plaintiff in the suit.

The controversy between the parties to the litigation are indicated by the principal issues raised for determination in the suit, which were to the following effect: Was there any contract for sale to the plaintiff? Was the contract legally enforceable and capable of specific performance? Had defendants 6 and 7 any authority to enter into any contract? Did defendants 1 to 5 approve of or ratify the contract? Had defendants 8 to 13 notice of the contract? Are defendants 8 to 13 bona fide purchasers for value? The learned Subordinate Judge, Second Court, Sylhet, in whose Court the suit was instituted, passed a decree in the suit in these words:

"The suit be decreed with costs, decrees against defendants 1 to 7 being for Rs. 850, and against all the defendants for costs, prayers ka to chha of the plaint and claim for Rs. 3,000 as compensation being disallowed and interest running at 6 per cent per annum on decretal amount till realization."

The prayers ka to chha, it may be mentioned, related to specific performance. On appeal by the plaintiff, the learned District Judge of Sylhet modified the decree of the trial Court, and passed a decree directing that the suit be decreed as against defendants 2, 4, and 5 to 13, and that the plaintiff be allowed specific performance as against defendants 2, 4, 5 and 8 to 13, of the agreement dated 3rd Chaitra 1330. The kabalas dated 4th Ashar 1331, in favour of defendants 8 to 13 were declared invalid, in respect of the shares of defen-

dants 2, 4 and 5. The decree further directed the execution of a fresh kabala in respect of the shares of defendants 2, 4 and 5, in favour of the plaintiff. The plaintiff's suit was dismissed as against defendants 1 and 3. Defendants 2 and 4 to 13, as well as the plaintiff, have appealed to this Court. The defendants' appeal being appeal from Appellate Decree No. 851 of 1929 while the appeal by the plaintiff is appeal from Appellate Decree No. 898 of 1929. In view of the questions raised in these appeals the findings arrived at by the learned District Judge on appeal in his elaborate and careful judgment may be briefly referred to. The learned Judge held upon the evidence before him, that defendants 6 and 7, on behalf of defendants 2 to 5, entered into a contract with the plaintiff for the sale of the property, and that the agreement was concluded on 3rd Chaitra 1330. Defendants 6 and 7, the agents, were, according to the learned Judge's finding, acting beyond the scope of their authority, but the agreement was ratified by defendants 2, 4 and 5, but not by defendants 1 and 3. On the question of the position of defendants 8 to 13 the District Judge has held that on the facts and in the circumstances mentioned by him the contract could be specifically enforced against them.

One of the points raised in the appeal by defendants 2 and 4 to 13 is with reference to the decision arrived at by the Court of appeal below, that defendants 8 to 13 were persons against whom the plaintiff's contract could be specifically performed; and mention has to be made of the reason given by it in this behalf. The learned Judge has made mention of evidence showing that these defendants had information of what was taking place in regard to the contract for sale, to the plaintiff, and of evidence showing that the plaintiff's agent having asked them not to buy the property in question. The learned Judge has refused to disbelieve plaintiff's evidence on the point; and has held that even if they were only aware of the fact that negotiations for the sale of the property was in progress, between defendants 1 to 5 and the plaintiff's agent, that should have put them on their guard, and they should have made necessary inquiries as to whether any agreement to sell the property had been definitely concluded. This de-

fendants 8 to 13 did not do. There can be no doubt that the learned District Judge has rightly directed himself in coming to the decision on the question whether defendants 8 to 13 were or were not bona fide purchasers for value, and whether or not they had knowledge or notice of the previous contract with the plaintiff. It is well settled now that when a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character. If defendants 8 to 13 chose to make no inquiry, they could not claim to be transferees without notice: "they could not predicate of themselves" that they were persons who claim without notice of the contract of 3rd Chaitra 1330, with the plaintiff: see in this connexion, *Baburam Bag v. Madhab Chandra Pollay* (1). The decision of the learned Judge, in the Court of appeal below, that the contract could be specifically enforced against defendants 8 to 13, is upon the findings arrived at by him correct and must be affirmed.

On the question of ratification of the contract for sale to the plaintiff by defendants 2, 4 and 5, and not by defendants 1 and 3, which was raised in the appeal by the plaintiff, there is a clear finding of fact arrived at by the learned District Judge. It was pressed before us that there has been an inaccuracy in quoting from the deposition of one of the witnesses for the plaintiff, examined on this part of the case, inasmuch as the witness stated that he "wrote" the document evidencing the sale to the plaintiff, at the bidding of defendants 1 to 5, and not that he "read out" the same, as mentioned in the judgment of the Court of appeal below. It has also been urged that upon the findings arrived at by the lower appellate Court, there was ratification in law by defendants 1 and 3, on the evidence that was common to the defendants 1 to 5. We are unable to say that the inaccuracy in quoting a passage from the deposition of a witness, to which reference has been made above, in any way affects the findings and the conclusion arrived at by the learned Judge in the Court below, on the question of ratification. From the facts and circumstances to which reference has been made in the judgment of the Court below, the

1. (1913) 40 Cal 535=19 I C 9.

conclusion followed that the defendants 1 and 3 had not ratified the contract. It is impossible upon the findings arrived at by the lower Court, to hold in favour of the plaintiff, that defendants 1 and 3 had ratified the contract; and upon those findings there appears to be no justification for the contention that there was ratification in law, seeing that upon the facts proved in the case, and upon the inference drawn from such facts, there was no ratification of the contract, either express or implied, so far as defendants 1 and 3 were concerned.

The question whether the contract of 3rd Chaitra 1330, was legally enforceable, and the question whether the contract was capable of specific performance, were raised before the Courts below, and have been urged in the appeal by defendants 2 and 4 to 13. The plaintiff who had previously acquired some share in the property in suit, was desirous of securing other shares in the same. With a view to this, there were negotiations with defendants 2 to 5 for purchase of the shares of the property owned by them; defendant 6 who had sold his own share in the property to the plaintiff, negotiated as agent of defendants 2 to 5. Upon the finding arrived at by the Court below, the agents (defendants 6 and 7) had gone beyond the scope of their authority, but defendants 2, 4 and 5 had subsequently ratified the contract entered into by the agents on their behalf; defendants 1 and 3 however did not ratify the contract. Thus the contract sought to be specifically enforced was not treated by the parties concerned as one entire contract indivisible in its nature: it was not also a contract entered into by a cosharer of joint property undertaking to obtain the consent of the other cosharers in respect of joint property. It may be noticed that the nature of a contract, whether it was divisible or not, must be determined upon the facts and circumstances of each particular case; and the question was essentially a question of fact. The contract entered into by the agents in the case before us, was one, in regard to the distinct and different shares of cosharers defendants, 2 to 5, in the joint property, and in respect of which shares only, taken separately, there could be a conveyance of title, so far as any of the cosharers was concerned. There was the contingency of

any of the cosharers not agreeing to convey his own share; and subsequent events showed that such contingency did happen. The position then was that the agents were negotiating on behalf of each of the cosharers, defendants 2 to 5, for the sale of the joint property; some of the parties concerned, defendants 2, 4 and 5, ratified the action of the agents; defendant 3 as well as defendant 1 did not ratify the same.

Defendant 1, it must be remembered, was not a cosharer, but was only an ijaradar of the share of defendant 3 in the joint property. The contract therefore in the case before us, was one that was, on the face of it, and in view of the conduct of the parties and the intention to be gathered from such conduct, divisible in its nature; and was, in point of fact separated and divided by defendants 2, 4 and 5 ratifying the contract, and by the refusal of defendant 3 to do so, in respect of his own share in the joint property. It was therefore an agreement between the plaintiff and defendants 2, 4 and 5 for sale, and does not come within the general rule that where a person is jointly interested in an estate with another person, and purports to deal with the entirety, specific performance will not be granted against him as to his share. Very great reliance has been placed by the learned advocate for defendants 2 and 4 to 13, appellants, on the pronouncements of their Lordships of the Judicial Committee of the Privy Council, in the case of *Rai Promotha Nath Mittra v. Gosha Behari Sen* (2), as also upon the rule laid down by their Lordships in *Graham v. Krishna Chunder Dey* (3), in support of the case of these defendants, that there was no concluded contract in the case before us, which could be specifically enforced by the plaintiff, in view of the non-ratification of the contract by defendants 1 and 3; and that the plaintiff not having relinquished his claim to further performance and all right to compensation, was not entitled to a decree for specific performance. It was urged that there was no mutuality in the contract of which specific performance was sought, as defen-

2. A I R 1932 P C 48=186 I C 405=59 I A 47 (P C).

3. A I R 1925 P C 45=80 I C 282=52 I A 90=52 Cal. 335 (P C).

dants 2, 4 and 5 could not insist upon the enforcement of the contract.

The questions thus raised do not in our judgment, arise for consideration in the case before us, in view of the nature of the contract entered into. It cannot be said in this case, as it was made out in *Rai Promatha Nath Mittra's* case (2) that the contract was on the footing that all the owners of the property would consent to the sale. The agents acting on behalf of defendants 2 to 5 in this case were negotiating for the sale to the plaintiff, of the share of the joint property, owned by each of these defendants separately; and defendant 3 refused to ratify the act of the agents, so far as his own share was concerned. In *Graham's* case, their Lordships of the Judicial Committee definitely held that in India ss. 14 to 17, Specific Relief Act, 1877, constituted a complete Code, so far as specific performance of part of a contract was concerned, and their Lordships laid down the law in a case where there was the question of a part performance of a contract, the vendor having failed to make title to one of the two items of property agreed to be sold. The contract was not one in regard to which it could be said that one of the items of property stood on a separate and independent footing, so as to be within the terms of S. 16, Specific Relief Act. In the case before us, the separate shares of defendants 2 to 5 in the joint property stood altogether on an independent footing, and the plaintiff and the agents on behalf of these defendants were negotiating for the sale of these separate shares of these defendants in the joint property. The case placed before the Court by the plaintiff, regard being had to the averments made in his plaint, was one to which S. 15, Specific Relief Act, could not have any application; and the rule laid down by the Judicial Committee, in *Rai Promatha Nath Mittra's* case (2) that unless there was relinquishment by the plaintiff of claims, as provided by that section, there could be no decree made for specific performance, in favour of the plaintiff, could not therefore apply.

The contract in the case before us, was, after ratification, a concluded contract in regard to the shares of defendants 2, 4 and 5, and as such, specific performance could be granted of the same. The decision of the learned District Judge, in

the Court of appeal below, in favour of the plaintiff, is, in our judgment, correct, and it is in consonance with the principles underlying the decisions of the Judicial Committee of the Privy Council in the cases referred to above, upon which reliance has been placed on behalf of defendants 2 and 4 to 13 in the suit. In the result both the appeals are dismissed with costs. The decision and decree passed by the learned District Judge in the Court of appeal below are affirmed.

K.N./R.K.

Appeals dismissed.

* A. I. R. 1933 Calcutta 102

MUKERJI AND BARTLEY, JJ.

(Syed) Zainuddin Hossain and others
—Defendants—Appellants.

v.

(Moulvi) Muhammad Abdur Rahim
and others—Plaintiffs—Respondents.

Appeal No. 8 of 1929, Decided on 1st June 1932, against original decree of Second Class Sub-Judge, 24-Parganas, D/- 19th May 1928.

(a) Mahomedan Law — Wakf — Construction—Principle stated.

The intentions of the settlor have to be gathered primarily from the terms of the deed, though attendant circumstances may be looked into if the intention is not apparent or clear from such terms, and subsequent circumstances also, but only if and so far as they throw any light on such intention: *A I R 1932 Cal 93, Ref.* [P 105 C 1]

(b) Mahomedan Law—Wakf—Mere declaration of wakif extinguishes his rights in wakf property.

According to Abu Yusuf whose tenets hold the field so far as Bengal is concerned the wakf becomes absolute and binding on the mere declaration of the wakif, and on such declaration being made, his rights in the properties which form the subject matter of the declaration become extinguished at once: *A I R 1922 Cal 429; A I R 1930 Cal 673 and A I R 1927 P C 191, Ref.* [P 105 C 1]

(c) Mahomedan Law — Wakf — Validity established — Whether acted on or not is immaterial.

Once it is found that a wakf is valid, it is wholly immaterial whether its provisions were carried out or not for that is a matter of breach of trust only. Once it is found that the wakf is valid and operative, even the wakif himself has no power to interfere with it. [P 105 C 2]

(d) Mahomedan Law — Wakf — Family settlement made after wakf cannot affect wakf property.

Family settlement cannot affect any properties which were not the properties of the family but were the properties of an endowment validly created, the ownership of which belonged not to the parties to the settlement but to the Almighty. Under the guise of a family arrange-

ment a party cannot enter into a transaction which he is not under the law competent to do and which is beyond his disposing power. Hence even if the wakf did not act according to the terms of the wakf or subsequently converted a part of the wakf property into a family dwelling house for himself or his heirs or that he disposed of some of the properties of the endowment as if they were personal properties of his own they would not affect the validity or operative character of the wakf. [P 105 C 2]

(c) Mahomedan Law—Alienation—Guardian—De facto guardian cannot alienate minor's property but minor can ratify alienation on becoming major.

Under the Mahomedan law a mother has no power as de facto guardian of her infant children to alienate or charge their immovable property. But if the minor on coming of age ratifies the arrangement or accepts a benefit under it he would be estopped from questioning its validity. [P 108 C 2]

(f) Limitation Act (1908), Arts. 142 and 144—No dispossession or discontinuance—

Suit for possession by plaintiff is governed by Art. 144 and not by Art. 142.

Where there is no transfer by the plaintiff to the defendant of any interest in immovable property at all but only a permission to reside in the premises, and so there was no dispossession nor any discontinuance of possession on the part of the plaintiff, plaintiff must be deemed to have been in possession of the premises; and if the defendants contend that they acquired by adverse possession for over 12 years a limited interest, viz., a right to reside which could not be defeated, the suit is governed by Art. 141 and not by Art. 142 and time would begin to run only after plaintiff's right to that possession is denied. [P 108 C 5]

Nasim Ali and Md. Nurul Haq Chowdhury—for Appellants.

Sarat Chandra Roy Chowdhury and A. Quasim—for Respondents.

Judgment.—The relationship of the parties who figure in this case will appear from the following genealogical tree:

MOHAMED ISMAIL

Mohamed Israil
(predeceased his
father)

Mohammad
Ibrahim

Mohammed
Abdur Rahim
plaintiff).

Fatema Bibi
(pro forma
defendant 5).

Azimunnessa
Bibi w. Syed
Tajammal
Hossein

Mohamed Gous

Syed Zainuddin
Hossein
(defendant 1).

Syed Sharifuddin
Hossein
(defendant 2).

Mt. Fakherunnessa
Bibi
(defendant 3).

Mt. Zohra Khatun
(pro forma
defendant 4).

The plaintiff's case shortly put was the following: that his father Mohamed Ismail, who owned considerable properties in and near about Calcutta built a mosque at No. 21, Ismail Street, and dedicated it as a place of worship for the Mahomedan public; and for the upkeep of the same he also, by a deed of wakfnama dated 17th January 1864 dedicated, amongst other properties, premises No. 20, Ismail Street, which consisted of some land with buildings standing thereon; that the said Mohamed Ismail acted as muttawali during his lifetime, that on his death his son Mohamed Ibrahim, and on the death of the latter the plaintiff came to be muttawali; that during the minority of the plaintiff, Syed Tajammal Hossein, father of defendants 1 to 4, who was the husband of the plaintiffs' sister Srimati Azimunnessa Bibi, managed the properties on his behalf; that by lease and license of the plaintiff, his two sisters, viz., Srimati Fatema Bibi and the said Srimati Azimunnessa Bibi, lived with their respective families in certain rooms in the said premises No. 20

Ismail Street; that the said Azimunnessa Bibi died in 1915, and since her death her children, defendants 1 to 4, were allowed permission by the plaintiff to remain in occupation of certain rooms in the said premises which were described in the schedule to the plaint, and in 1916, defendant 1 agreed to pay Rs. 5 as rent for an outer room which he also came to occupy; and that the plaintiff as muttawali of the wakf served a notice on the defendants to vacate the rooms in their possession, but the defendants set up a claim to retain possession thereof. It was said in the plaint that the pro forma defendants 4 and 5 did not question the title of the plaintiffs and on the contrary expressed their willingness to vacate the rooms in their possession, and so no relief was claimed as against them.

The defence was that no valid wakf was created by Mohammad Ismail and at any rate the wakf which he created was never acted upon by him; that soon after the wakfnama he himself converted premises No. 20 Ismail Street, into a family dwelling house; that he executed a will

before his death; that on his death the heirs executed an ekrarnama as amongst themselves and partitioned the properties left by him; that by the ekrarnama it was agreed that the said premises would be used as a family dwelling house by his heirs; and that having acquired the right so conferred by the ekrarnama the father or the defendant made extensive addition and alterations at his own expense. Occupation of the heirs under the leave and license of the plaintiff, as well as the lease at a rental of Rs. 5 were denied. The Subordinate Judge having decreed the suit defendants 1 to 3 have preferred this appeal.

Before dealing with the questions raised a few more facts require to be stated. By the wakfnama executed on 17th January 1864, Mohamed Ismail dedicated two plots of land, Nos. 393 and 394 said to comprise 1 bigha 4 cottas of land together with certain structures. He constituted himself the first muttawali and reserved to himself the right to appoint either one of his heirs or a stranger as muttawali to act after him. He provided that:

"If during my life-time I do not appoint anybody as muttawali either from amongst my heirs or outsiders, then out of my heirs, first of all out of my male heirs, my sons, should they be competent or honest, or otherwise one of them (my other heirs), who may be competent or honest, shall carry out the duties of the towliat."

He directed that after defraying the expenses detailed, whoever would be muttawali would get a remuneration not exceeding Rs. 10 per month.

It appears that Muhammad Ismail made a will on 24th June 1875. The will is not forthcoming and it is not possible to say if and to what extent it interfered with the wakf. It then appears that after the death of Muhammad Ismail and on 30th June 1876 an ekrarnama was executed. The parties to this document were: (1) Mt. Sharfunnessa, the widow of Muhammad Ismail, for self and as mother and guardian of her minor son Abdur Rahim; (2) Muhammad Ibrahim, son of Muhammad Ismail; (3) Fatima Bibi; and (4) Azimunnessa Bibi. It was stated in this document that Muhammad Ismail had built a mosque and had dedicated three plots of lands, Nos. 383, 393 and 394 not the last two plots only as in the wakfnama, and the first plot (containing 13 cottas of land) and had divided his house properties in Gardener's Lane

and European Asylum Lane amongst the executants, his heirs, by virtue of the will dated 24th June 1875. It was stated further that the heirs agreeing with one another thought it better to perform all acts according to the desire of their deceased ancestor and that they accordingly made certain stipulations the more important of which, to quote the words of the deed, were the following:

1. "We by this deed declare that we shall in compliance with the will and towliat, be bound by the recitals in this deed, that is to say, our claim in the capacity of heirs respecting the lands bearing holdings Nos. 383, 393 and 394 with the brick-built houses relating to the wakf shall not be valid."

2. "We, Muhammad Ebrahim, Muhammad Abdur Rahim and Muhammad Gholam Gous shall remain mutwallis thereof, but during the minority of Muhammad Abdur Rahim and Muhammad Gholam Gous all the affairs relating to the trust shall be conducted by me Muhammad Ebrahim."

3. "After defraying the proper and necessary expenses of the wakf, whatever balance out of the income of the wakf property will be left shall be divided equally amongst us the three mutwallis monthly by way of remuneration."

4. "None of the heirs or mutwallis shall have any claim to the right of direct or exclusive possession of the particular dwelling house No. 20 nor shall any of them have the right to prevent any other from residing therein or occupying it for residence. On the other hand excepting the right of transfer, etc., we the heirs and the mutwallis shall always have equal right of residence. All the heirs and mutwallis shall equally be bound to do all improvements and repairs with regard to the said house."

5. "Whatever debts are due by the said deceased ancestor shall be paid according to the details given below. The details given are that Muhammad Ebrahim should pay Rs. 229, Muhammad Abdur Rahim Rs. 173, Fatima Bibi Rs. 291 and Azimunnessa Bibi Rs. 177, that is to say Rs. 1,070 in all."

Now, one of the issues framed in the suit in view of the pleadings of the parties, was:

"Was the wakfnama acted upon? Is it a valid and binding document? Can the defendants raise this question?"

The intention, as far as one can gather, was on the part of the defendants to challenge the validity of the dedication itself and to assert that it was not operative because the wakif himself did not act according to its terms; and on the other hand on the part of the plaintiff to deny the right of the defendants to raise these questions. In the letter (Ex. C) which was written by the defendants' solicitor in answer to the notice dated 12th June 1930 calling upon them to vacate by 30th June 1930, it was said:

"They (i. e., the defendants) state that they are occupying a portion of the premises No. 20 Moulvi Ismail Street, as heirs of the wakif and they have every right to do so. A reference to the wakfnama and the deed of confirmation of the said wakfnama dated 30th June 1876 will convince you of the fact. Your allegation that they are occupying a portion of the said premises with your client's leave and license is without foundation and my clients totally deny the same."

It is clear therefore that the defendants claim at that time was based upon the wakfnama and the ekrarnama, which purported to confirm the wakf and not to dispute it. It is quite true that in the written statement, substance of which has been already quoted above, the validity of the original dedication and the operative character of the wakf were challenged; but it is obvious that such a position is not consistent with the letter Ex. C."

Be that as it may, when the issue has been tried and decided, we think we should express our view on it. The original dedication does not seem faulty in any respect. The wakif went through the formality and the procedure of having the deed registered. There is nothing to indicate that it was not executed with the bona fide intention of creating a wakf. The intentions of the settler have to be gathered primarily from the terms of the deed, though attendant circumstances may be looked into if the intention is not apparent or clear from such terms, and subsequent circumstances also, but only if and so far as they throw any light on such intention: see *Masuda Khatun Bibi v. Muhammad Ebrahim* (1) and the cases referred to in it. According to Abu Yusuf whose tenets hold the field so far as Bengal is concerned [*Jinjira Khatun v. Muhammad Fakirulla Mia* (2)] the wakf becomes absolute and binding on the mere declaration of the wakif, and on such declaration being made his rights in the properties which form the subject-matter of the declaration become extinguished at once: *Debendra Nath v. Nohar Mal Jalan* (3). In the case of *Balla Mal v. Ataullah Khan* (4) their Lordships of the Judicial Committee have observed:

"Under the Act (meaning the Wakf Validating Act, 1913) a wakf is not rendered invalid merely

because it appears that the main object of the settlor was to make a settlement of his property on his family rather than to devote it to what are understood as charitable purposes, whereas with regard to a wakf created before the passing of the Act the test still is, as laid down by the Board in *Ahsanulla Chowdhury v. Amar Chandra Kundu* (5), *Mujibunnissa v. Abdur Rahim* (6), *Ramanandan Oshthar v. Veva Lalal Marakayar* (7) and *Solehman Quader v. Saiton Ullah Bahadur* (8), was there a substantial dedication of the properties included in the wakf to charitable purposes. The test may sometimes be difficult of application and in applying it, the Courts, especially, since the passing of the Act, will not be disposed to construe the provision of the deed too strictly; but still the question must remain whether the properties included in the wakf have been substantially dedicated to charity, or whether they have been put into wakf by the settlor with the real object of effecting some non-charitable purpose, such as, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Mahomedan law of succession. . . . The law as laid down by the Board is that the properties must be substantially dedicated to charity, and not . . . that the gift to charity should be substantial."

Judged in the light of these tests, the materials placed before the Court do not suggest that the wakf was anything else than a valid one. Once this is found, it is wholly immaterial whether its provisions were carried out or not, for that is a matter of breach of trust only. In so far therefore as it has been contended that the wakif himself did not act according to the terms of the wakf, or that he subsequently converted the premises No. 20, Ismail Street, into a family dwelling-house for himself or his heirs or that he disposed of some of the properties of the endowment as if they were personal properties of his own, allegations even if proved would not affect the validity or operative character of the wakf which in our opinion was in its inception a good Mussalman Wakf. In our judgment, no claim of the defendants based on the position that the premises was not a property of the endowment, but a personal property left by Muhammad Ismail can possibly succeed.

Subsidiary to the contention just dealt with, it has been argued that the wakif by the will which was subsequently executed interfered with the wakf. Once

5. (1890) 17 Cal 498=17 I A 28=5 Sar 476 (P C).

6. (1901) 28 All 233=28 I A 15=7 Sar 829 (P C).

7. A I R 1916 P C 86=44 I A 21=40 Mad 116=39 I C 235 (P C).

8. A I R 1922 P C 107=49 I A 153=49 Cal 820=69 I C 138 (P C).

1. A I R 1932 Cal 28=59 Cal 402=133 I C 557.

2. A I R 1932 Cal 423=49 Cal 477=67 I C 77.

3. A I R 1930 Cal 673=128 I C 195.

4. A I R 1927 P C 191=54 I A 372=108 I C 518 (P C).

it is found that the wakf was valid and operative, even the wakif himself had no power to interfere with it; but it is not at all clear that he, in fact, did so. The will as already stated is not forthcoming. It is very likely that it is being withheld by the plaintiff and so a presumption may not unreasonably be drawn against him that if produced it would have gone against some part of his case. The secondary evidence that has been sought to be given of its contents by certain witnesses is not of a convincing character at all. In a conveyance executed by the plaintiff in 1891 in respect of premises No. 19, Gardener Lane, it was recited that Muhammad Ismail being absolutely seized and possessed of the said premises had executed a will on 24th June 1875 by which he had partitioned and divided his real estate amongst his widow and children, and that after his death the said widow and children had amicably divided and partitioned the said estate amongst themselves by an instrument of partition dated 30th June 1876. The plaintiff's evidence betrays an anxiety on his part to deny all knowledge of everything. He deposed thus:

"I am not aware of any will of my father. No will of his is with me. I am not aware of any ekrarnama. I sold the property No. 19, Gardener Lane. In that respect I relied upon my brother-in-law Syed Tajammal Hossein, father of defendants 1 to 4, for everything I did as I was directed by him. I cannot understand English documents. He dictated what was recited in the kobala. He told me that everything was all right. So I accepted it as correct. I was not aware of its contents. I do not know that in this deed any reference to the will was true."

It is evident that these denials are not true and that they must have been made with an ulterior motive. But even then it cannot be inferred from them or from what was said in the conveyance that the will in any way concerned the wakf properties. On the other hand the avowed object of the ekrarnama and the basis on which it proceeded was to leave the endowment untouched. And further, the defendants, if they rest their case upon the ekrarnama, as they most undoubtedly do, must be held bound by the admission contained in it as regards the validity and operative character of the wakf. This being the position, what has to be considered next is whether the plaintiff should be held bound by the ekrarnama. It has been contended on behalf of the defendants, in the first

place, that the parties to this deed are bound by its terms inasmuch as it embodies a family settlement arrived at bona fide. It may be assumed from what is to be gathered from the terms of the deed, though there is no direct evidence worthy of belief to that effect, that there was an apprehension of dispute, that the arrangement was made bona fide with the object of removing that dispute which might induce a litigation the result of which was uncertain, and that there was a policy of giving and taking pursued in arriving at that settlement. This is apparent from the recitals in the deed itself; Muhammad Gous being given the status of a mutwalli, provision being made as to who should act as guardian of the mutwallis as minors, and arrangement being made as to which party was to discharge what share of the debts.

In these essentials the arrangement satisfies the requirements of a bona fide family settlement. But such settlement could not possibly affect any properties which were not the properties of the family but were the properties of an endowment validly created, the ownership of which belonged not to the parties to the settlement but to the Almighty. Under the guise of a family arrangement a party cannot enter into a transaction which he is not under the law competent to do and which is beyond his disposing power, *Indra Narain Manna v. Sarbajit Dasi* (9). It has next been contended that the plaintiff is estopped from questioning the settlement embodied in the ekrarnama because the plaintiff himself came in as a mutwalli by reason of the terms of the ekrarnama. On behalf of the plaintiff it has been argued that no estoppel can possibly arise as against the plaintiff because the plaintiff was a minor at the date of the ekrarnama and whatever arrangement may have been agreed by his mother as her guardian is not binding on her, and reliance in this behalf has been placed upon the decision of the Judicial Committee in the case of *Imambandi v. Mutsaddi* (10). As far as the last mentioned contention is concerned it is quite true that under the Mahomedan law a mother has no power as de facto guardian of her infant children to alienate or charge their immova-

9. A I R 1925 Cal 748=37 I C 980.

10. A I R 1918 P C 11=47 I C 618=45 I A 73=45 Cal 878 (P O).

ble property. But it cannot be disputed that if the minor on coming of age ratifies the arrangement or accepts a benefit under it, he would be estopped from questioning its validity. A more sound position for the plaintiff to take would have been to say that even though there might be an estoppel personal to the plaintiff by reason of such benefits as he might have received for himself under the ekrarnama, and which he would not be entitled to under the towliat, such estoppel can only be personal to the plaintiff and can in no way be operative as against the endowment.

Under the wakfnama the plaintiff was to be a mutwalli if he was competent and honest and under the ekrarnama he became one of the mutwallis. It is possible that there was no objection to his being the mutwalli on the ground of want of competency and honesty, and in that way he, by being appointed mutwalli under the ekrarnama, got nothing under it to which he was not entitled under the wakfnama. But, that he obtained certain advantages under the ekrarnama which he had not under the wakfnama, cannot be seriously disputed for, as far as can be gathered now, it removed a dispute as to mutwalliship; it divided the liability for the debts and it enhanced the remuneration for the mutwalli which in the absence of the accounts, which must be with him and which he has not filed, must be taken to have been drawn by him since then. That there may be an estoppel personally to that extent as against the plaintiff is a matter on which we entertain no doubt. It has been argued that there can be no estoppel where both the parties made an agreement with full knowledge of the real facts. This proposition cannot be disputed. But the defendant may say that though the property was wakf property and they were aware of that fact they were not aware that an arrangement of the character embodied in the ekrarnama was outside the competency of the mutwalli to make. Of course, the defendants rested their case upon a much higher footing, alleging that they and their father had spent money on improvements and repairs and the plaintiff has reaped the benefit thereof, but in this respect their case has failed.

This leads us to a consideration of the

next question that arises, namely whether this estoppel which is personal to the plaintiff precludes him from going to recover possession on behalf of the endowment. In the case of *Jagannath Mohinee Dosses v. Sookha Mony Das* (11) their Lordships of the Judicial Committee held that a former abuse of trust in another instance could not be pleaded against a trustee who sought to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he was seeking to protect the property, though it would be a reason for excluding him from administration of the property as shebait. The question of estoppel did not arise in that case. Their Lordships observed:

"The Court could not with propriety say: 'We will decline to protect the property and leave it further exposed to loss,' and decline to make a declaration that it is trust property merely because they would not trust the plaintiff with its administration."

Their Lordships made a decree declaring that the properties were and continued dedicated to a trust, but made no decree for possession which had been prayed for and further declared that the decree was to be without prejudice to any further suit or proceedings for the enforcement of the trust declared on the appointment of a proper shebait. It has been contended before us on behalf of the plaintiff that it is always open to a shebait or a trustee to sue for recovering trust property alienated by himself and that there is nothing to stand in the way of his succeeding in the suit once he establishes that the alienation was unauthorized and beyond his powers. The following observations in *Narain Das v. Abdul Rahim* (12) (at p. 879 of 47 Cal.) have been relied on in this connection:

"A mutwalli is a mere manager and in the case of public charitable endowment, such as the present the legal ownership of the property dedicated is the Divine Being or in the charity created in his name. A transfer by a mutwalli who assumes to deal with the trust property as if he were the true owners, in breach of his duty and in fraud of the trust reposed in him, is ultra vires and may be avoided by timely proceedings taken for the purpose."

The observations do not support the position contended for, and it will be seen that the case in which they were

11. (1870) 14 M I A 389=17 W R 41=10 Beng. L R 19=2 Suthor 612=3 Sar 23 (P O).
12. A I R 1920 Cal 379=53 I C 705=47 Cal 566.

made was a suit by the successor of a mutwalli who had made the alienation. Reference in this connection has also been made to the decision of the Patna High Court in the case of *Muhammad Fahimul Haq v. Jagat Ballaw Ghosh* (13) (at p. 400 of 2 Pat.) where it has been said:

"The general principle in these cases is that where the transfer is void in law no question of equity as between the transferor and the transferee can arise."

Whether the principle can be laid down in so general terms is a matter which we need not discuss. But we are not prepared to hold that a Court is so powerless as to feel compelled in all cases to place the property again in the hands of the same delinquent mutwalli or shebait who had previously committed a breach of trust in respect of it and who now seeks to avoid the consequences of his own act, even though proper defences are taken resisting such a course. That a trustee of an endowment may under circumstances be estopped from questioning his own breach of trust is a proposition that cannot be denied: *Sidhu Sahu v. Gopi Charan Das* (14). It is unnecessary however to pursue this matter any further because it has not been pleaded in this case on behalf of the defence that by virtue of any misconduct on the part of the plaintiff he is disentitled to recover possession of the properties in his capacity as mutwalli. There was no plea of the character, and there was no issue raised in order to determine whether and if so to what extent the plaintiff was debarred from suing for possession in his capacity as mutwalli, nor any issue as to what sort of a decree, if any, he was entitled to in the circumstances of the case. In our judgment therefore, in so far as the present case is concerned, there is nothing in the nature of a bar to stand in the way of the plaintiff getting a declaration to the effect that the property in suit is the property of the endowment in respect of which he is the mutwalli and also an order that the said property be restored to the endowment. In other words, in our opinion, the plaintiff is entitled to succeed, in his claim for khas possession, if the defendants fail to establish their right to remain on the premises.

So far as this right is concerned the material on which the defendants rely is the ekrarnama; the wakfnama gives them no such right. So far as the ekrarnama is concerned, it is impossible to read its terms as creating any right in favour of anybody except the heirs of Muhammad Ismail who were parties to the deed. We have examined its clauses as carefully as possible, but we can find no means of construing it as creating any right whatever in favour of any descendants of the said heirs. Unless such an interpretation is permissible the defendants get no benefit from its terms.

The last contention of the defendants is, as it must be, that the claim is barred. It has been maintained on their behalf that Art. 142, Lim. Act, is the article to apply. As authority they rely on the decision of the Judicial Committee in the cases of *Bageswari Charan Singh v. Jagarnath Koeri* (15). In that case there was an alienation, a gift, void ab initio and consequent on it a discontinuance of possession of the real owner. In the present case there was no transfer of any interest in immovable property at all but only permission to reside in the premises, and so there was no dispossession nor any discontinuance of possession on the part of the plaintiff; notwithstanding the permission, such possession as the grantor of the leave of license could have, he had in the premises. It has also been argued that the defendants and their predecessors acquired by virtue of adverse possession for over twelve years a limited interest, namely, a right to reside which could not be defeated. One amongst several answers to this contention is that there was never any such right asserted adversely to the plaintiff at any time before the solicitor's letter Ex. C. In our opinion the article applicable to the case is Art. 144 of the Act, and time began to run only after the plaintiff's right to khas possession was denied, when only and not before the defendants' possession became adverse to the plaintiff. We can find no justification for holding that the plaintiff's claim is barred.

We have no option therefore but to dismiss the appeal and uphold the decision of the Court below. As we are not satisfied that the plaintiff really wants

13. A I R 1923 Pat 475=74 I C 408=2 Pat 391.

14. (1918) 18 I C 969.

15. A I R 1932 P C 56=136
180=11 Pat 272 (P C).

the rooms for the purposes of the wakf, and as a certain amount of deferential treatment in respect of the descendants of the founder of the wakf at the hands of the plaintiff, the present mutwalli, is apparent from the very frame of the suit, we would not make any order for costs in favour of the plaintiff so far as the appeal is concerned.

K.N./R.K.

*Appeal dismissed.***A. I. R. 1933 Calcutta 109**

MUKERJI AND BARTLEY, JJ.

(Sri Sri) Gopal Sridhar Mahadeb and others—Defendants—Appellants.

v.

Sashi Bhusan Sarkar and others—Plaintiffs—Respondents.

Appeal No. 30 of 1931, Decided on 23rd May 1932, against original decree of First Class Sub-Judge, Faridpore, D/- 22nd December 1930.

(a) Contract—Specific performance may be granted when essential terms are settled—Specific Relief Act (1877), S. 21 (c).

If the essential terms of a contract are settled the contract may well be regarded as complete and concluded and may be enforced or specifically performed, either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description. [P 111 C 2]

(b) Principal and Agent—Nature of proof of implied authority of agent to settle lease indicated—Otherwise principal is not bound—Contract Act (1872), S. 237.

It was sought to be established that D had an implied authority to settle a lease on behalf of B, a shebait. The lower Court found that D was acting as if he was the real shebait.

Held: that the finding was insufficient to prove implied authority. What has to be found in this connexion was that D had implied authority to enter into a contract of the present nature, and for that it would be necessary to find that he had been authorized to do some work of this class to which the contract belongs. If an authority to settle this lease could be inferred from the facts and circumstances, it would have been more than enough; or if it could be established that he had authority generally to make all settlements, that also would have been sufficient; or if the settlement of this lease was necessary in order to do an act which D was authorized to do, that also would have sufficed. But in the absence of any such proofs, the authority cannot be held to be proved so as to bind the principal: *Case law referred.* [P 113 C 1]

(c) Hindu Law—Perpetual minority of deity is not under Hindu law—Valid contract on behalf of deity is capable of specific performance.

The analogy of minority of deities is a pure fiction for which no authority is to be found in Hindu law itself and there is no principle on which on such analogy a contract on behalf of a deity, otherwise good and valid can be taken

out of the class of contracts of which specific performance may be granted under the law.

[P 113 C 1]

(d) Trusts Act (1882), S. 47—Duties of trustee cannot be delegated—Agent acting for shebait in matter which shebait was bound to look to—Shebait repudiating agent's acts—Specific performance cannot be obtained—Specific performance.

It is open to a trustee or a shebait to appoint a sub-agent, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment.

Where the granting of a lease was a matter with regard to which D, the shebait, was bound to exercise her judgment, and when it is found that the agent under a supposed authority which must have purported to delegate that exercise of judgment to him made the contract, and when the shebait repudiates the contract at the earliest opportunity available to her, it is impossible to uphold this delegation, which is a good deal more than the mere employment of a machinery for carrying out the duties which attach to the shebait in the fiduciary character she occupies, and it is impossible to hold that specific performance should be granted in respect of it: *A I B 1922 P. C 209, Rel. on.*

[P 113 C 1, 2]

Jogesh Chandra Roy, Amarendra Nath Bose and Nirmal Chandra Chakravarti—for Appellants.

Atul Chandra Gupta, Deb Lal Sen, Bhudhar Halder and Biman Chandra Bose—for Respondents.

Suriya Kumar Aich—for Deputy Registrar.

Judgment.—This is an appeal from a decision of the Subordinate Judge, First Court, Faridpur, decreeing a suit for specific performance of a contract of lease. Defendants 1, 2 and 4 are the appellants. The case of the plaintiffs, who were eleven in number, was the following: There is a jalkar mehal which is the debutter property of defendant 1, a group of deities, of whom the shebait is defendant 2 who is the mother of defendant 3, her only son. The jalkar was under an ijara lease with defendant 4, for a period of four years and a half which was to expire in Chaitra 1336 (=April 1929). On 16th Ashar 1335 (=30th June 1928) defendant 3 on behalf of defendant 2 having announced at Goalundo Ghat that on the expiry of the said lease the jalkar mehal would be again let out in ijara for a term of five years, there was a verbal contract between him and the first four plaintiffs to the effect that the said plaintiffs would be granted the said lease at an annual rent of Rs. 6,998; that they would pay defendant 2 Rs. 10,000 as rent

in advance, out of which Rs. 2,000 was to be credited against the rent every year; that the remainder of the amount of rent would be paid in eight specified instalments every year; and that defendant 2 would execute a potta in favour of the said plaintiffs before the puja of 1338 and the said plaintiffs would also execute a kabuliat at the same time. In pursuance of the said contract the said plaintiffs paid Rs. 2,355 in several instalments up to 22nd Kartic 1335 (=8th November 1928).

On 24th Aswin 1335 (=10th October 1928) defendant 3 sent to plaintiff 4 a draft of the lease through an officer of his and informed him that the documents would be executed after the puja was over. On 14th Kartic 1335 (=31st October 1928) another officer was sent by defendant 3 for purchasing the stamps and they were purchased on 16th Kartic 1335 (=2nd November 1928), the price thereof, Rs. 210, being paid by plaintiff 4 on the understanding that it would be credited against the ijara rent. Defendant 3 put off the execution of the document on one pretext or another and ultimately gave out in Aswin 1336 (=September 1929) that his mother, defendant 2, would not grant the lease. The plaintiff's case was that

"defendant 3 was performing all acts of management, such as looking after, preservation and settlement, etc., of the said debuttar and other properties,"

and

"as a matter of fact defendant 3 was the authorized agent of defendant 2."

Their case further was that defendant 4, with full knowledge of the aforesaid contract and of the receipt of money thereunder got a fresh lease of the said jalkar executed in his favour by defendant 2, and that in fact it was he who had induced defendants 2 and 3 to break the aforesaid contract. Various defences were taken. Defendant 4 alleged inter alia that he was a bona fide transferee for valuable consideration. Defendant 3 pleaded that there was no concluded contract with the eleven plaintiffs but only a proposal on the part of the first four plaintiffs to take a lease from defendant 2 through him, they having asked him to recommend to her the granting of lease upon the terms alleged and having proposed to pay him Rs. 1,000 and having agreed to pay the advance rent of Rupees 10,000 before the puja of 1335 (=1928);

that the said plaintiffs deposited some money but failed to pay up the entire sum of Rs. 10,000 before the puja of 1335 (=1928); that in Pous 1335 (=December 1928) the said plaintiffs asked for extension of time but he refused and asked them to take back the deposit, and in the same month defendant 2, on coming to know of the matter rebuked defendant 3 for making negotiations with the plaintiffs for the lease and asked him to return the money; and that the draft of the potta filed by the plaintiffs was not genuine.

Defendants 1 and 2 took the defence that defendant 3 was not an authorized agent for making such a contract; that she had no knowledge of the contract on the deposit; that when she came to know that such proposal and negotiations had been made she at once turned them down; that the plaintiffs were tenants and ijaradars under the zamindars of Teota with whom she had litigation and who had a jalkar adjacent to this one and so the proposed lease would be undesirable; that defendant 4 had connexion with the estate for a long time before, and his father, an old officer of the estate, held this jalkar in ijara from long before, and he himself was the ijaradar for the period that was running; and that on 18th Sravan 1336 (=3rd August 1929) the lease was granted to him by defendant 2 for five years (from 1337 to 1341) on receipt of an advance rent of Rs. 12,000 and at a yearly rent of Rupees 7,000 out of which the said advance was to be deducted in instalments. The Subordinate Judge decreed the suit in part. He ordered specific performance of the contract of lease as embodied in the draft in favour of plaintiffs 1 to 4 and khas possession of the jalkar to be delivered to them on their paying the balance of the advance rent, i. e. Rs. 7,435. He dismissed the suit in so far as it was of the plaintiffs other than Nos. 1 to 4. (Their Lordships in disposing of these matters held that the case was to be decided on the footing that defendant 3 was to be regarded as agent of defendant 2 and proceeded). The two questions that have to be primarily considered are: first was there a concluded contract which can be enforced; and second, if so, had defendant 3 authority to enter into it on behalf of defendant 2? To take the first question first. Upon

the evidence which the plaintiffs have adduced there can be no reasonable doubt that there was a contract as alleged on their behalf. That the terms were proposed and agreed upon as between plaintiffs 1 to 4 and defendant 3 was also admitted on behalf of the latter except that it was alleged on his behalf that the understanding was that he would be paid Rs. 1,000 and would recommend to defendant 1 the granting of the proposed lease. Defendant 3 did not depose nor was any evidence adduced to support his version of the transaction. We think the Subordinate Judge was right in holding that defendant 3 deliberately omitted to put himself forward and we think that even though he was ill he could have given his deposition on commission if only he was not unwilling to face the trial. The points, upon which reliance was placed for the purpose of establishing that there was no complete contract but only a proposal depending on the acceptance of defendant 2 on the recommendation of defendant 3, are that the receipts for the moneys paid show that the moneys were to be held in deposit, that the terms of the alleged contract were not put into writing at the time, that as has been deposed to by plaintiff 1, when the latter suggested to defendant 3 that they should be put down in writing, defendant 3 replied that he would send a draft patta which would be enough, that even so late as on 31st October 1928 [Ex. 2 (d)] defendant 3 was inquiring as regards the names of the persons in whose favour the lease had to be executed, and further that the draft itself contained many new terms and conditions which were admittedly not thought of by the parties at the time of the said contract.

In our opinion these facts do not necessarily show there was no completed contract. It is quite true that the contract that can be enforced is the original contract and not the contract embodied in the draft; and in this respect the Subordinate Judge's judgment can only be upheld on the footing that the plaintiffs raised no objection to take the lease in that form. But we are unable to hold that merely because the moneys received were allowed to remain in deposit in anticipation of the due execution and exchange of documents between the parties or that the details were left to be settled in future when the draft would

be tendered, or that the names of the actual parties in whose favour the lease would be executed were not known to defendant 3, the contract, the essential terms of which had been agreed upon, is to be regarded as being incomplete so as to be incapable of specific performance or unfit to be enforced. If the essential terms of a contract are settled, the contract may well be regarded as complete and concluded and may be enforced or specifically performed, either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description. Judged by this test, the terms contained in the draft Ex. 3 may not satisfy its requirements. But the plaintiffs not having raised any objection and on the other hand being willing to have the lease in that form, it is not open to the appellants to contend that there was no complete or concluded contract on 16th Ashar 1335 (30th June 1928) to the extent that the terms, which are all the essential terms of a contract of this description, were settled between the parties. In the result we hold that there was a complete and concluded contract between the parties as alleged on behalf of the plaintiffs. We are also of opinion that the plaintiffs' version of the subsequent events, except as regards a few matters which however are of no real consequence, is true in the main. We think that the plaintiffs' account of the deposits and payments that were made, of the sending of the draft patta by defendant 3 to them, of the purchase of the stamp paper for the documents and of the subsequent refusal of defendant 3 to have the lease executed has been satisfactorily proved.

Of the points on which we feel doubtful about the truth of the plaintiffs' story, a few require to be mentioned in view of the defence taken, namely that the plaintiffs themselves abandoned the contract or at any rate failed to perform their part of it. (Their Lordships, after dealing with these matters, concluded that it was not established that the plaintiffs had abandoned the contract or were in default.) The second question is the question of authority. It is admitted that there was no express authority from defendant 2 in favour of defendant 3. An implied authority in his favour however has been sought to be

established: Defendant 2, in her anxiety to repudiate the contract, has, it seems, endeavoured to put her case too high in her own evidence, and consequently her own evidence in this respect cannot be trusted. Equally unconvincing is the evidence of her witnesses who have endeavoured to make out that defendant 3 took no part whatever in the affairs of the estate. The evidence which has been adduced on behalf of the plaintiff sufficiently establishes that defendant 2 trusted defendant 3 and it was the latter who really did the works necessary to be done for the management of the estate. He was her only son, and however wayward he may have been, she does not appear to have withdrawn her confidence from him or excluded him from conducting the affairs of the estate. It is quite possible that in matters relating to the management of the estate it was his voice that used to carry weight, that the officers of the estate would look upon him as their master and carry out his bidding and that the lady herself did not in fact interfere with his doings. Notwithstanding all this it will still be necessary to find, in order to bind defendant 2 by any act of defendant 3 that the latter had authority not necessarily express, but such as may be implied by the facts and circumstances of the case. The term "agency" is very wide in its import. In *Bh Blackburn Low & Co. v. Vigors* (1) Lord Halsbury observed:

"I cannot but think that the somewhat vague use of the word 'agent' leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge and intentions of their principal; and whether his acts are the acts of his principal depends upon the specific authority he has received."

In the case of *Bombay Burma Trading Corporation Ltd. v. Mirza Mahmedally* (2) their Lordships of the Judicial Committee referred to an earlier decision of the Board in *Mackay v. The Commercial Bank of New Brunswick* (3) in which the

rule was laid down as to the principles which regulate the liability of a master for the acts of an agent done without his express authority but still within the scope of the authority of the agent. Their Lordships also quoted with approval the observation of Willes, J., in *Barwick v. The English Joint Stock Bank* (4) as containing as clear an exposition of the law upon this subject as is anywhere to be found. They are as follows:

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and in the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit . . . In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

For instance where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him which authority under circumstances of emergency must be deemed to include a power to borrow on exceptional terms outside the ordinary course of business, it was held that the lender was not bound to inquire whether the emergency had arisen or not, but that he was entitled to recover from the principal if he lent to the agent bona fide and without notice that the agent was exceeding his mandate: *Montaignac v. Shitta* (5). So also where an agent in contracting on behalf of his principal has acted within the terms of a written authority given to him by his principal, but the existence of which was not known to the other party to the contract, that principal cannot, if the other party has acted bona fide, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests and those of the principal: *Hambro v. Burnand* (6). That if the

1. (1887) 12 A C 581.

2. (1860) 4 Cal 116=5 I A 120=3 Sar. 828 (P C).

3. (1874) 5 P C 394=48 L J P C 31=30 L T 180=22 W R 473.

4. (1868) 2 Ex 259=36 L J Ex 147=16 L T 461=15 W R 877.

5. (1890) 15 A C 357.

6. (1904) 2 K B 10=75 L J K B 669=30 L T 803=52 W R 563=9 Com Cas 251=20 T L R 398.

act of the agent falls within the class of acts delegated to him, the mere fact that the interest at stake is considerable or extraordinary, would not make any difference appears sufficiently from the decision in *In re, Drabble Bros.* (7). Bearing these observations in mind we have to examine the materials which have a bearing on this question. (Their Lordships summarized the evidence for the plaintiff and proceeded). The Subordinate Judge upon the above evidence has come to the conclusion that defendant 3 had been acting as if he was the malik or the shobait and that it shows that he and not defendant 2 was the real shobait of the deities, defendant 1. We are of opinion that all this evidence, giving to it the fullest weight, would not go anywhere near what has to be proved in this case to enable the plaintiffs to succeed. Moreover, this finding of the Subordinate Judge, even if correct, would not in our opinion sufficiently support his decision. What has to be found in this connexion is that defendant 3 had implied authority to enter into a contract of the present nature, and for that it would be necessary to find that he had been authorized by defendant 2 to do some work of this class to which the contract belongs.

Of course if an authority to settle this jalkar could be inferred from the facts and circumstances, it would have been more than enough; or if it could be established that he had authority generally to make all settlements, that also would have been sufficient; or if the settlement of this jalkar was necessary in order to do an act which defendant 3 was authorized to do, that also would have sufficed. But in our opinion no such thing can be held to have been established in the present case. It may be that defendant 2 ordinarily left the affairs of the estate in the hands of defendant 3 and so long as she did not interfere everything went on all right. But it has not been proved that she ever granted him any power or authority to enter into a contract of this kind or class on her behalf. Some evidence has been given by the plaintiffs as witnesses in this case to show the nature of work which they had seen defendant 3 do in connexion with the estate. That too

is very general evidence and falls far short of establishing a liability on the part of a principal on the ground that his words or conduct induced third parties to believe that the acts of the agent were within the scope of the agent's authority, on the principle underlying S. 239, Contract Act. It may also be pointed out here that the plaintiffs have not rested their claim on any such estoppel. Defendant 2 has not produced the Jama Kharach of the estate for the year 1335. We are not satisfied that the explanation given for its non-production is true. It is possible that if produced the Jama Kharach would have shown that the moneys received under the contract were credited in it. But this fact, even if it be assumed to be proved, would not in our opinion carry the case any far. In our judgment, the plaintiffs have failed to prove any facts or circumstances which would justify us in holding that defendant 2 was bound by the contract which defendant 3 had made. What we have just said is sufficient for the disposal of this appeal. But some of the other conclusions of the Subordinate Judge have also been either challenged or sought to be supported before us and so we propose to express our opinion on them though quite briefly. (Their Lordships after agreeing with the lower Court in holding that the contract was not injurious to the defaulter and that defendant 4 had knowledge of the contract when he took the lease, proceeded). It has been argued that the deities are perpetual minors and so no contract made on their behalf should be specifically enforced. The analogy of minority of deities, in our judgment, is a pure fiction, for which no authority is to be found in Hindu law itself and we can conceive of no principle on which on such analogy a contract, otherwise good and valid, can be taken out of the class of contracts of which specific performance may be granted under the law.

It has also been contended that even if defendant 2 had authorized defendant 3 to enter into the contract, such authority should not be upheld and so specific performance should be refused, on the principle laid down by the Judicial Committee in the case of *Bonnerji v. Sitanath Das* (8). In that case it was

7. (1980) 2 Ch 211=99 L J Ch 845=(1930) B & O R 168=148 L T 387=74 S J 464.

8. A I R 1922 P C 249=58 I O 140=49 I A 46=49 Cal 325 (P C).

held that neither a trustee nor a person in a representative capacity can delegate his authority; consequently a lease is invalid if it is granted by a person as attorney for one who is either a trustee or manager of the property leased and who did not negotiate or consider the lease or know of it until after its execution; this is so whether the executant acted under a general power of attorney or under a power specially relating to the management of the property. Their Lordships observed:

"Their Lordships therefore have considered what the position would be supposing such document had, in fact, been proved and had been shown to be a special power purporting to authorize dealings with the trust estate, and they are of opinion that in that event it could not have availed the defendants. The reason for this is plain. In whatever capacity Pratap held the land in question the capacity must have been a representative one. It was said that he was not in the strictest language a trustee; but be it so, his position was none the less a representative one, and it being plain that he never negotiated nor knew of the lease until after it was executed; if what was done, was done by virtue of a power of attorney it could only have been done because the power had delegated the representative authority that he possessed to a third party. The duties of Pratap, however they may be defined, were in their nature fiduciary, and fiduciary duties cannot be the subject of delegation. If therefore the document had been before their Lordships it would have been impossible to have supported the contention that it conferred the power to negotiate and execute the document upon which the whole of the defendant's case rests."

In the present case the plaintiff's case rests wholly on the foundation that defendant 3 had authority to conclude the contract for the lease, without any reference to defendant 2 and that for the completion or the conclusion of the contract no knowledge or consent of defendant 2 was necessary. Immediately, as it is conceded that her sanction was necessary, the contract would lose its character as a final agreement fit for specific performance. It is open to a trustee or a shobait to appoint a sub-agent, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment. As Bowen, L. J., observed in, *In re Speight, Speight v. Gaunt* (9), at p. 763:

"The proposition that as trustees or agents they cannot delegate means this simply: that a man employed to do a thing himself has not the right to get somebody else to do it, but when he

is employed to get it done through others, he may do so."

In *Learoyd v. Whiteby* (10) Lord Watson observed:

"Whilst trustees cannot delegate the execution of the trust they may, as has been held by this House in *Speight v. Gaunt* (9), avail themselves of the services of others wherever such employment is according to the usual course of business."

The principle has been explained by Kekewich, J., in *Re Wroth* (11) in these words:

"A trustee is bound to exercise discretion in the choice of his agent; but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not however follow that he can entrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it is his conclusion, that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs."

It cannot be denied that the granting of a lease of this character was a matter with regard to which defendant 2 as shobait, was bound to exercise her judgment, and when it is found that defendant 3 under a supposed authority which must have purported to delegate that exercise of judgment to him made the contract, and when defendant 2 repudiates the contract at the earliest opportunity available to her it is impossible to uphold this delegation, which is a good deal more than the mere employment of a machinery for carrying out the duties which attach to defendant 2 in the fiduciary character she occupies, it is impossible to hold that specific performance should be granted in respect of it. The result is that in our judgment the plaintiff's claim for specific performance must fail. But we see no reason why plaintiffs 1 to 4 should not get a decree in terms of prayer 4 of the plaint. The decree of the Court below therefore should be set aside, and in lieu of it a decree should be passed in favour of the plaintiffs and against the heirs of defendant 3 for a sum of Rs. 2,555, carrying

10. (1887) 12 A C 527=51 L J Ch 40=68 L Q T 98=76 W R 721.

11. (1889) 42 Ch D 674=58 L J Ch 718=61 L T 288=57 W R 779.

9. (1889) 22 Ch D 727.

interest at 12 per cent per annum from 1st October 1925 up to the date of realization. The said plaintiffs will also get their costs from those heirs in respect of the suit and of this appeal, hearing-fee in the appeal being assessed at 15 gold mohurs. The decree will be realized from the assets of defendant 3 in the hands of the said heirs. All other parties will bear their own costs in this litigation. The cross-objection has not been pressed and it is dismissed, but with no order as to costs.

M.N.

*Order accordingly.***A. I. R. 1933 Calcutta 115**

RANKIN, C. J. AND C. C. GHOSE, J.
(Mallik) Ramlal—Appellant.

v.

Official Assignee of Calcutta and others
—Respondents.

Appeal No. 96 of 1931, Decided on 1st February 1932.

Presidency Towns Insolvency Act (1909), Ss. 17 and 51—Prior adjudication under Provincial Insolvency Act passed by Delhi Court—Subsequent order of adjudication under Presidency Towns Insolvency Act by Calcutta Court—Act of insolvency relied on by Calcutta petitioning creditor prior to adjudication order in Delhi—Prior order in Delhi vested property of insolvent—Unless that order was dislodged proceedings under later order would be of no effect.

Under the Provincial Insolvency Act the Delhi Court passed an adjudication order and two days later the Calcutta Court passed another order of adjudication under the Presidency Towns Insolvency Act against the same insolvent. The act of insolvency relied upon by the Calcutta petitioning creditor was prior to the adjudication order made in Delhi.

Held: that the prior adjudication order passed by the Delhi Court vested the property of the insolvent in the Delhi Court, although under the Presidency Towns Insolvency Act the title of the trustee relates back to the date of the first available act of insolvency having regard to the date of the petition. Hence unless the proceedings under the prior adjudication order were dislodged the proceedings under the later order of the Calcutta Court would have no effect: *A I R 1919 Mad 566, Rel. on.* [P 116 C 1]

The Advocate-General, S. N. Banerjee and S. B. Sinha—for Appellant.

Gregory—for Official Assignee.

A. K. Roy and Sambhu Banerjee—for Respondents.

Rankin, C. J.—This is an appeal by one Malik Ramlal who is stated to have on 4th February 1930 presented a petition in the Delhi Court for adjudication of the firm of Tulsidas Kissendayal and on whose petition the Delhi Court made an order of adjudication against these par-

ties on 13th February 1930. At the time these proceedings were initiated and taken to completion the position was that the debtors had committed an act of insolvency under the Presidency Towns Insolvency Act on 4th January, a petition in insolvency had been presented against them in Calcutta and this Court in Calcutta on 17th January had appointed the Official Assignee interim receiver of their assets in Calcutta, Delhi, Karachi and elsewhere. On 15th February, that is, two days after the date of the adjudication order of the Delhi Court, this Court made an adjudication order. In those circumstances, an application was made by the Official Assignee to the Delhi Court for an order under S. 36, Provincial Insolvency Act, that that Court should cancel the insolvency proceeding pending before itself or stay those proceedings. That application was dismissed by the Delhi Court. A Calcutta creditor had at or about the same time presented a similar application which application has not yet been disposed of by the Delhi Court. In these circumstances, the Official Assignee in Calcutta who had taken possession of certain Calcutta properties as interim receiver applied to the learned Judge on the original side sitting in insolvency for a direction whether the estate should stay under his own management or whether the proceedings ought to be carried on by the Official Receiver, Delhi.

The learned Judge before whom it first came made an order and directed that a copy should be sent to the Judge of the insolvency Court in Delhi and to the receiver. Nothing happened as a result of that and, on 1st September 1931, another learned Judge exercising the insolvency jurisdiction of this Court directed the Official Assignee to take steps to sell the property in his hands. It appears that he also directed the Official Assignee to appeal from the order of the Delhi Court refusing to take action under S. 36, Provincial Insolvency Act. But Mr. Roy informs us that this latter course would be infructuous as the time for appealing has elapsed.

We have therefore to say whether the learned Judge's direction to the Official Assignee to sell the Calcutta property in his hands should be allowed to stand. Now, it is true that under the Presidency Towns Insolvency Act, the title of the trustee relates back to the date of the

first available act of bankruptcy having regard to the date of the petition and in this case the act of bankruptcy relied upon by the Calcutta petitioning creditor was prior to the adjudication order made in Delhi. It has however been decided in the case of *Official Assignee of Madras v. Official of Rangoon* (1) that the adjudication order which is prior in time vests the property of the insolvent regardless of the doctrine of relation back which might be applied in favour of the Official Assignee under the later order. In these circumstances it appears to be plain that on 13th February 1930 the property with which we are concerned really vested in the insolvency Court at Delhi or its receiver and, in my judgment, it was not in these circumstances open to the learned Judge on 1st September 1931 to give a direction to the Official Assignee here to sell the Calcutta property.

The position is of course that unless the proceedings under the prior adjudication order can be dislodged, the proceedings under the later order will have no effect, and, if it does not seem necessary on this application to do more than deal with the question whether the property should be sold, I may point out that the course provided by the statute in the matter is simply this that if in the end the Delhi Court cannot be induced to set aside its own order or stay the proceedings thereunder then it will be for this Court on a proper application to consider whether it should not stay its own proceedings and annul its own adjudication under S. 22, Presidency Towns Insolvency Act. I do not think that we ought to make any order under that section now. We will leave it to any person who may desire to have such an order to apply for it and obtain, if he can, having regard, in particular, to the fact that the application by the Calcutta creditor in Delhi has not been disposed of. But all that is necessary on the present appeal to say is that we set aside that part of the order of the learned Judge by which he directed the Official Assignee to sell the Calcutta property in his hands. The Official Assignee will have his costs out of any assets that may be in his hands. Both Mr. Roy's client and Mr. Banerjee's client will have liberty to add their costs

in these proceedings before the learned Judge and before us to their proofs in any administration in this Court.

C. C. Ghose, J.—I agree.

S.N./R.K.

Order set aside.

A. I. R. 1933 Calcutta 116

JACK, J.

Kabedali Mandal—Petitioner.

v.

Dasura Mura and others—Opposite Parties.

Civil Rule No. 1500 of 1931, Decided on 4th May 1932, against order of Munsif, Second Class, Bogra.

Oaths Act (1873), Ss. 8 and 9—Special oath can be administered under S. 9 only when initiative comes from parties.

It is only when the initiative comes from the parties that a special oath can be administered under S. 9 as according to S. 8 the initiative must come from the parties and not from the Court. [P 116 C 2]

Jatindra Mohan Choudhury and Daluram Bose—for Petitioner.

Manindra Narayan Majumdar—for Opposite Parties.

Judgment.—This rule has been issued on the opposite party to show cause why the order of the Munsif, Second Court of Bogra, dismissing the plaintiff's suit on a money bond should not be set aside and a re-trial ordered on the ground that the procedure adopted by the Munsif was very irregular inasmuch as he asked the parties to swear touching books which he represented to them to be sacred books and allowed his decision to be influenced by the refusal of the plaintiff to swear touching those books. The opposite party had put in an affidavit in which they state that this took place not after the evidence was recorded as stated by the petitioner. It was after the Court had asked the parties if they wished to take special oath and neither party took any oath, but both parties agreed to take special oath, that the Court proceeded to record evidence and decided the case on its merits. Taking for granted that the procedure adopted by the Munsif was as represented in the affidavit of the opposite parties, it still appears that the Court took the initiative in suggesting that the parties should take special oath whereas under S. 8, Oaths Act, the initiative should come from the parties and not from the Court and it is only under such conditions that special oath can be administered under

S. 9. Inasmuch as it is possible that the learned Munsif may have been influenced by what took place in reference to this special oath, I think in the interests of justice a retrial should be ordered. The order of the learned Munsif is accordingly set aside and the suit remanded for retrial by some other Court. Costs of this rule will abide by the result, hearing-fee being assessed at one gold mohur.

R.M./R.K.

Case remanded.

A. I. R. 1933 Calcutta 117

S. K. GHOSE, J.

Ganesh Chandra Khan and Sons—
Petitioners.

The Corporation of Calcutta—Opposite Party.

Criminal Revn. No. 585 of 1931, Decided on 4th August 1931.

(a) Calcutta Municipal Act (1923), S. 386 (1) (a)—Place of occurrence not mentioned in summons—Omission is material irregularity.

Where a place of occurrence is not specifically mentioned in the summons issued to answer a charge under S. 386 (1) (a) such omission is a material irregularity. [P 117 C 2]

(b) Calcutta Municipal Act (1923), S. 386 (1) (a)—Person convicted on charge under S. 386 (1) (a) on plea of guilty—No evidence taken nor plea recorded in accordance with provisions of S. 243, Criminal P. C.—Plea denied—Conviction held not sustainable—Criminal P. C. (1898) S. 243.

A person was convicted on a charge under S. 386 (1) (a), Municipal Act, on a plea of guilty for storing lime without license at place N without taking evidence and without recording the plea in accordance with the provisions of S. 243, Criminal P. C. The accused could not be said to have pleaded guilty to the charge with respect to the place of N.

Held: that the conviction could not be sustained. [P 118 C 1]

*Hiralal Ganguly and Satindra Nath Chatterjee—*for Petitioners.

*Gopendra Krishna Bannerjee—*for Opposite Party.

Judgment.—The petitioner in this Rule is a firm carrying on business in lime and its case is that since May 1931 the articles belonging to the firm had been stored at 11 Neogi Ghat Street. The owner of the firm one Ganesh Chandra Khan, resides at 75-B, Baghbazar Street, but nothing is stored there. On 2nd June 1931 the firm applied to the License Officer of the Calcutta Corporation for a license in respect of dealing in and storing of lime at No. 11 Neogi Ghat Street, and again applied on 5th June

1931 to the Health Officer, District 1, for a license as aforesaid. These applications have not yet been disposed of. But on or about 6th June 1931, a summons was left at the residential house of Ganesh Chandra Khan. In that summons the petitioner firm was required to answer a charge made under S. 386 (1) (a), Calcutta Municipal Act of 1923, for using or attempting to use the premises No. 73-B, Baghbazar Street, for storing lime without license. The date of the offence was given as 2nd March 1931, but there was no mention of premises No. 11 Neogi Ghat Street. On 8th June Ganesh Chandra Khan appeared before the Municipal Magistrate. The petitioner's case is that Ganesh stated to the Magistrate the aforesaid facts with regard to the two applications for a license in respect of premises No. 11 Neogi Ghat Street. But the learned Magistrate took it to be a plea of guilty and, after recording it as such he sentenced the petitioner firm to pay a fine of Rs. 25. The petitioner firm alleges that Ganesh Chandra appeared in person and not by pleader, but that on taking a certified copy of the Magistrate's order he found that the place with regard to the offence committed was stated to be 11 Neogi Ghat Street. Thereupon the petitioner firm filed an application in this Court and obtained a Rule on grounds Nos. 1, 2, 3 and 4 of the application.

Now, it is quite clear from the summons, which was served on the petitioner firm and which has been produced before me, that it is addressed to Ganesh Chandra Khan and Sons, No. 73-B Baghbazar Street, to answer a charge made against the firm under S. 386 (1) (a), Calcutta Municipal Act of 1923, in respect of premises "aforesaid." The learned Magistrate in his explanation says that by mistake in the office the place of occurrence was not specifically mentioned in the summons issued. I should have thought that such a mistake in itself would be a material irregularity which would seriously mislead an accused in a case of this nature. But even this explanation of the Magistrate is not correct. Then the learned Magistrate further says that no mention was made by the accused during the trial of any petition for a license, but that subsequent inquiry showed that the accused had filed one petition for a license to the

Health Department on 5th June 1931, and further that no petition, dated 2nd June* 1931, to the license officer had been found to have been submitted by the accused. This latter statement again is incorrect. The learned advocate for the petitioner has filed before me a receipt showing that an application from this firm for a license was filed before the license officer on 2nd June 1931. The learned advocate appearing for the opposite party was constrained to concede that this must be correct, but he contended that this application was for a license in respect of the year 1931-32 and not of the year 1930-31. This discrepancy in the year however was not a matter of much importance. As mentioned already it is the petitioner's case that the firm only started storing goods at premises No. 11 Neogi Ghat Street, in May 1931.

If he were permitted to establish this case there would have been no occasion for applying for a license for the year 1930-31. The learned Magistrate in his explanation submits that under S. 243, Criminal P. C., no evidence was necessary after the accused had admitted the charge against him. But that section of the Code requires that the admission should be recorded as nearly as possible in the words used by the accused and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly. In this case it is clear that the plea of the accused was not recorded in accordance with the aforesaid provision of the Code. Having regard to the allegation in the petition which *prima facie* I am not prepared to disbelieve it would be unreasonable to suppose that the petitioner actually pleaded guilty to the charge with respect to premises No. 11 Neogi Ghat Street. The Rule must therefore be made absolute on the grounds on which it was issued. The conviction of the petitioner is set aside and the fine, if paid, must be refunded.

P.N./R.K. *Conviction set aside.*

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PANCKRIDGE AND PATTERSON, JJ.

Tushar Kanti Ghose and another — Petitioners.

v.

The Governor of Bengal in Council— Opposite Party.

Misc. Criminal Case No. 102 of 1932, Decided on 1st December 1932.

(a) Contempt of Courts Act (1926)— Complaint not signed as required— Existence of evidence legally admissible showing *prima facie* that contempt has been committed— Absence of proper signature is not fatal irregularity.

Though the rules and practice of the Court require that petitions for taking action under Contempt of Courts Act should be signed by or on behalf of the persons presenting them, still where the Court has before it evidence legally admissible showing *prima facie* that contempt had been committed it can and should of its own motion issue the rule; and the absence of a proper signature in such cases is not a fatal irregularity and does not entitle the opposite parties to ask for the discharge of the rule.

[P 120 C 1]

(b) Contempt of Courts Act (1926)— Secretary to Government signing petition is presumed to be acting within authority— Government of India Act (1919), S. 49 (1)— Evidence Act (1872), S. 114, Illus. (e).

Where in proceedings under the Contempt of Courts Act, the petition is signed by the Secretary to the Government it must be presumed that the Secretary is acting within the scope of the authority conferred upon him until the contrary is shown.

[P 120 C 1]

(c) Contempt of Courts Act (1926), S. 2 (1)— Contempt of Commissioner's Court— High Court has jurisdiction to entertain application— Government of India Act, S. 107.

The High Court has jurisdiction to entertain an application for contempt of the Commissioner's Court even though the right of appeal from Commissioner's Court is less extensive than the right of appeal from the ordinary criminal Courts in that there is no ordinary right of appeal to the High Court from the Commissioner's Court. The fact that the rule-making power with regard to Commissioner's Courts is vested in the Local Government is immaterial for under S. 107 the rule-making power is something different from and additional to the right of superintendence : *A I R 1933 Bom 1, Rel on.*

[P 120 C 2]

(d) Contempt of Court — Improper comments on pending proceedings tending to create prejudice should be stopped at once— Belated applications are not to be allowed.

Improper comments on pending proceedings tending to create prejudice must be stopped at once in summary fashion; but belated application for the exercise of such procedure should not be allowed.

[P 122 C 1]

(e) Contempt of Court— Contempt can be committed when technically no case is pending.

Contempt can be committed when there is technically speaking no case pending. *Re, Lixbonchere Ex parte Columbus Co. Ltd.*; 17 T L R 578;

R. v. Parke, (1908) 2 K B 492 and *R. v. Davies*, (1911) 1 K B 32, *Ref.* [P 121 C 2]

(f) Contempt of Court—Criminal Court.

Findings of criminal Court which must under the law be considered judicially by the High Court should not be the subject of lengthy and detailed criticism in the press [P 123 C 2]

(g) Contempt of Court—Articles tending to prejudice minds of Judges—Danger or absence of danger of actual prejudice is not only consideration for jurisdiction of Court.

Although the danger or absence of danger or actual prejudice is an important consideration, it is not the only consideration: for the jurisdiction of the Court exists not only to prevent mischief in the particular case but to prevent similar mischief arising in other cases: *In the matter of the Finca Union*, (1895) 11 T L R 167, *Ref.* [P 123 C 2]

(h) Criminal P. C. (1898), Ss. 4 (i) and 493—Legal Remembrancer is ex officio Public Prosecutor—No vakalatnama is necessary.

The Legal Remembrancer is ex officio Public Prosecutor on the appellate side of the Court and as such has the power to instruct counsel, his authority to act for the Local Government being in no way dependent on anything in the nature of a vakalatnama or warrant of attorney. [P 10 C 1, 2]

(i) Contempt of Courts Act (1926)—Comment.

Comments are not permissible when made during the course of the trial. [P 123 C 2]

(j) Contempt of Courts Act (1926)—Headline not itself misleading but amounting to criticism of prosecution case under guise of summary proceedings—Contempt is committed

Where although there is nothing misleading in a particular headline if taken with other headlines it in fact amounts to a criticism of the prosecution case under the guise of a summary of the day's proceedings, the matter comes within the mischief of the Act. [P 121 C 2]

A. K. Roy, S. M. Bose and J. N. Mukherji—for Petitioners.

N. K. Basu, S. K. Basu, C. C. Biswas, Hiralal Ganguli and Paramananda Dutt—for Opposite Party.

Judgment.—This is a rule granted on 18th July last by Jack and M. C. Ghose, JJ., on the application of His Excellency the Governor of Bengal in Council calling on the opposite parties, the first of whom is the editor, and the second the printer and publisher of a daily newspaper called the *Amrita Bazar Patrika* circulating in Calcutta, to show cause why they should not be ordered to stand committed, or otherwise dealt with for the contempt of the Court of the Commissioners appointed as herein-after stated and of this Court, in respect of the acts and publications referred to in the petition on which the application for the rule is based.

On 30th April 1932 Mr. Douglas, the

District Magistrate, was assassinated at Midnapore. In June the Local Government; under the powers conferred upon it by the Bengal Criminal Law Amendment Act 1930, directed the trial by three Commissioners of one Prodyot Kumar Bhattacharjee for the murder of Mr. Douglas. The Commissioners sat at Midnapore during the month of June and delivered their judgment on the 25th of that month convicting the accused of the murder of Mr. Douglas and sentenced him to death. On 30th June the accused filed an appeal against his conviction and sentence. It is said that the reports of the trial appearing in the issues of the *Amrita Bazar Patrika* of 12th, 14th 17th 22nd and 23rd June 1932 are contempts of the Court of the Commissioners, a Court subordinate to the High Court and punishable by the High Court by reason of the provisions of the Contempt of Courts Act, 1926. It is further said that two leading articles appearing in the issues of 28th and 29th June 1932 are contempts of this Court. Mr. N. K. Basu who has appeared for the opposite parties raised certain preliminary points with which it will be convenient to deal before discussing the merits of the application.

He submits first of all that the rule should not have been granted inasmuch as the petition on which the Court was moved was unsigned. Relying on the judgment of this Court in *Legal Remembrancer v. Matilal Ghose* (1) he argues that inasmuch as these proceedings are criminal in character the opposite parties are in the position of accused persons and entitled to have the benefit of any error, however technical, into which the party who seeks to imprison them may fall. He therefore asks us to discharge the rule leaving it to the petitioner to move the Court again upon a properly signed petition if he is so advised. The learned Advocate-General has been constrained to admit that the petition, although verified by an affidavit affirmed by an Additional Deputy Secretary to the Government of Bengal, and supported by a further affidavit affirmed by Abdul Ghani, Sub-Inspector of Police, is not signed by anyone on behalf of the petitioner, the Governor of Bengal in Council, nor has he sought to

question the proposition that the rules and practice of the Court require petitions of this sort to be signed by or on behalf of the persons presenting them. He argues however that the irregularity is not fatal to the application, since the Court at the time the rule was granted had before it evidence legally admissible showing *prima facie* that contempt had been committed, and could and should of its own motion, if it considered that the interests of justice so required, have issued the rule though there was no application before it by the petitioner or anyone else. We consider the contention is correct, and we hold that the absence of a proper signature does not entitle the opposite parties to ask for the discharge of the rule.

At the conclusion of the argument we permitted the petition to be returned for signature, not because we considered such signature necessary to enable us to deal with the application, but in order that the petition might be made to conform with the rules of the Court. The petition has now been signed by Mr. Henderson, Secretary to the Government of Bengal in the Judicial Department. Mr. Basu contends that even now the matter is not at rest, and that it is necessary for the Advocate-General to show by evidence that the signatory has been authorized by rule under S. 49 (1), Government of India Act, 1919 (9 and 10 Geo. 5 C. 101), to represent the Governor in Council; and he calls attention to the difference between the language of that section and that of S. 40 (1) of the same Act. This point, in view of our opinion on the main question, does not strictly require our decision. We are disposed however to hold that Mr. Basu's argument is not maintainable and that when signing a petition of this nature a Secretary to Government must be presumed to be acting within the scope of the authority conferred upon him until the contrary is shown.

Mr. Basu was further disposed at one stage to challenge the *locus standi* of the Legal Remembrancer and his power to instruct counsel in a matter such as this. In our opinion no question can arise as to this. The Legal Remembrancer is *ex-officio* Public Prosecutor on the appellate side of the Court and as such has the power to instruct counsel, his authority to act for the Local Govern-

ment being in no way dependent on anything in the nature of a *vakalatnama* or warrant of attorney. Another argument has been addressed to us which is only concerned with the part of the application which seeks the punishment of the opposite parties for contempt of the Commissioners' Court, and is to the effect that such Court is not a Court subordinate to the High Court within the meaning of S. 2(1), Contempt of Courts Act, 1926, and therefore the statutory jurisdiction of the High Court does not extend to a contempt of a Commissioners' Court. It was not suggested that Commissioners are not Courts and indeed their powers including those of trying, convicting and sentencing are powers peculiar to Courts. Counsel's argument was based on S. 107, Government of India Act, 1919, which gives to the High Courts superintendence over all Courts for the time being subject to their appellate jurisdiction and amongst other powers the power of making and issuing general rules and prescribing forms for regulating the practice and procedure of such Courts. Mr. Basu points out that the only right of appeal from Commissioners is the right of appeal to the High Court given by S. 3 (1), Bengal Criminal Law Amendment (Supplementary) Act, 1925, to a person convicted on a trial held by Commissioners, there being no provision for an appeal by the Local Government from an order of acquittal such as is made by S. 417, Criminal P. C., and also that the power to make rules for the procedure of Commissioners' Court is vested by S. 10 of the principal Act not in the High Court, but in the Local Government. We do not think that these arguments lead to the conclusion that Mr. Basu urges upon us. The jurisdiction to hear appeals from the Commissioner is nonetheless appellate jurisdiction because the right of appeal from Commissioners is less extensive than the right of appeal from the ordinary criminal Courts. The fact that the rule-making power with regard to Commissioners' Courts is vested in the Local Government appears to us immaterial, for under S. 107 the rule-making power is something different from and additional to the right of superintendence, and were Parliament to repeal sub-S. (c) that right would still remain.

It should further be observed that even under the section the power is not

unlimited as the rules must not be inconsistent with the provisions of any law for the time being in force and in the case of this Court require the previous approval of the Governor-General in Council. A question in many respects similar to that which we are now discussing has recently been considered by the Bombay High Court in *Emperor v. Balkrishna Hari* (2), where it was held that the High Court had the power to revise orders made by the Courts of Special Magistrates constituted by the Emergency Powers Ordinance 2 of 1932 on the ground that an appeal in certain cases lay from such Courts to the High Court.

It is now necessary to consider the merits of the application, first with regard to the reports of the trial appearing in the news columns of the paper which it is said are contemptuous of the Commissioners' Court. The petitioner's case is based not so much on the reports themselves as on the headlines by which they are preceded. It is said that their composition and the nature of their display were deliberately made to impress on the public and on witnesses who were likely to be examined that the prosecution case was weak and that the prosecution was not likely to succeed in proving the guilt of the accused.

We think there is reasonable ground for this allegation. The headlines of 12th June are not objectionable, but those of 14th June begin with the words in heavily loaded type "identity doubtful." The casual reader, it seems to us, would conclude either that these words are comments and express the general impression made on the mind of the writer by the day's proceedings or that prosecution witnesses had admitted doubts as to the identity of the accused person. In so far as the words are comment they are clearly not permissible when made during the course of the trial. In so far as they can be described as a summary of the evidence given they are garbled and misleading, for they are based on a passage in the cross-examination of Mr. George, the Subdivisional Officer and an eye-witness of the murder, where the witness is referring not to the accused but to a man who was stated to have joined in the attack on Mr. Douglas and to have escaped capture.

2. A I R 1933 Bom 1 (S B).

The headlines of 17th June are concerned with a statement by a witness that he was unable to vouch for the accuracy of all the entries appearing in a list made of the articles found when the person of the accused was searched after his arrest. Though there is nothing misleading in these headlines, we consider that, taken with the other headlines, they in fact amount to a criticism of the prosecution case under the guise of a summary of the day's proceedings.

The petitioner also relies on the headlines of 22nd June. We cannot see anything objectionable in them. It is true the opening line consists of the words "I am quite innocent" in large type; but the next line clearly explains, what the use of inverted commas had already indicated, that the words are a verbatim extract from the statement of the accused. They are for practical purposes the whole of his statement and we consider that having regard to the public importance of the case the editor was entitled to draw the attention of the readers of his newspaper to the statement by summarizing it in a headline and by the use of heavy type.

The position however is different with regard to the headlines of 23rd June. The first and most heavily typed is "Not guilty of any offence" and the second "Prodyot attracted from playground by report of firing." Then follows "judgment reserved" while the last headline is as is obvious from the use of inverted commas, the summary of an argument addressed to the Court. In fact the whole of the report is concerned with the address of the learned counsel for the defence and much of it reproduces the actual words used. But we do not think the casual reader would suppose the first two headlines which are not in inverted commas were merely the submissions of counsel to the Court although from the words "judgment reserved" he might infer that they were not the findings of the Court.

Taking the headlines as a whole and more particularly those appearing on 14th June and 23rd June we have no doubt that their publication might have an effect on the minds of witnesses to be examined or cross-examined before the Commissioners and is what Alverstone,

C. J., describes in *R. v. Tibbets* (3) as conduct calculated to produce an atmosphere of prejudice in which the proceedings must go on.

However if the headlines were the only material before us and if we were invited to punish the opposite parties solely on the allegation that they had been guilty of contempt of the Commissioners' Court we should be disposed to discharge the rule on the ground that there has been undue delay in moving the Court. The main justification for the summary fashion in which contempts of this nature are punished is that improper comments on pending proceedings tending to create prejudice must be stopped at once and this would not be possible if the ordinary procedure of the criminal law was followed.

It is no answer to the application to say that at the date the Court was moved the proceedings before the Commissioners had terminated. It may often be impossible to apply to the Court during the actual pendency of the proceedings. In the present case however it has not been argued that there were special circumstances making delay unavoidable. The first publication complained of was on 12th June and the last on 23rd June. The judgment of the Commissioners was on 25th June. No application to this Court was made until 18th July more than three weeks after the proceedings had come to an end.

We consider that in the circumstances to accede to the petitioner's prayer that we should punish the opposite parties for the contempts with which we have already dealt would create a dangerous precedent and encourage belated applications for the exercise of the summary procedure. There remain for consideration the articles of 28th June and 29th June which are alleged to be contempts of this Court. Each is the principal leading article of the day and each fills about two columns of the newspaper. That of 28th June begins with a statement to the effect that because on a careful and anxious perusal of the evidence and the judgment the writer has come to the conclusion that a grave miscarriage of justice has taken place he is compelled to "comment adversely" on

the latter. Mr. Basu concedes that if in the circumstances it was a contempt to comment it is impossible to argue that contempt has not been committed. No useful purpose would be served by a close analysis of the articles. Although there is nothing improper or disrespectful in the language used they are from start to finish a systematic criticism of the judgment of the Commissioners for the purpose of showing that it is erroneous and that the accused person has been wrongly convicted.

The opposite parties first submit that inasmuch as at the date of publication no appeal had been filed there could be no contempt of the High Court as the case was not pending before it. This contention clearly puts the matter too high, for the authorities show that contempt can be committed when there is technically speaking no case pending. Thus it has been held contempt to comment on a case where the jury has disagreed but the case has not been set down for retrial: *Re. Jabouchere Ex parte, Columbus Co., Ltd.* (4). Again it is a contempt of the High Court of Justice to comment on the magisterial inquiry into a case triable only at the Assizes before the person charged has in fact been committed for trial [*R. v. Parke* (5)] or even when it is uncertain whether the person charged if committed will be tried at Assizes or Quarter Sessions: *R. v. Davies* (6). Moreover the judgment of Sir Lawrence Jenkins, C. J., in *Legal Remembrancer v. Matilal Ghose* (1) (at p. 215 of 41 Cal.) seems to recognize the possibility of a contempt of the High Court on the appellate side when no appeal is pending before it.

What were the circumstances in the case with which we are dealing? It appears to us that the editor must have had in his mind the probability of an appeal, for the readers of the paper were informed in the issue of 26th June, in which the judgment of the Commissioners was reported at length, that Prodyot had signed a vakalatnama for filing an appeal in the High Court. With regard to this the editor in an affidavit used in opposition states that he is personally aware of many cases in which no

3. (1902) 1 K B 77=71 L J K B 4=85 L T 521=56 W R 125=66 J F 5=20 Con C G 70=18 T L R 49.

4. (1901) 17 T L R 578.

5. (1903) 2 K B 482.

6. (1906) 1 K B 82=75 L J K B 104=93 L T 772=54 W R 107=22 T L R 97.

appeal has been filed although a vakalat-nama has been signed. We can attach no importance to this statement, for the only object which the editor could have in informing his readers of the signing of the vakalatnama was to apprise them of the fact that an appeal was to be expected.

The matter does not end here, for whether Prodyot appealed or not it was inevitable that the merits of the case should be the subject of judicial consideration by this Court, for S. 3 (2), Bengal Criminal Law Amendment (Supplementary) Act, provides that when the Commissioners pass a sentence of death the records of the proceedings before them shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. It is—imagine, a matter of general knowledge among educated persons in this country that capital sentences passed by subordinate Courts require confirmation by the High Court and we entertain no doubt that the exhaustive criticism of the Commissioner's judgment published at the time it was, constituted a contempt of this Court by which the proceedings were bound under the provisions of the law to be considered. Lastly the submission has been made that in the circumstances if contempt has been committed it is a venial contempt and should not entail any punishment and our attention has been drawn to *Ananta Lal Sinha v. A. H. Watson* (7).

In that case newspaper comment had been made on the conduct of a barrister in accepting a brief from persons who were then on their trial before Commissioners. As Rankin, C. J., points out in his judgment the criticism, although this did not appear to be appreciated, by the critic, had little or no force except upon the assumption that the accused persons were guilty of the offences charged. The Court discharged the rule holding that, although contempt had been committed, the tendency of the article to do harm was slight and the character and circumstances of the comments were otherwise such that it could properly be ignored. On this aspect of the case we observe that there is no expression of regret on the part of the opposite parties for any

contempt they may have unwittingly committed. Their defence has been "we have done what the law permits us to do." Apart from this however we consider that the circumstances of the case are too grave for us to confine ourselves to a mere expression of disapproval. That the findings of a criminal Court, which must under the law be considered judicially by this Court, should first be the subject of lengthy and detailed criticism in the Press, cannot in our opinion be tolerated for a moment. The affidavit filed by the opposite parties states that editors believe that they are entitled to comment when an appeal has not yet been filed. In support of this statement the deponent annexes a copy of the Statesman of 26th June 1932 containing the statements that the sentence of death will be generally approved and that the guilt of Prodyot is unquestionable.

We are only concerned with the case before us, but we think it right to say that all comment in the press whether by way of approval or disapproval of the judgments of Courts of Session or of Commissioners in capital sentence cases made pending their disposal by this Court is reprehensible and may entail most disagreeable consequences on those responsible for it. It is urged that there was no real danger of the articles prejudicing the minds of those Judges of this Court on whom the duty of confirming or setting aside the sentence passed by the Commissioners was to fall. This is true, but although the danger or absence of danger of actual prejudice is an important consideration it is not the only consideration. As observed by Bruce, J., in *Re Labouchere ex parte Columbus Co., Ltd.* supra the jurisdiction of the Court exists not only to prevent mischief in the particular case but to prevent similar mischief arising in other cases. To adopt the language of Wills, J. in *In the matter of the Finance Union* (8) articles such as those under discussion amount to a preliminary trial by newspaper when a trial by a regular tribunal is pending. As such they are an affront to the dignity of the Court and merit punishment. We do not in the circumstances of the present case consider it necessary to commit the opposite parties to prison and we consider it sufficient to order that

7. A I R 1931 Cal 257 = 1931 Cr U 259 = 32 Cr L J 675 = 53 Cal 894 = 131 I C 267.

8. (1905) 11 F L R 167.

each of them to pay a fine of Rs. 500 by 15th December 1932.

R.K. Order accordingly.

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RANKIN, C. J. AND PEARSON, J.

Nil Ratan Ganguli—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 279 of 1932, Decided on 17th November 1932.

(a) Ordinance (2 of 1932) — Nature of — Ordinance 2 is special law for purposes of Limitation Act, S. 29.

For the purposes of S. 29, Lim. Act, Ordinance 2 of 1932 is a special law. [P 125 C 2]

(b) Ordinance (2 of 1932), Ss. 39, 34, 45 and 52—Conviction and sentence passed by special Magistrate under Ordinance—Appeal after period of seven days fixed by S. 39—Court has no power to extend time under Limitation Act, S. 5.

Where an accused is convicted and sentenced by a special Magistrate acting under S. 89 (1), and an appeal is filed after the period of seven days fixed for filing such appeal by S. 89, the Court has no power to extend time under S. 5, Lim. Act, as a wholly general provision cannot be read as interfering with the specific provision with regard to limitation: *A I R 1923 Mad 95, Rel. on.* [P 126 C 2]

(c) Ordinance (2 of 1932)—Limitation Act (1908)—Another meaning not to be given on grounds of hardship — Interpretation of Statutes.

It is necessary for the Courts to base the construction of Ordinance 2 of 1932 and of the Limitation Act upon principle and it is not possible for them on the ground of hardship to give another meaning to the Ordinance. [P 126 C 2]

(d) Arms Act (1878), Ss. 19 (f) and 20—Person giving revolver to another for purpose of keeping it concealed — Accused guilty under S. 20.

Where a person was in possession of a revolver and cartridges and he gave the revolver to somebody for the purpose of keeping it concealed:

Held: that it is a plain case under S. 20 and that he was guilty under that section. [P 127 C 2]

(e) Arms Act (1878), S. 20—Person guilty under S. 20—Punishment — Maximum sentence was upheld.

Where a person who was charged under Ss. 19 (f) and 20 pleaded guilty to the charge and it was found that his possession was connected with his political opinions and he was given the maximum sentence under S. 20.

Held: that it was very necessary that the powers of the Court should be employed in putting down those very dangerous crimes of possession and concealment of arms and that as there was nothing calling for interference, High Court refused to interfere in appeal or in revision. [P 128 C 1]

(f) Ordinance (2 of 1932), S. 51—Scope.

Section 51 does not take away the right of the special Magistrate to try a case simply because the first Magistrate does not wish for good reasons to try the case or is unable to try the case. [P 127 C 1]

(g) Limitation Act (1908), S. 5 — S. 5 applies to appeals from special Judge under Ordinance (2 of 1932), S. 34.

So far as the Limitation Act is concerned S. 5 is not to be deemed to be one which is to be applied to the special law, but in the case of an appeal from a special Judge under S. 34, Ordinance 2 of 1932 the provisions of the Limitation Act are to apply as if it were an appeal under the Criminal P. C. [P 126 C 1]

Santosh Kumar Dasu—for Appellant.

Khundkar, Nirmal Chunder Chuckerbutty and Fanindru Mohan Sanyal—for the Crown.

Rankin, C. J.—In this case, the accused Nil Ratan Ganguli has preferred the appeal from jail against the conviction and sentence passed upon him by a Special Magistrate in the District of Hooghly acting under S. 39 (1), Ordinance 2 of 1932. The case was one in which the charges were laid under S. 19 (f) and S. 20, Arms Act. There were two accused originally and the case against them was that this accused Nil Ratan had handed over to Upen Bhumij alias Upen Singh a revolver and afterwards to Upen's wife some cartridges in order that those might be concealed and kept on his behalf. Both the accused persons made confessions, the confessions being recorded on 17th January 1932. One of the accused was made an approver and the case in the end was held to be amply proved by the Magistrate. The Magistrate found as regards the present accused who gave his name and the occupation as that of a Congress worker, that he used to live in the Congress office and that his meals were supplied by different persons of the village Majdah; and the Magistrate thought that the accused acquired great influence over the villagers, so much so, that when the Sub-Inspector in charge of the case came to investigate into it he found great difficulty in getting witnesses to sign their names in the search list. At the trial, the present accused stated in his examination under S. 342, Criminal P. C., that his confession was true and he set up the case that he had found this revolver and the cartridges wrapped up in a piece of cloth near a railway station some four years ago, that he kept them buried and that at the time alleged he went to Upen's bari and made over to him the revolver and the cartridges wrapped in a piece of cloth. The accused disputed certain evidence to the effect that the cartridges as distinct

from the revolver had been handed over to the wife of Upen; but that is the evidence. On being asked if he wanted to say anything else, he said:

"I don't want to say anything else. I want heavy punishment for 'freedom first'."

In his memorandum of appeal to this Court, the appellant having been sentenced to seven years' rigorous imprisonment says:

"I am guilty. The sentence passed upon me under S. 20, Arms Act, has been heavy. I therefore pray that your Lordships may be graciously pleased to reduce my sentence."

The sentence which has been inflicted by the Magistrate is the extreme sentence permissible under S. 20, Arms Act. The Magistrate gives us his reasons for this that there are no extenuating circumstances in the accused's favour and that when his statement was taken under S. 342, Criminal P. C., he showed a very defiant attitude and boldly challenged the Court to pass a heavy sentence and said "freedom first." In these circumstances, we find that the sentence having been passed on 5th February 1932 the appeal was not lodged from jail until the 28th March following whereas by S. 39, Ordinance 2 of 1932, which was a very recent Ordinance having come into force in the beginning of the present year a distinct provision is made that an appeal in such a case as this shall be brought within seven days. Accordingly, when this matter was examined first in the office, it was referred to me and the question of admission was sent to be dealt with by the Criminal Bench. The Criminal Bench however did not hear any argument or decide any question so far as I know, but the learned Judges recorded the order:

"This appeal will be heard on the question of sentence only. Let the record be sent for and the usual notices issue."

That order was made on 20th April 1932. The matter of the appeal therefore comes before this Court as an admitted appeal and it will appear that all questions of law are open both to the prosecution and to the defence.

We have accordingly directed our attention, in the first place, to the question whether we are debarred from entertaining this appeal by any provision of law. In support of the contention that we are so debarred the argument is as follows: By S. 29, Lim. Act it is provided that

"where any special law prescribes for any appeal a period of limitation different from the period prescribed therefor by Sch. 1, the provisions of S. 3 shall apply as if such period were prescribed therefor in that schedule."

Accordingly, while the provisions of the Ordinance is that the appeal shall be brought within a certain time, *prima facie* that attracts the operation of S. 3, Lim. Act, which contains a provision against the Court entertaining the appeal. It is necessary however in this case to pursue the provisions of S. 29 of the Act somewhat further. That section goes on to provide that for the purpose of determining the period of limitation certain provisions of the Limitation Act shall apply only in so far as and to the extent to which they are not expressly excluded by the special law; and further that "the remaining provisions of this Act shall not apply." Now, S. 5, Lim. Act, is not one of the provisions which are to apply in the absence of something to the contrary. It is one of the sections to which the concluding clause is applicable, namely "the remaining provisions of this Act shall not apply." It is clear enough I think and it is conceded by the learned Deputy Legal Remembrancer that the provision means "shall not apply by virtue of the Limitation Act" and is not a provision prohibiting any special law making the sections applicable or any special law according to the intention of which such a section as S. 5 can be deemed to be applicable. It means that so far as the Limitation Act is concerned the section is not to be deemed to be one which is to be applied to the special law. There is authority both in the Patna High Court and in this High Court for that proposition; but, as it is not contested, I shall not further deal with it.

On behalf of the appellant Mr. Basu, who at the Court's request has been so good as to support the appeal and has done so with great care and ability, puts forward two contentions. He says first of all that the Ordinance is not a special law, and he says in the second place that there is enough in S. 52 of the Ordinance to entitle this Court to say that the special law intends that S. 5 should be applied to an appeal such as the present. I cannot doubt that, for the purposes of S. 29, Lim. Act, Ordinance 2 of 1932 is a special law. It contains provision for setting up certain

special criminal Courts. It is true that these Courts have jurisdiction not only over offences created by the Ordinance, but it would seem over offences of any kind provided they are committed in certain circumstances; but I cannot doubt that nonetheless it is a special law and it seems to me clear that when the Ordinance contents itself by saying that the appeal shall be presented within seven days it does so because of the provisions already made by the Limitation Act in S. 29 which attracts the operations of S. 3 and makes that period of time effective as the period of limitation.

The next question is whether we can say that in the special law itself there can be discerned any intention that the Court should have the power given by S. 5, Lim. Act. This question involves a careful examination of the Ordinance and certain sections of the Ordinance have been brought to our notice as having a possible bearing upon this question. It is to be noticed, for example, that in S. 45 where provision is made for an appeal from a Court set up as a summary Court to a tribunal called a Special Judge there is a provision that the appeal shall be presented within seven days from the date of the sentence followed by a provision that the Special Judge shall follow the same procedure and have the same powers as an appellate Court follows and has under the Code, that is the Code of Criminal Procedure. It is also to be observed that in dealing with the question of an appeal from a Special Judge S. 34 of the Ordinance makes a provision to the effect that the provisions of the Limitation Act are to apply as if it were an appeal under the Code from a sentence passed by a Court of Session. So it would appear that in the case of an appeal from a Special Judge the ordinary law of limitation is to be applied; but, to decide which of the provisions of the ordinary law is applicable to the new tribunal, it is prescribed that the new tribunal is to be deemed as a Court of Session.

The matter before us however depends upon the provisions of S. 39 of the Ordinance. This is another class of appeal provided by the Ordinance, namely, an appeal from a Special Magistrate. An appeal is provided in such a case as the present to the High Court and it is followed by a provision that it is to be pre-

sented within seven days. Nothing however is said as regards the powers of the High Court in that section. S. 52 however is a very general section applicable to all Special Criminal Courts, that is to say, all the Courts which are set up by Ch. 4 of the Ordinance from the highest to the lowest. It says that:

"the provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Ordinance, shall apply to all matters connected with, arising from or consequent upon a trial by special criminal Courts constituted under this Ordinance."

The question is whether by virtue of that general provision we are entitled to say in the face of the concluding words of S. 29, Lim. Act, that the Ordinance itself contemplates and provides that the High Court in this case shall exercise the power of dispensation for sufficient cause which is contained in S. 5, Lim. Act. In my opinion it is impossible to attribute this meaning or this result to the very general provision of S. 52 of the Ordinance. In the first place it is very difficult to see that the phrase "the provisions of any other law for the time being in force in so far as they may be applicable"

could have any such effect in view of S. 29, Lim. Act, as to introduce S. 5. But, apart from this question, the provision as to limitation contained in sub-S. 2, S. 39 of the Ordinance is a specific provision the consequences of which are provided for as a matter of limitation by S. 29, Lim. Act. These have been prescribed or provided for in advance. A wholly general provision could not be read as interfering with this specific provision with regard to limitation. *Generalia specialibus non derogant* is a maxim which is clearly applicable to S. 52 if it is argued that S. 39 (2) of the Ordinance is to be controlled by S. 5, Lim. Act. In these circumstances, I arrive upon this question at the same result as was arrived at by the Madras High Court in the case of *Mittoor Modeen Haje and others* reported in *A. I. R. 1923 Mad 95*. It is certainly somewhat alarming that limitation for so short a period as seven days should not be one over which the High Court in a proper case should have any power of control or dispensation; but it is necessary to base our construction of the Ordinance and of the Limitation Act upon principle, and it is not possible for us on the ground of hardship to give an-

other meaning to the Ordinance. In these circumstances it would serve no purpose as regards this appeal to direct any inquiry whether this particular accused had any sufficient cause for not preferring his appeal in time. In view of what he said at the conclusion of his trial, it may or may not be probable that the delay was due to a sufficient cause; but that is a matter which it is not now necessary for us to decide.

Mr. Basu in the interest of the accused has asked us to examine into this case under the general power of superintendence which was given in certain terms by S. 15 of the High Courts Act of 1861, and in rather different terms by the Government of India Act, S. 107. He has invited us to interfere on several grounds. He has thrown a doubt upon the right of the particular Special Magistrate to deal with the case in view of the fact that the first Magistrate who dealt with it said that as he had heard the confessions of the accused and certain other persons connected with it he would prefer that some other Magistrate with a more open mind should deal with the matter. It is therefore said that, by virtue of S. 51 of the Ordinance, this Magistrate had no jurisdiction to deal with the case. As regards that, I am of opinion that that contention has no foundation. It is quite unnecessary to read S. 51 as meaning anything such as is suggested. It is not possible to argue that in such a case if a Magistrate for good reasons does not wish to try a case or is unable to try it the case may not be tried by some other Magistrate. The first Magistrate in this case apart from taking cognizance of the case did not take any part in the trial. The change was entirely in the interest of the accused and in the interest of maintaining an attitude not only of absolute lack of prejudice but manifest lack of prejudice to the accused.

Then it has been suggested that we should interfere because while the accused was found guilty under S. 19 (f) Arms Act, he was not guilty under S. 20. I can only say that it seems to me to be a plain case under S. 20. S. 19 (f) deals with the mere question of having in possession or under control a weapon. A person may commit a breach of the law so far as that is concerned without being guilty of anything much worse than

negligence or inattention. But S. 20 provides a heavier penalty in cases of possession where there is an element of concealment. As regards that the accused himself does not complain that he is not guilty. He did not do so in the trial Court and he has not done so in his memorandum of appeal to us. I am bound to say that in this matter on the facts disclosed I agree with the lower Court that he is guilty under S. 20. Here is a man who, according to his own statement in open Court, and certainly according to the evidence was in possession of a revolver and cartridges. He gave the revolver to somebody for the purpose of keeping it concealed. It is evident that his possession of this revolver was at any rate in some way connected with his political opinions because he asked for a heavy punishment and said "freedom first"; and it is a little difficult to see what this could have to do with the case unless he was a person who was committing a breach of the Arms Act in connexion with his political activities.

I cannot say that it is in any way evident to me that there is any necessity for minimizing the gravity of the offence. One can see easily enough what was quite likely to happen. If a person of such political opinions as are in some way connected with a revolver was keeping the revolver concealed in the custody of a friend, then there is a high probability that sooner or later this revolver would be found to have been used by somebody very probably by somebody of the age of 16 or 17. It is very necessary at the present time, when there is clear evidence of revolvers being kept in connexion with political movements, that the offence when it is made plain should be visited with a severe punishment. The accused said nothing to the trial Magistrate to show that he was in any way repentant. He appears to be a person who did his very best by bravado to adopt a contumacious attitude as long as he could. In these circumstances, the Special Magistrate thought that the maximum sentence prescribed by the law for offences under S. 20 would be appropriate. I am bound to say that I saw no reason for this Court to disagree with him. It is a heavy sentence even for an offence under S. 20 and it is the maximum sentence;

but it is very necessary that the powers of the Court should be employed in putting down these very dangerous crimes of possession and concealment of arms. I cannot think that there is anything in this case calling for interference by this Court and I should be of the same opinion whether this matter came before us in appeal or in revision.

On the merits therefore the appeal to S. 107, Government of India Act, does not in this case avail the accused at all. I desire to say nothing in the present judgment about the meaning of the word "superintendence" as it occurs in S. 107, Government of India Act and S. 15 of the Act of 1861. When necessary, it may be a proper thing to examine the decisions so as to come to some conclusion as to the way in which the ultimate powers of the High Court under these sections should be regarded. It is not necessary at the present instance to do so and I prefer to wait till it becomes necessary before laying down any principle. The result is that the appeal is dismissed.

Pearson, J.—I agree.

S.R./R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 128

GUHA AND M. C. GHOSE, JJ.

Corporation of Calcutta—Defendants
—Appellants.

v.

Probhat Chandra Barua—Plaintiff—
Respondent.

Appeal No. 225 of 1931, Decided on 24th May 1932, from original order of Small Cause Court Judge, Sealdah, D/- 31st January 1931.

Calcutta Municipal Act (1925), Ss. 131, 134 and 127—Premises vacant and with structures on, amalgamated during currency of assessment—S. 127 does not control Ss. 131 and 134—Total area cannot be revalued on residential basis.

Some premises with structures on, were amalgamated with vacant premises during the currency of an assessment. The Corporation reassessed the joint premises under S. 127 at a valuation higher than the total of the past separate valuation.

Held, that S. 127 could not come into operation in its entirety, in making a revaluation on amalgamation, and in fixing the annual value of amalgamated premises, so as to control the provisions contained in Ss. 131 and 134, during the currency of the assessment that was in force at the time of amalgamation. The total area of land comprised in the amalgamated premises could not be revalued on residential basis, under S. 127, on amalgamation, as the valuation

made for the purposes of assessment was to remain in force for the whole of sexennial period, and the only addition that could be made was the amount that represented the annual value of the structures added to those standing on the premises before amalgamation.

[P 129 C 1]

Brojolal Chakravarty and *Krishnalal Banerjee*—for Appellant.

Jatindra Mohan Chaudhuri—for Respondent.

Guha, J.—The respondent in this appeal, Raja Probhat Chandra Barua as owner of the amalgamated premises No. 12, Mullen Street, Calcutta, appealed under S. 141, Calcutta Municipal Act, to the Court of Small Causes at Sealdah, on being dissatisfied with the order passed by the Deputy Executive Officer of the Calcutta Municipal Corporation, in respect of the valuation made by that officer of the amalgamated premises. The premises formerly bearing Nos. 12, 12-1 12-2 and 13 had, on the application of the respondent, been amalgamated into one, No. 12, Mullen Street; Nos. 12, 12-1 and 12-2 being vacant land, were according to the assessment that was in force at the time of the amalgamation in the year 1930, assessed on rental basis; No. 13 was however assessed on residential basis, i.e., on value of land plus cost of construction of the structures standing on the same. On amalgamation, a new assessment was made on residential basis in respect of the whole of the amalgamated premises, and the annual value for the purpose of assessment was raised from Rs. 1,359 to Rs. 1,987. It was against the valuation so made on 23rd May 1930 that an appeal was taken to the Court of Small Causes, as mentioned already.

The question raised by the Court of Small Causes, and the questions that arise for consideration by us on appeal to this Court, by the Corporation of Calcutta, relate to this: whether the Deputy Executive Officer was right under the law, in holding that the assessment on amalgamation could be higher than the assessment on separate valuation of the four amalgamated premises No. 12, 12-1, 12-2 and 13 plus the annual value of the new structures raised on the amalgamated premises, numbered as No. 22, Mullen Street.

On a consideration of the materials placed on the record, and on a construction of the provisions contained in the Calcutta Municipal Act, relating to the

valuation, revaluation and assessment of lands and buildings, to the consolidated rate, the method of determination of annual value and the duration of such assessment, we have come to the conclusion that the view taken by the learned Judge of the Court of Small Causes in allowing the appeal of the respondent before us, is correct. The annual value of the amalgamated premises could not, under the law, exceed Rs. 1,512, during the currency of the assessment that was made in 1928-1929, previous to the amalgamation in 1930.

In our judgment, S. 127 could not come into operation in its entirety, in making a revaluation on amalgamation, and in fixing the annual value of amalgamated premises; so as to control the provisions contained in Ss. 131 and 134, during the currency of the assessment that was in force at the time of amalgamation. The total area of land comprised in the amalgamated premises, could not be revalued on residential basis, under S. 127, on amalgamation, as the valuation made for the purpose of assessment was to remain in force for the whole of sexennial period, and the only addition that could be made was the amount that represented the annual value of the structures added to those standing on the premises before amalgamation. In the result, the appeal is dismissed with costs. The hearing-fee is assessed at two gold mohurs.

M. C. Ghose, J—I agree.

M.N.

Appeal dismissed.

A. I. R. 1933 Calcutta 129

RANKIN, C. J. AND COSTELLO, J.

Narayan Singh Sundar Singh—Appellants.

v.

Attar Singh Moal Singh—Respdt.

Appeal No. 105 of 1931, Decided on 11th April 1932.

(a) *Presidency Towns Insolvency Act (1909)*, Ss. 27 and 28—Court should not lightly dispense with public examination of debtor.

Although there may be power under the Act to dispense with the public examination of a debtor, in a case where a composition is being proposed, the Court should not lightly dispense with the public examination of the insolvent. A composition in the absence of public examination in a case where the debts are large, is not consistent with an efficient administration of the Act. [P 180 C 1]

(b) *Presidency Towns Insolvency Act (1909)*, Ss. 28 and 38—Court should investi-

gate into conduct of debtor before annulling his adjudication.

The duty of the Official Assignee and of the Court is to see that the adjudications are not annulled unless the conduct of the debtor has been such as to entitle him to such a course, and the Court is satisfied that it knows what the assets and liabilities really are. [P 180 C 1]

(c) *Presidency Towns Insolvency Act (1909)*, S. 28—Debtor's duty while submitting composition scheme stated.

The debtor applying for composition must take care in setting out in the scheme itself what his assets are and what his scheme of composition is; and if the assets are to be vested in a trustee or trustees, there must be a statement to that effect and if the trustee or trustees are to guarantee so much money to the creditors, there must be a proper statement to that effect also. [P 180 C 1]

Sudis Chunder Roy—for Appellants.

S. Ghose—for Respondent.

Rankin, C. J.—In this case it appears that three persons presented their own petition in insolvency on 1st August 1930. They did not even file their schedule of affairs till 31st March 1931. On the same day they filed a proposal of composition. That proposal is said to mean a good many things which are not properly stated. In itself it contains no information whatever except that there is a hope that the creditors will be paid five annas in the rupee. From what fund they will be paid there is nothing in it to tell us. There is a statement that certain people are very respectable and are prepared to act as trustees and are also prepared to furnish security to the satisfaction of the Court. The composition is not a scheme at all and ought not to be regarded as a scheme. Further details, however are to be obtained from other documents. It seems from the Official Assignee's report that these insolvents have incurred debt at least to the extent of Rs. 1,50,000. There are certain new creditors, who have come in but who are not included in the schedule. The probable assets set out in the schedule of affairs amount to Rs. 17,000 of good outstandings and Rs. 14,000 is described as bad outstandings. Apparently a sum of Rs. 15,000 has been collected by the Official Assignee and it appears that the money required in order to pay five annas in the rupee is Rs. 57,759-12-2. The creditors for some reason or other appear to have accepted the scheme; but what they thought they accepted I do not know.

The main objection on the part of the appellant before us is that this insol-

veney has been annulled before any inquiry whatever has been made by public examination into the debtors' conduct and affairs. I would like to say that, although there may be power under the Act, to dispense with the public examination of a debtor, in a case where a composition is being proposed, it is a very strong thing to dispense with the public examination. The rules of this court anticipate that public examination should be held in all these cases. In my judgment a composition in the absence of public examination, in a case where the debts are large, is not consistent with an efficient administration of the Act. In the present cases the scheme is extremely informal, hazy and unsatisfactory, and, apart from that, there has been no investigation such as could possibly show what the real assets of these debtors were. It is alleged that they are keeping back certain properties. There may be something in it or there may not be; but there has been no investigation into the matter; and until there has been an investigation no creditor can know whether it is his interest to accept the scheme of composition. The duty of the Official Assignee and of the Court is to see that these adjudications are not annulled unless the conduct of the debtors has been such as to entitle them to such a course, and the Court is satisfied that it knows what the assets and liabilities really are.

In my judgment the appeal must succeed and the order complained of must be set aside. As the debtors desire it, we make an order to the effect that the public examination of the debtors is to be held as soon as may be convenient to the Registrar in Insolvency. The next time the debtors apply for composition, they must take a great deal more care in setting out in the scheme itself what their assets are and what their scheme of composition is; and if the assets are to be vested in a trustee or trustees there must be a statement to that effect and, if the trustee or trustees are to guarantee so much money to the creditors, there must be a proper statement to that effect also. In my judgment the present appeal must be allowed and the creditor will have leave to add his costs of this appeal to his proof of debt.

Costello, J.—I agree.

V.S.

Appeal allowed.

A. I. R. 1933 Calcutta 130

RANKIN, C. J. AND C. C. GHOSH, J. .

Hira Lal Mondal—Appellant.

v.

Burmah Shell Oil Storage and Distributing Co. of India Ltd.—Respondent.

Appeal No. 41 of 1931, Decided on 3rd August 1932, from original order of Commissioner, Workmen's Compensation, Bengal, I/- 8th November 1930.

(a) *Workmen's Compensation Act (1923), S. 10—Notice.*

Section 10 requires a notice in writing.

[P 131 C 1]

(b) *Workmen's Compensation Act (1923), S. 10 (2)—Statement of cause of injury need not be same as in application.*

When the section says that the "notice shall state in ordinary language the cause of the injury" it does not mean that the notice must state in language to the same effect as the subsequent application before the Commissioner.

[P 131 C 1]

Mohendra Kumar Ghose for Surajit Chunder Lahiri—for Appellant.

Barwell and Sudhansu Sekhor Kar—for Respondent.

Rankin, C. J.—This is an appeal by a workman from a decision of the Commissioner under the Workmen's Compensation Act in a case in which the workman claimed a lump sum exceeding Rs. 300 as compensation for the injuries alleged to have been sustained by him on 7th February 1930. It is clear enough that he went to the company's doctor on the next day and it appears that on 21st April he wrote a letter to the company in which he said :

"From 7th February last I am unable to work and could not attend owing to severe pain over the chest and heart. I had a hurt over the chest while I was boring rail; since then I am feeling this difficulty."

Then he goes on to ask that he may get his pay for the time during which he was absent and also that he may be permitted to retire with a gratuity. In the end the employing company, the *Burmah Shell Company*, refused to make any payment and the workman brought the case under the *Workmen's Compensation Act* on 6th August 1930. In his application before the Commissioner he stated the cause of his injury somewhat differently without succeeding in being very intelligible. He said :

"the cause of the injury was due to a fall from a height of about 20 feet while making a hole in the garden in the Filling Shade No. 3 in Budge Budge Installation of the said company."

That collection of English words is not particularly clear, but I understand from

the learned advocate for the appellant that what it means is that he was drilling a hole in a joist, that by some accident he was hit on the chest by or fell up against the tool he was using so as to render him unconscious; at all events he slipped and fell down and in that way suffered an injury. The matter is by no means plain but it is important to observe that up to the present time it has not been inquired into at all. What happened was that the employers filed a written statement taking all the usual defences and three issues were framed: (1) whether the applicant sustained any personal injury by accident; (2) if so, did he sustain the injury alleged; and (3) was the statutory notice served. Under S. 10 of the Act the provision is that proceedings are not to be entertained: "unless notice of the accident has been given, in the manner hereinafter provided, as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured."

The Act however provides that: "the Commissioner may admit and decide any claim notwithstanding that the notice has not been given in due time" as provided by the Act "if he is satisfied that the failure so to give the notice was due to sufficient cause."

The section also provides that "the notice shall state in ordinary language the cause of the injury"

and certain other particulars. Now when this matter came before the Commissioner he first of all decided to deal with issue 3 first: "Was the statutory notice served?" It was argued before him that notice had been given verbally the day after the accident, that is to say, on 8th February to the company. The Commissioner says that S. 10 requires a notice in writing. No doubt, so far the learned Commissioner is right. He goes on to say:

"He says that the applicant having done this supplemented it by a written notice on 21st April, which complies with all the provisions of the section. It does not however comply with the first provision, for it does not state the cause of the accident. This is given in the application as a fall from 20 feet, but the applicant has not been able to show that any notice of such a fall was ever given to the employer."

In my judgment, the decision is based upon an erroneous view. When the statute says that the "notice shall state in ordinary language the cause of the injury" it does not mean that the notice must state in language to the same effect as the subsequent document namely the application before the Commis-

sioner. It merely says that the thing is not to be deemed a proper notice if it does not state in ordinary language the cause of the injury. In this case whoever has written the letter for this workman has done his best to state in his language the cause of the injury; but he has not done it very well; he has not done it in the same sort of language as is afterwards employed before the Commissioner. What he says is: "I had a hurt over the chest while I was boring rail." In my judgment, as a statement of the cause of the injury whether it is a very unsuccessful attempt or a good attempt has nothing to do with the point. The Commissioner's idea that this notice of 21st April is not a notice within S. 10 is in my judgment erroneous.

If there is something suspiciously vague about it, that is a matter which is to be considered when the Commissioner comes to deal with the merits. The delay in giving this notice may be a matter of great importance. What the Commissioner had to decide was whether he would refuse to entertain this because of the absence of a written notice given in due time. The Commissioner has not found that the notice of 21st April was bad because it was not given "as soon as practicable after the happening of the accident." He has not found that at all. In the same way he has not even purported to consider whether the failure was due to sufficient cause. It may very well be that this man having seen the company's doctor and told him all about it had considerable excuse for thinking that it was better to wait before giving a formal notice to the company. That matter has not been dealt with. The issues framed in the case do not show that the Commissioner had appreciated that on the failure to prove a timeous notice in writing he had other duties in the matter.

In my judgment, this matter must go back to the Commissioner. It will be open to him still to hold that the notice of 21st April is bad as not having been given "as soon as practicable after the happening of the accident." That is a matter which is to be inquired into upon evidence. The employers must pay the costs of this appeal. We assess the hearing-fee at three gold mohurs.

C. O. Ghose, J.—I agree.

M.N.

_____ Appeal allowed.

* A. I. R. 1933 Calcutta 132

RANKIN, C. J. AND PEARSON, J.

Manmatha Nath Biswas—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 445 of 1932, Decided on 2nd December 1932.

(a) Limitation Act (1908), Ss. 5, 3 and 29—Time for appeal fixed by S. 33 (2), Bengal Emergency Powers Ordinance, 1931, cannot be extended by S. 5, Limitation Act—Bengal Emergency Powers Ordinance (1931), S. 33 (2).

In view of the terms of S. 29, Lim. Act, S. 5 thereof cannot be applied to extend the time prescribed by the Ordinance of 1931 for filing appeal. [P 133 C 2]

(b) Government of India Act (1915), S. 107—Power of superintendence not repealed by S. 39 of Ordinance—Bengal Emergency Powers Ordinance (1931), S. 39.

Section 107, Government of India Act, survives notwithstanding the wide language of S. 39, Bengal Emergency Powers Ordinance, and the High Court has the power of superintendence: A I R 1933 Bom 1 (S B), Ref. [P 133 C 2]

(c) Government of India Act (1915), S. 107—'Superintendence'—Meaning and nature of.

The superintendence is not a legal fiction whereby a High Court Judge is vested omnipotence, but is a term having a legal force and signification. The general superintendence which the High Court has over all jurisdiction subject to appeal is a duty to keep within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. It does not involve responsibility for the correctness of their decisions, either in fact or law: 1 Pat L J 326, Appr; 7 W R 420, Foll; 33 Cal 68 and 6 C L J 705, Ref. [P 134 C 1, 2]

(d) Appeals—Limit upon, to be enforced under S. 107, Government of India Act.

The limits put upon appeals by the Indian Legislature are a part of the judicial system which it is just as necessary for the High Court to enforce under S. 107 as any other feature of that system. [P 134 C 2]

(e) Government of India Act (1915), S. 107—Prohibition and Mandamus are not the sole forms of superintendence—High Court Act (1861), S. 16.

Prohibition and Mandamus are not sole forms of superintendence which an Indian Court should bear in mind as a guide to the character of the power conferred by S. 16 of the Act, 1861. Defects of jurisdiction, fraud on the part of the prosecutor and error on the face of the proceedings are all good grounds for certiorari: R. v. John Smith, (1800) 8 T R 589 and 1 Pat L J 326, Ref. [P 134 C 2]

(f) Government of India Act (1915), S. 107—Power of superintendence should be exercised upon judicial principles.

The power of superintendence is a power of a known and well recognized character and should be exercised upon those judicial principles which

give it its character: Queen v. Bolton, (1811) 1 Q B 66, Ref. [P 135 C 1]

(g) Government of India Act (1915), S. 107—Conviction by Special Magistrate acting under Bengal Ordinance—Prisoner, being ignorant, complaining after seven days that the Magistrate had no jurisdiction—Objection should be entertained.

If a man ignorant and in prison, without legal assistance or knowledge of the special or general law, is to complain after seven days from his conviction that the Special Magistrate is not qualified as such, or that the case is not within his jurisdiction, the High Court should entertain such objection, but not a general objection to the justice of his conviction on the merits.

* (h) Penal Code (1860), S. 34—Two persons found together—Arms found on one of them—Other is not guilty under Arms Act (1878), S. 19 (f).

Where two persons are searched and on the body of one of them revolver cartridges are found but nothing incriminating on the other, S. 34, I P. C. had no application and the latter is not guilty under S. 19 (f), Arms Act. [P 136 C 2]

Santosh Kumar Basu—for Appellant.
Khundkar, Anil Chunder Roy Chowdhury and Fanindra Mohun Sanyal—for the Crown.

Rankin, C. J. — The appellant Manmatha Nath Biswas was on 27th April last convicted of an offence against S. 19 (f), Arms Act—viz., of having in his possession or under his control a revolver and six cartridges on 18th February. He was tried by the Chief Presidency Magistrate sitting as a Special Magistrate under the Bengal Emergency Powers Ordinance, 1931. Another man, Lalit Mohan Singha was tried together with him. The prosecution evidence was as follows: That these two persons had been seen at about 5 p. m. on 27th January standing and talking together for fifteen minutes in front of the office of a newspaper called "Liberty" in the Upper Circular Road, after which they went together to the Sealdah crossing and separated, that some three weeks afterwards, viz., at about 6.30 p. m. on 18th February, they were again seen near to the same spot, but on the east side of the street where there are railway lines; that they loitered and talked together there for about an hour, after which they proceeded northwards along the street till they came to the crossing of Rani Swarnamoyee Road, where there is a petrol shop, that they stopped and loitered in front of that shop till a little before 9 p. m. when Sub-Inspector Chowdhury challenged Lalit and arrested him after a

severe struggle: that the appellant Manmatha at once began to run away, but was stopped in a few yards by a constable and did not resist arrest.

Both were there and then searched. In Lalit's right hand pocket was found a revolver wrapped in paper and in his left hand pocket were the six cartridges. Upon the appellant Manmatha nothing incriminating was found. The revolver was in working order and the cartridges fitted it. I should here carefully add that Sub-Inspector Choudhury says that the movements of the accused gave him the impression that they were waiting for some one and that opposite the petrol shop they were pointing this way and that moving about restlessly. Sub-Inspector Roy says that opposite the Medical School their movements "became suspicious." It appears that they had been pointed out to the officers as persons suspected of smuggling arms. The Special Magistrate convicted both accused under S. 19 (f), Arms Act, and convicted Lalit under S. 20 also. He sentenced Lalit to six years rigorous imprisonment under S. 20 and the appellant to two years under S. 19 (f) expressly acquitting him under S. 20. As regards the appellant, the Magistrate took the view that:

"there cannot be a shadow of doubt that he was aware of Lalit's possession of the revolver. His presence at the place in question in Lalit's company shows that he was aiding and abetting and sustaining him."

He does not however convict the appellant of abetment. He says that S. 34, I. P. C., applies to the case apparently because:

"the circumstances show that they both had the same common object, viz., to possess the revolver for the purpose of committing terrorist crime or for furthering terrorist crime, e. g., by selling the revolver to some anarchist."

Accordingly he arrives at the conclusion that Lalit who had the revolver in his own pocket possessed it in such a manner as to show an intention to conceal it; that the appellant had the revolver in Lalit's pocket, but not in such a manner as to show an intention to conceal it. On 15th April, the prosecution case having closed, the trial was adjourned to the 25th for defence if any and argument. On the 25th no lawyer appeared for the accused. They were convicted on the 27th and the present appeal by Manmatha was signed and forwarded from jail on 23rd May. Under

the Ordinance an appeal from a Special Magistrate is to be brought within seven days, S. 33 (2), and this Bench has recently held that in view of the terms of S. 29, Lim. Act, S. 5 thereof cannot be applied to extend the time prescribed by the Ordinance. We are therefore prohibited by S. 3, Lim. Act, from entertaining this appeal.

Mr. S. K. Basu for the appellant accordingly prays in aid our power of "superintendence" under S. 107, Government of India Act, as the only remedy available to him in view of S. 39 of the Ordinance. That we have the power given by that section is to me reasonably plain. By S. 72, Government of India Act, an Ordinance has the like force of law as an Act passed by the Indian legislature and is subject to the like restrictions as the power of the Indian legislature to make laws. By S. 65 that legislature has no power to repeal or affect S. 107 unless expressly so authorised by Act of Parliament. By Sch. 5, Ss. 106, 108 (1), 109 and other sections are particularised as sections which may be repealed or altered by the Indian Legislature but S. 107 is not included, and therefore survives notwithstanding the wide language of S. 39 of the Ordinance: cf. *Emperor v. Balkrishna Hari Phansalkar* (1). In the present case Mr. S. K. Basu has contended that the power of superintendence imposes upon this Court a duty to see that justice is done by the subordinate Courts in every case and that this duty rests upon the Court independently of any action which the aggrieved party may take or may not take. He founds upon the observations of Woodroffe, J. in *Lekraj Ram v. Debi Prosad* (2), to the effect that there is no form of judicial injustice which this Court cannot, if need be reach and that Judges have repeatedly refused to make any declaration limiting their powers under the Charter. He further contends that as the accused has lost his right of appeal by reason of the shortness of the period of limitation we should on that ground be the more ready to examine his case upon the merits under S. 107 since we have no power to extend the time for appeal. Mr. Khunkdar on the other hand, besides arguing that the Magistrate's conclusions are well founded con-

1. A I R 1935 Bom 1=1933 Cr C 1 (S B).

2. (1906) 12 O W N 678=7 Cr L J 499.

tends that when the time is elapsed for filing an appeal the Court in a case where the right of appeal existed should not exercise its power of "superintendence."

In my judgment both these lines of argument are to be rejected and are contrary to the weight of authority in this Court. Soon after S. 15, High Court's Act, of 1861 had introduced the word "superintendence" to describe the power in question it was pointed out by Norman, J., in *Gopal Singh v. Court of Wards* (3) that it had "a legal force and signification which are perfectly well known to the legislature." He referred to Blackstone's "Commentaries" and Bacon's "Abridgement" as showing that the writs of mandamus and prohibition were methods of exercising this power and concluded :

"This power of superintendence is entirely distinct from the jurisdiction to hear appeals. If the inferior Court after hearing the parties comes to an erroneous decision either in law or fact on a matter within its jurisdiction the Court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal."

An elaborate review of the decisions of this and other High Courts upon the subject is to be found in the Patna Case *Parameswar v. Kailaspati* (4), a case which like most of the Calcutta cases arose out of proceedings under S. 145, Criminal P. C., for which before 1923 "revision" under that Code did not apply. In the Full Bench case of *Sukh Lal v. Tara Chand* (5) Maclean, C. J., described the power of superintendence as somewhat analogous to that of the King's Bench Division to interfere by mandamus, and in *Kedar Nath v. Khetra Nath* (6) Mitra, J., said that it could only be exercised in cases of non-exercise or illegal exercise of jurisdiction. I agree with Roe, J., in the Patna case that superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence but as Norman, J., had said a term having a legal force and signification. The general superintendence which this Court has over all jurisdiction subject to appeal is a duty to keep them within the bounds of their authority, to see that they do what their duty requires and

that they do it in a legal manner. It does not involve responsibility for the correctness of their decisions, either in fact or law.

Thus in England a mandamus to hear and determine according to law does not mean that the inferior tribunal is ordered to give a correct decision nor does prohibition lie to correct a wrong decision on the merits. The limits put upon appeals by the Indian Legislature are a part of the judicial system which it is just as necessary for this Court to enforce under S. 107 as any other feature of that system. Upon the Indian cases however I doubt whether sufficient attention has been paid to the fact that as regards Magistrates in particular the King's Bench in England has made extensive use of the writ of certiorari to bring up and quash convictions. Prohibition and mandamus are not I think the sole forms of superintendence which an Indian Court should bear in mind as a guide to the character of the power conferred by S. 16 of the Act, 1861. Defects of jurisdiction, fraud on the part of the prosecutor and error on the face of the proceedings are all good grounds for certiorari. Thus in *R. v. John Smith* (7), where the evidence was set out in the conviction or order and it appeared that there was not proper evidence to be considered by the Magistrates in support of a point material to the conviction, the conviction was quashed. As Lord Kenyon's judgment shows, it is certainly not enough that the Magistrates have misconceived a point of law or come to a wrong decision on the facts. For this purpose the Magistrate should be regarded as the person to judge the weight of the evidence.

But if there is no evidence at all of the facts charged or if on the Magistrate's own view of the facts proved the offence was not in law committed, I think that an Indian High Court acting under S. 107 will not be misconceiving the character of its power if it interferes. In this respect only would I add anything to the valuable and concise statement given by Chamier, C. J., in the case of *Parameswar v. Kailaspati* (4) at p. 340. "The face of the record" meant a different thing in the old English cases from what we naturally mean by it in India today but what I have just said is I think the substance and meaning of the

3. (1867) 7 W R 490.

4. (1916) 1 Pat L J 336=17 Cr L J 369=35 I C 801 (F B).

5. (1906) 33 Cal 64=2 O L J 241=9 O W N 1046=2 Cr L J 618 (F B).

6. (1907) 8 C L J 705=6 Cr L J 490.

English rule in terms applicable to Indian practice. It should perhaps be made clear that the case where on the Magistrate's own view of the facts the offence was not in law committed is an entirely different thing from the case where the Magistrate in his judgment has not specifically mentioned every element in the offence. It is practicable that the High Court should see that no man is convicted without a legal reason. Indeed it is idle to give a remedy for irregularity in procedure if remedy is to be refused where, after a proper trial, the final order of the inferior Court is without any legal foundation. It is not practicable that this Court should re-try all cases of the lower Courts and that it should do so upon no settled principle but in cases arbitrarily and sporadically chosen is highly anomalous and undesirable. The power of superintendence is a power of a known and well recognized character and should be exercised upon those judicial principles which give it its character. The matter cannot be better put than in the words of Lord Denman, C.J., in *Queen v. Bolton* (8) at p. 76:

"It is of much more importance to hold the rule of law straight, than from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

This is in my opinion more in consonance with the nature of the power of superintendence, with judicial principle and with the due administration of justice itself, than is the alternative procedure which begins by refusing to recognize any limits to the power or any principles as fit to govern its exercise and ends by vouching discretion for the result, after an open rehearing of each case. So far from being tempted to extend the grounds of interference under S. 107 by the circumstance that the accused has allowed his right of appeal to become barred, I think that his difficulty is increased by the fact that he had such a right. Yet if he loses his rights as an appellant by a delay beyond seven days I cannot think that it is possible on that account to refuse him the much more limited right to complain of his conviction under S. 107. The circumstances are very strong to excuse his small delay.

By the ordinary standard for such matters in this Court he would have 60 days : he petitioned within 27 days. The matter may be tested thus. Suppose a man, ignorant and in prison, without legal assistance or knowledge of our special or general law, were to complain after seven days from his conviction that the Special Magistrate was not qualified as such, or that the case was not within his jurisdiction, could this Court because of the right of appeal provided by the Ordinance refuse to entertain such an objection. Surely not. Better reason must be given for refusing relief against a contempt of the Crown. My view is that there is all the difference between an applicant who comes into Court with such a case and one who comes with a general objection to the justice of his conviction on the merits ; that English practice shows that it is quite practicable, if none too easy, to draw a line of distinction between cases of the one kind and of the other and very necessary that the line should be kept clear and straight; that it is not a question of what the Court will ordinarily do in this jurisdiction but a question of what the scope and object of this jurisdiction is. The limit set to the right of appeal is not a limit to all remedy against usurpation of authority.

In the present case the accused cannot in my judgment dispute the jurisdiction of the Magistrate to determine the case but he is in a position to present his case as follows : He need not ask us to disbelieve any of the prosecution evidence but says that it does not amount to proof or indeed to any evidence that he knew of Lalit's possession of the revolver, or, if he knew, that he was abetting Lalit's offence of possessing it ; still less that he himself was in possession or control of the revolver whether jointly with Lalit or otherwise. He says that the Magistrate has upon no evidence convicted him of possession by reason as his judgment shows of an erroneous notion that S. 34, I. P. C., enabled him to do so, and that his findings as to S. 19 (f) and S. 20 are contradictory and betray the illegality of the conviction. Now, in my judgment the finding that the accused knew of Lalit's possession of the revolver is not a finding without any evidence though I do not think that the evidence carries the matter beyond the realm of

7. (1800) 8 T R 588.

8. (1841) 1 Q B 66.

suspicion. On the Magistrate's own view of the facts however I do not see how he could in law convict this accused under S. 19 (f). There is no evidence that the revolver in Lalit's pocket belonged to this accused and there is nothing to show that if this accused had asked for it he would not have met with the reply: "Certainly not. It is my revolver." No doubt if, both men acting together to shoot X, Lalit had fired the shot, S. 34 might apply to render Manmatha guilty of murder or of wounding. Again if the Magistrate had found as a fact that the two were in joint possession of the revolver the question before us would have been different.

But in what way S. 34 applies to show that Manmatha was in possessor or control of the revolver. I do not understand. With all possible respect to the learned and very able Magistrate, this conviction rests in the end upon no foundation in the evidence or in the findings and I think it should be set aside under S. 107. We were asked to substitute a conviction for abetment, but we would only do that if the accused had had an opportunity to meet a case based upon S. 28, Arms Act, and if we ourselves were satisfied with the proof of the elements of that offence. Neither condition is satisfied. I propose that we should treat this petition of appeal as an application under S. 107, Government of India Act, direct that the conviction be set aside and that the accused be acquitted and released.

Pearson, J.—I agree.

K.S.

Conviction set aside.

A. I. R. 1933 Calcutta 136

PANCKRIDGE AND PATTERSON, JJ.

C. G. Lloyd—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 204 of 1932, Decided on 8th December 1932.

(a) Evidence Act (1872), S. 15 — Accused charged under S. 409, Penal Code—Plea of bona fide payment to wrong persons under misapprehension—Evidence of other transactions of conversion of money to personal use is not admissible—Penal Code (1860), S. 409.

When an accused charged under S. 409, Penal Code, pleaded that the payments were made bona fide to wrong persons under misapprehension and the prosecution tried to let in evidence of other

transactions in which the accused had appropriated sums of money out of fund entrusted to him to his own use.

Held: that S. 15, Evidence Act, had no application to the case and that such evidence would merely show general dishonesty and as such would be irrelevant and inadmissible for rebutting the accused's defence of bona fide payments to wrong persons. [P 138 C 1]

(b) Evidence Act (1872), S. 167—Scope.

Where a trial Court convicts an accused on the evidence part of which has been wrongly admitted and the Sessions Court excluding the wrongly admitted evidence upholds the conviction on the remaining evidence and the trial has taken a course substantially different from that contemplated by the law by the admission of a large body of inadmissible evidence, the case is outside the purview of S. 167, Evidence Act, and should be sent back for retrial. [P 139 C 1, 2]

(c) Evidence Act (1872), S. 15 — Conduct alleged and proved against accused susceptible of more than one interpretation — Evidence of similar acts is admissible to show systematic conduct.

Where the conduct alleged and proved against the accused is susceptible of more than one interpretation, it is permissible for the prosecution to call evidence of similar acts on the part of the accused for the purpose of showing that his conduct is systematic, and therefore, not capable of a favourable interpretation. [P 137 C 2]

Barwell and Monindra Nath Mukherjee—for Petitioner.

A. K. Roy and G. Gupta Bhaya—for the Crown.

Judgment.—This is a rule granted by my learned brother M. C. Ghose, J. and myself calling upon the Deputy Commissioner of Dibrugarh to show cause why the order dismissing the appeal of the petitioner against his conviction and sentence should not be set aside. The petitioner is an employee of the Telegraphs Department in Assam. He was convicted on 5th November 1931 by the Extra Assistant Commissioner on charges under S. 409, I. P. C. The charges were three in number and related to sums of money amounting in all to Rs. 413-4-0. The trying Court convicted and sentenced the petitioner in respect of the first charge to six months' rigorous imprisonment and to a fine of Rs. 413-4-0 or in default to a further term of imprisonment for two months, the fine, if realised, to be paid to the telegraphs department as compensation. In respect of the other two charges the petitioner was convicted and sentenced to six months' rigorous imprisonment on each of them, the sentences to run concurrently with the sentence of imprisonment imposed in respect of the first charge. The petitioner appealed to

the Sessions Judge of the Assam Valley Districts and on 1st February 1932 his appeal was dismissed. He obtained this Rule on 14th March 1932. The Rule was granted upon six out of ten grounds set out in the petition. The grounds upon which we propose to dispose of the rule are those which are concerned with the admissibility of certain evidence tendered by the prosecution. It was the case for the prosecution that the petitioner in his capacity of Subdivisional Officer, Telegraphs, Dibrugarh Subdivision was in charge of Government Funds drawn on imprest account for various purposes, among which was the payment of wages to coolies employed from time to time on casual labour in connexion with repairs to telegraph lines in the Dibrugarh Subdivision.

It is stated by the prosecution that with respect to the three sums with which the charges are concerned the petitioner, instead of paying those sums to the coolies as wages, converted them to his own use, and it is also the case for the prosecution that the muster rolls, which from the record of the payments which the petitioner states he made, are fictitious documents in the sense that no payment was made to the persons whose names appear on the muster rolls or to any one. The prosecution called witnesses and produced documents to prove that the petitioner did not in fact make any of the payments appearing in the muster rolls, and that circumstances showed that the story that he had made such payments was not false but impossible. In addition to the evidence relating to the sums of money which formed the subject-matter of the three charges the prosecution called evidence in respect of other payments which, they alleged, the petitioner falsely claimed to have made, whereas in fact there had been no such payments, the petitioner having applied the sums in question to his own use. It appears that in addition to the three muster rolls with which we are concerned, and which related to the charges on which the petitioner was convicted, 14 other muster rolls were tendered and admitted in evidence and the circumstances with regard to the payments shown therein were investigated in the case at a rate of a large number of them. The petitioner contended before the learned Sessions Judge that the Magistrate had

wrongly admitted the evidence concerning the payments and muster rolls other than the payments which were the subject-matter of the charges and the muster rolls supporting them.

The learned Sessions Judge has come to the conclusion that in this respect the petitioner's contention is well founded, and that under the Evidence Act the evidence to which the petitioner takes exception is not admissible. In the circumstances of the case we have first to consider whether the learned Sessions Judge was right in the view he took, because if we were of opinion that the evidence was admissible we should not have to consider the question of discharging or of making absolute the rule on any of the grounds connected with that evidence. We have come to the conclusion after hearing learned counsel for the petitioner and the learned Advocate General on behalf of the Crown, that the Sessions Judge was right in the view he took, and that the evidence should have been rejected by the trying Magistrate. The section of the Evidence Act under which the Crown seeks to justify the admission of the evidence is S. 15. In our opinion, S. 15 has no application to the circumstances of the case. The act alleged was misappropriation of public money, and if the prosecution story was true that the petitioner had applied the money for his own purposes and had endeavoured to conceal his dishonesty by fabrication of false muster rolls, no question arose whether his act was an intentional or accidental act. Moreover it was common ground that if the petitioner had done what he was alleged to have done he must have done it with full knowledge of the nature of his action and with dishonest intention. Various cases were brought to our notice where the conduct alleged and proved against the accused was susceptible of more than one interpretation.

In such cases it is permissible for the prosecution to call evidence of similar acts on the part of the accused for the purpose of showing that his conduct is systematic, and therefore, not capable of a favourable interpretation. In the statement filed by the petitioner when he was examined under S. 342, Criminal P. C., there are various observations to the effect that if it transpired that the payments which he alleges he made, were

made to persons who were not entitled to receive them, he had acted bona fide and under misapprehension. The fact that in his statement he suggested the possibility of having made the payments to the wrong persons under misapprehension does not justify the prosecution in calling evidence of other transactions in which they say, the petitioner appropriated sums of money out of the fund entrusted to him to his own use. The case for the prosecution was not that he had dishonestly paid money to persons who were not entitled to it. The case for the prosecution was that not only had he not made any payment, but that it was impossible for him to have made any payment. If it be said that they were entitled to anticipate his defence of bona fide mistake, the answer to me appears to be that such an anticipation would not justify them in tendering evidence of instances of dishonesty of a different nature, because obviously it is one thing for a Government servant to put government money into his own pocket and quite another thing to pay it dishonestly to persons not entitled to receive it. Therefore it appears to me that if the issue was whether the payments, if made were made bona fide, examples of conversion of money to the petitioner's own use would merely show general dishonesty, and as such would be irrelevant for the purpose of rebutting the petitioner's defence of bona fide payments to wrong persons. For these reasons we agree with the Sessions Judge that the evidence ought not to have been admitted.

Having dealt with the evidence the admissibility of which was challenged, the Sessions Judge proceeded to consider the rest of the evidence as to the admissibility of which exception cannot be taken, and came to the conclusion that, if he excluded from his consideration the evidence wrongly admitted, the remaining evidence justified the conviction of the petitioners. At the first sight it would appear that the learned Sessions Judge has followed the course contemplated both by the Code and by S. 167, Evidence Act, and has after due consideration of the evidence properly admissible come to the conclusion that the accused is guilty. His finding is a finding of fact and prima facie we should not be disposed to interfere with it or

question its propriety in revision. But it is clear from the language of S. 167 that it is not in every case that the admission of inadmissible evidence will be disregarded on the ground that it appears to the appellate Court that independently of the evidence improperly admitted there was sufficient evidence to justify the decision.

That, in our opinion, is clear from the language of the section which says that the improper admission of evidence shall not be ground "of itself" for a new trial or reversal of any decision. We have to consider whether there are circumstances here which would justify our interference with the order of dismissal in spite of the provision of S. 167, Evidence Act. With regard to this there are some important observations in the judgment of the learned Judge. Before the learned Judge the petitioner had taken exception to the mass of evidence which had been given before the charges were framed, because apparently evidence was given as to the 17 suggested instances of misappropriation prior to the selection of three of such instances as the subject-matter of three charges eventually framed. The learned Judge takes the view that this procedure was undesirable as it was bound to some extent to increase the difficulties of the defence. But he couples with this observation a statement to the effect that it is possible to conduct a trial, without infringing the provisions of the Code, in a manner prejudicial to the accused, and that it is not easy to see how it is possible for the Court to interfere in such a case. This is so, and we recognize the difficulty of giving any redress in cases of hardship where in fact the provisions of the law have been observed, but have operated harshly in the circumstances of the particular case. But the position is quite different when the evidence is not only embarrassing to the accused by reason of its complexity and bulk but is also legally inadmissible, as we have held it to be here.

It has not been questioned that, had the evidence been confined to what was directly relevant to the three charges the scope of the inquiry would have been considerably reduced. It seems to us that we cannot allow the conviction to stand when the lower appellate Court has found that the difficulties of the peti-

tioner have been increased by the amount of material, oral and documentary, tendered by the prosecution, and where the fact that the amount has been so great is due to the admission of a large body of evidence not legally admissible. We attach less importance to the observation of the Judge that the evidence weighed with the Magistrate and influenced him in coming to his decision. We are not prepared to say that that is of itself a ground for setting aside the order complained of. The learned Judge was clearly impressed by the difficult position in which the defence was put by the admission of inadmissible evidence, for he repeats the observation to which we have referred shortly before concluding his judgment. In our opinion, the effect in this case of the admission of a large body of inadmissible evidence has been that the trial has taken a course substantially different from that contemplated by the law. We think that this is a circumstance which compels us to hold that the case is outside the purview of S. 167. We need not concern ourselves with the other grounds upon which the rule was granted because we think that the ground which we have dealt with of itself necessitates a retrial, and that even if the other grounds were substantiated they would not justify order other than one for a retrial. We therefore set aside the conviction and sentence and direct that the petitioner be retried on the same charges by some Magistrate other than the Magistrate who had already dealt with his case. With regard to bail we direct that pending his retrial the petitioner be released on furnishing bail to the satisfaction of the Chief Presidency Magistrate for his appearance on such date and in such Court in the province of Assam as may be required of him.

K.S. *Conviction set aside.*

A. I. R. 1933 Calcutta 139

JACK AND M. C. GHOSE, JJ.

A. M. A. Zaman — Accused — Petitioner.

v.

• Emperor — Opposite Party.

Criminal Revn. No. 71 of 1932, Decided on 20th July 1932.

Penal Code (1860), S. 153-A—Criticism of British Imperialism but no promotion of class hatred—S. 153-A does not apply.

While there were criticisms in an article of British Imperialism and the Rulers of India accusing them of exploiting and crushing the "workers" and the proletariat, the article could not be said to be calculated to promote feelings of enmity or hatred between the Europeans as Europeans and the Indians as Indians.

Held : that a charge under S. 153-A cannot be sustained. [P 13] C 2]

Kshitish Chandra Chakravarti and Ramani Mohan Banerji—for Petitioner.

Khundkar and Nirmal Ch. Chakravarti—for the Crown.

Judgment.—This rule has been issued upon the Chief Presidency Magistrate of Calcutta to show cause why the conviction and sentence imposed upon the petitioner should not be set aside on the ground that the learned Magistrate ought to have held that the article in question is an attack upon the capitalists without reference to the Europeans and that the prosecution does not disclose an offence under S. 153-A, I. P. C. The charge in this case is that by the publication of an article entitled "Samrajya bader khara" or "Sword of Imperialism" the accused attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects to wit, the Europeans and the Indians and thereby committed an offence punishable under S. 153-A. We have perused the article which is the basis of the charge, namely, the article published by the petitioner in the paper called "Sarbahara" of which he is the Editor, entitled "Samrajya bader khara," and we find that while there are criticisms in this article of British Imperialism and the Rulers of India accusing them of exploiting and crushing the "workers" and the proletariat we think that the article cannot be said to be calculated to promote feelings of enmity or hatred between the Europeans as Europeans and the Indians as Indians to which enmity the charge refers. Nor is there any evidence that there was any intention on the part of the accused to promote that kind of enmity. We think therefore that on the charge as framed the petitioner ought not to have been convicted. We therefore set aside the conviction and sentence passed upon the petitioner under S. 153-A, and acquit him on the charge framed.

The petitioner will be released unless detained on any other sentence.

M.N. *Rule made absolute.*

A. I. R. 1933 Calcutta 140

MALLIK AND PATTERSON, J.J.

A. M. A. Zaman—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 68 of 1932, Decided on 5th August 1932.

(a) Penal Code (1860), S. 124-A — Indictment against Imperialism which was used in an interchangeable sense with Government—S. 124-A applies if hatred or dissatisfaction likely.

The terms "Imperialism" and "Imperialistic Government" and Government as used in an article were interchangeable and it was in that interchangeable character that the writer used them when writing the article. The passages in which "reckless oppression, free exploitation" and other acts were attributed to "Imperialism" were well calculated to excite disaffection and hatred towards the author thereof and Government was meant to be the author thereof.

Held : that the article was seditious.

[P 140 C 2 ; P 141 C 1]

(b) Penal Code (1860), S. 124 A—Sentence—Circulation of paper, age and education of accused are considerations.

A paper had not any wide circulation and there were only 760 copies printed of the issue in which the seditious article was published. The editor was a young man of about 22 only with not very great education. In appeal the sentence of one year was reduced to one already undergone.

[P 141 C 1]

Kshitish Ch. Chakravarty—for Appellant.

Khundkar—for the Crown.

Mallik, J.—The appellant A. M. A. Zaman has been convicted under S. 124-A, I. P. C., and under that section sentenced to one year's rigorous imprisonment. Zaman was the Editor, Printer and Publisher of a Weekly Bengalee paper "Sarbahara." The charge against him was in respect of an article which appeared in that paper in its issue on 26th September 1931, under the heading "Massacre at Hijli and Responsibility of the Nation." In this article the writer after condemning the incidents at Hijli proceeded to analyse the reasons why the incidents had happened, whether the Nationalists (the Congress leaders) would be able to remove the causes and the writer concluded by saying that the Congress leaders were impotent in the matter

and it would lie with the revolutionary proletariat to come forward to make the creation of a wider and finer society possible through the destruction of the existing impossible, social and administrative regime and the article ended with the slogan :

"Down with Imperialism : Victory to revolution : May the Proletariat be victorious in all ways. What explanation can the nation offer for the death of the prisoners ?"

The passages in the article to which objection was taken were (1) :

"The Imperialism which is based on reckless oppression and free exploitation has forgotten its responsibility. Hence such impossible oppression on these men has been possible,"

and (2)

"It is not the impotent Congress leaders but the revolutionary proletariat who will have to come forward to make the creation of a wider and finer society possible through the destruction of the existing impossible, social and administrative regime in order that this fighting propensity of Imperialism may be stopped."

According to the prosecution these passages were seditious as they could not but have excited disaffection and hatred towards Government. Mr. Chakravarty who appeared for the appellant conceded that if the term "Imperialism" in these passages could be taken to mean "Government" then that would be seditious. But his contention was that the term "Imperialism" in the article was not to be taken as meaning "Government." This contention, in my opinion, cannot for a moment bear scrutiny. According to the writer "imperialism" had : "Waded through the sea of blood of Santosh Kumar and Tarakeswar" who had been killed at Hijli, Imperialism had forgotten its responsibility and it was futile to cherish the hope of being partners of that Imperialism. Imperialism could not wade through the sea of blood. It cannot forget its responsibility nor can it have anybody as its partners unless it is taken to mean the followers of the doctrine of Imperialism which according to the writer the present Government was. I am therefore clearly of opinion that the terms "Imperialism" and "Imperialistic Government" and Government as used in the article were interchangeable and it was in that interchangeable character that the writer used them when writing the article. There can be no manner of doubt that the passages in which "reckless oppression, free exploitation" and other acts were attributed to "Imperialism" were well calculated to excite dis-

affection and hatred towards the author thereof and if Government was meant to be the author thereof as it must have been meant as shown above, the articles were clearly seditious. I am therefore of opinion that the appellant was rightly convicted under S. 124-A, I. P. C.

Then as regards the sentence. It appears that the paper "Sarbahara" was not a paper with any wide circulation and there were only 750 copies printed of the issue in which the seditious article was published. It appears moreover that the appellant is a young man of about 22 only with not very great education. It appears further that the paper "Sarbahara" is no longer in existence. Regard being had to all these circumstances I am of opinion that the ends of justice would be satisfied if we reduce the sentence of one year's rigorous imprisonment to the term already undergone.

Patterson, J.—I agree.

M. N.

Sentence reduced.

A. I. R. 1933 Calcutta 141

JACK AND M. C. CHOSE, JJ.

Jagan Nath Tripathi—Accused—Appellant.

Emperor—Opposite Party.

Criminal Appeal No. 24 of 1932, Decided on 12th August 1932.

Penal Code (1860), S. 124-A—Article read as a whole referring to Indian Government is within mischief of S. 124-A.

When reading an article as a whole, it is clear that whatever may have been meant by the opening paragraph referred to British Government throughout the rest of the article, the Government established by law in British India is referred to; it can be held without evidence to that effect that the readers of the article would regard the whole as an attack upon the British Government in India; *A I R 1930 Cal 244, Rel on.* [P 142 C 1]

Santosh Kumar Basu and Ramdas Mukerji—for Appellant.

Khundukar and Anil Chandra Roy Choudhuri—for the Crown.

Jack, J.—The appellant has been convicted under S. 124-A, I. P. C., and sentenced to nine months rigorous imprisonment and a fine of Rs. 100 in default

rigorous imprisonment for three months on the ground that he was the Editor, Printer and Publisher of a Hindi weekly newspaper "Lokmanya" in which an article entitled "Kajal-ka-Pahar" was published in the issue of 28th September 1931, which is found to be seditious. The grounds of appeal were that the Court below was wrong in holding that the article exceeded the bounds of legitimate criticism and that on a consideration of the entire evidence, facts and the circumstances of the case the Court should have acquitted the appellant. Two points have been urged before us, in the first place, that the Government referred to in the article in question was the British Government and not the Government established by law in British India and secondly, that on reading the article as a whole the intention of the writer was, as he says, that he was grieved at the incident in the Hijli Camp, that he made an appeal for an impartial inquiry and that it was not his intention to create disaffection towards Government.

As regards the first point it is clear that the writer himself does not state that it was the British Government that he was attacking. He says that it was not his intention to create disaffection towards Government, meaning obviously the Government of India and not the British Government. But referring to the article itself para. 1 may be interpreted as referring to the British Government inasmuch as in the opening words it is stated that:

"British Government is one of the civilized Governments of the world."

The writer then goes on to say:

"But Britain is putting a slur on her name which she has earned in India."

On behalf of the Crown it is argued that whatever may have been in the mind of the writer of the article, it is certain that to the minds of those who read it, it would mean the Government established by law in British India. On the other hand for the appellant it is suggested that there is no evidence as to the effect the article had on the minds of the readers and that in the absence of any such evidence it cannot be assumed that the readers would have regarded it as an attack on the Government established by law in British India. Reading the article as a whole, however it is clear

that whatever may have been meant by the opening paragraph, certainly throughout the rest of the article the Government established by law in British India is referred to: and in these circumstances there is very little doubt that the readers of the article would regard the whole as an attack upon the British Government in India, just as in the case *In re India in Bondage* (1), where the British Government is spoken of throughout and still the whole article was regarded as an attack upon the Government established by law in British India. In the present instance that this was the intention of the writer is borne out by the fact that the incidents with which the British Government have no direct concern are referred to such as the Jallianwala and the Hijli incidents:

"The Jallianwala incident was a big example of her pitilessness and Hijli incident is even a greater one than that,"

so that there is very little doubt that the readers of the article when they read the passages such as

"Britain is putting a slur on her name which she has earned in India. She has not once but several times demonstrated her barbarity. She is very proud of brute force. This has been the cause of her humiliation. The Jallianwala incident was a big example of her pitilessness and Hijli incident is even a greater one than that. No civilized Government would put to shame, humiliate, distract and crush the unarmed as has been done under the aegis of the British rule,"

would regard this as an attack upon the Government established by law in this country. The writer also goes on to say:

"No Government has undergone the same moral degradation as the Government. To attack the unarmed is immoral. . . . It may be that the sentries fired on the unarmed political prisoners in Hijli possibly on their own responsibility but it would be understood that the responsibility for it lies on the Government. If they do not want to hold an impartial inquiry into the misconduct of the sentries then the civilized world would know that there is an accumulation of mental dirt in the mind of the British Government and that they approve of the action of the sentries. However much Government may try to be truthful, their helpers are not so."

The reference to helpers shows he cannot mean the British Government outside India. Next he goes on to say:

"It is futile to appeal to justice and equity in India under British rule. To all appearances it seems that the Government have no respect for the lives of the prisoners at Hijli."

There are other passages showing that he was anxious that Government should make an inquiry into the incident at Hijli e. g., he says:

"In regard to the incidents like those in Hijli the Government should not admit the fault of their agents but should hold an impartial inquiry."

and he does give the Government a fair name where he says that:

"They should ponder over this bitter thing about their welfare for a small blot puts a smudge on a fair name."

Still taking the article as a whole we think there is no doubt that it does come within the mischief of the S. 124-A, I. P. C. It is however not so extreme as some of the articles which have been referred to and we think that in the circumstances of the case the sentence should be reduced to one of six months rigorous imprisonment with a fine of Rs. 100 in default three months rigorous imprisonment. Let the appellant surrender to his bail and serve out the sentence. We have been asked to order for the classification of the appellant as A; and we think that he may be put in that class subject to any objection.

M. C. Ghose, J.—I agree.

Order.—An objection has been raised on behalf of the Government as to the classification of the appellant being A. In the circumstances we think this classification should be left to the jail authorities.

M.N.

Sentence reduced.

A. I. R. 1933 Calcutta 142

JACK AND M. C. GHOSE, JJ.

Soko—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 663 of 1932, Decided on 10th August 1932.

Penal Code (1860), S. 354—Per *Jack, J.*—Intention to outrage or knowledge that assault is likely to outrage modesty of girl is necessary under S. 354—Per *M. C. Ghose, J.*—Offence under S. 354 can be committed on girl of five and half years though she has not developed sense of modesty.

A little girl of five and half years was playing with a boy of her age and the accused put his finger into her private parts and caused a mark on them. After a few hours she complained to her mother of a burning pain in her private parts and the mother saw a red mark there.

1. A I R 1930 Cal 244=1930 Cr C 328=127 I C 78=31 Cr L J, 114.=57 Cal 1317 (F B).

When questioned the girl said that the accused poked her there with his finger.

Held, Per Jack, J.—Under S. 354 it must be shown that the assault was made intending to outrage or knowing it to be likely to outrage the modesty of the girl. The conduct of the girl showed that in fact her modesty was not outraged. There were no suggestion that she had any hesitation in telling her mother exactly what had happened. It was therefore doubtful whether in fact the modesty of the girl was outraged, and that therefore the conviction ought not to have been under S. 354. As a matter of fact the charge might have been under S. 323. Medical evidence showed that there was injury. In view of the nature of the offence the sentence should be maintained but it should be under S. 323, I. P. C. [P 143 C 2]

Per M. C. Ghose, J.—On the facts as found by the Magistrate S. 354 would apply. No authority has been shown for the contention that a man who puts his finger into the private parts of a girl of five and half years of age is not guilty under S. 354 but is guilty under S. 352, inasmuch as she has not developed a sense of modesty. Such action on the part of a man would tend to destroy the formation of a sense of modesty in the girl. [P 143 C 2]

Sudhansu Kumar Sen—for Petitioner.

Jack, J.—In this case the petitioner has been convicted under S. 354, I. P. C., and sentenced to six months rigorous imprisonment on the ground that he outraged the modesty of a little girl of five and half years of age. This rule was granted on the ground that having regard to the age of the girl and the fact that she did not take any notice of the alleged assault and never complained to any one about the offence and she never cried or made any noise, the learned Magistrate should have held that the said girl had not developed the sense of modesty of a woman as contemplated by S. 354, I. P. C., and as such the conviction under S. 354, I. P. C., is illegal and should not be allowed to stand. The circumstances were that this little girl was playing with a boy of her own age and the accused aged about 50 put his finger into her private parts and caused a mark on them. This occurred in the afternoon and when her mother returned at about 5 o'clock and bathed the child, she complained of a burning pain in her private parts. The mother saw a red mark there and asked her how it had been caused and the child said that it was caused by the accused who was a servant of another family in the house. At the trial she said that Suku poked her there with his finger.

The police were then sent for and the accused was sent up on this charge.

When questioned the accused said that the girl scratched herself thereby causing the mark on her private parts. The girl admitted that she and the boy were playing foot ball but said that nothing had happened. Under S. 354 it must be shown that the assault was made intending to outrage or knowing it to be likely to outrage the modesty of the girl. It is urged for the petitioner that the conduct of the girl shows that in fact her modesty was not outraged. There is no suggestion that she had any hesitation in telling her mother exactly what had happened. In the circumstances I think that it is therefore doubtful whether in fact the modesty of the girl was outraged, and that therefore the conviction ought not to have been under S. 354, I. P. C. As a matter of fact the charge might have been under S. 323, I. P. C. Medical evidence was taken and it showed that there was injury, namely, slight excoriation (rubbing off epithelium) with redness on the lower parts of the labia such as might be caused by a finger being turned round and round at the entrance of the vagina. In view of the nature of the offence I think that the sentence should be maintained but it should be under S. 323, I. P. C. The rule is accordingly discharged with this modification of the offence found.

M. C. Ghose, J.—I am of opinion that on the facts as found by the Magistrate, S. 354, I. P. C., would apply. The learned advocate has been unable to show any authority for his contention that a man who puts his finger into the private parts of a girl of five and half years of age is not guilty under S. 354 but is guilty under S. 352, I. P. C., inasmuch as she has not developed a sense of modesty. I am of opinion that such action on the part of a man as has been committed here would tend to destroy the formation of a sense of modesty in the girl and for lack of any authority I cannot agree that the case does not come under S. 354, I. P. C. As my learned brother thinks otherwise, I do not wish to differ having regard to the circumstance that the sentence is maintained.

B.R./R.K.

Rule discharged.

*** A. I. R. 1933 Calcutta 144(1)**

C. C. GHOSE, AND PANCRIDGE, JJ.

Mahendra Lal Bose—Accused—Petitioner.

v.

Gopal Chandra Dey—Complainant—Opposite Party.

Criminal Revn. No. 96 of 1932, Decided on 5th May 1932.

*** Criminal P. C. (1898), S. 199—Complaint by father of girl under S. 498, Penal Code—No circumstances in existence justifying complaint by father instead of husband—Complaint could not be entertained.**

The father of a girl with whom she was residing lodged a complaint under S. 498, Penal Code, alleging that the husband was ill when the complaint was lodged. It was however found that the husband was neither ill when the complaint was lodged nor were there any circumstances justifying complaint by father.

Held: that the complaint was in contravention of S. 199, Criminal P. C., and therefore could not be entertained. [P 144 C 1]

Narendra Kumar Basu and Jogesh Chandra Sinha—for Petitioner.*Santosh Kumar Bose and Satish Chandra Sen*—for Opposite Party.

Judgment.—In this case the charge against the accused is that he has committed an offence punishable under S. 498, I. P. C., i. e. of having enticed away a married girl. The husband is not the complainant. It is said that at the time when the complaint was lodged, the husband was ill and that the girl's father, in whose house the girl had been residing, had therefore to be the complainant. The record does not bear any trace, whatsoever that at the time when the complaint was lodged the husband was really ill and therefore unable to lodge the complaint himself, or that there were any circumstances which would have justified the father of the girl in lodging the complaint instead of the husband. That being so, we are constrained to hold that the first point taken by Mr. Basu in support of this Rule must prevail, viz., that the complaint having been one which is in contravention of the terms of S. 199, Criminal P. C., the proceedings were without jurisdiction. The result, therefore is that the conviction and sentence are set aside. The Rule is made absolute. The petitioner will be discharged from his bail bond. But we desire to observe that nothing that we have said will debar in any way either the husband of the girl or the father of the girl, should such a

necessity arise, from instituting a proper complaint against the accused after taking the leave of the Court under S. 199, if he is so advised.

S.N./R.K.

*Rule made absolute.**** A. I. R. 1933 Calcutta 144(2)**

JACK, J.

Gostha Behari Dey—Decree-holder—Petitioner.

v.

Indra Chandra Dey and others—Applicants—Opposite Parties.

Civil Rule No. 731 of 1931, Decided on 10th July 1931, from order of 2nd Court Munsif, Arambagh, D/- 19th March 1931.

*** Civil P. C., (1908), O. 21, R. 100—R. 100 does not apply in cases where there has been only symbolical delivery of possession.**

Rule 100 only applies where there is actual dispossession and a person whether holding under a judgment-debtor or any one else is not entitled to apply under this rule in a case where there has been only symbolical delivery of possession. [P 144 C 2]

Khitish Chandra Chakravarty, Panchanan Ghoshul and lienoy Krishna Ghose—for Petitioner.*Rupendra Kumar Mitra and Khetra Mohan Chatterjee*—for the Crown.

Judgment.—This Rule was issued against an order allowing an application under O. 21, R. 10, Civil P. C. It appears that this application was made in consequence of an order giving the petitioner the decree-holder symbolical possession of the land in suit. The applicants under O. 21, R. 100 were not the judgment-debtors but holding under the judgment-debtors or some one else and they were not dispossessed by the decree-holder. O. 21, R. 100 only applies where there is actual dispossession and a person whether holding under a judgment-debtor or any one else is not entitled to apply under this rule in a case where there has been only symbolical delivery of possession. This Rule is made absolute, the order of the Court below is set aside and the application under O. 21, R. 100 is rejected. The petitioner will get his costs in the Court below as well as in this Court—hearing-fee one gold mohur in this Court.

K.N./R.K.

Rule made absolute.

* * A. I. R. 1933 Calcutta 145

C. C. GHOSE AND PANCKRIDGE, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

*Raisallee and others—Respondents.*Government Appeal No. 2 of 1930,
Decided on 3rd May 1932.

* * Criminal Trial—Jurisdiction—Commander of steamship complaining against members of crew of rioting and causing grievous hurt while on high seas—Processes not served as accused were not to be found on addresses given—Subsequently accused surrendering themselves—Case transferred to Third Presidency Magistrate—Third Presidency Magistrate had jurisdiction to proceed with trial although there was no evidence showing that accused were in Calcutta when complaint was made—Penal Code, S. 4.

The commander of a steamship laid a complaint before the Chief Presidency Magistrate against members of the crew charging them with having been guilty of rioting and causing grievous hurt while on the high seas. Processes however could not be served on them as they were not to be found on the address given. Subsequently after proclamations were issued, all the accused surrendered themselves to the Chief Presidency Magistrate, who transferred the case to the Third Presidency Magistrate for trial.

Held: that the Third Presidency Magistrate had jurisdiction to proceed with the trial, although there was no evidence to show that the accused were in Calcutta on the day on which the complaint was made: 39 Cal 487, *Rel on*.

[P 145 C 2]

Khundkar, Nirmal Chandra Chakravarty and Anil Chandra Roy Chowdhury—for the Crown.

Lalit Mohan Sanyal—for Respondents.

C. C. Ghose, J. —This is an appeal by the Local Government against an order made by the Third Presidency Magistrate Mr. Wajed Ali acquitting the accused Samiulla and five others in respect of an offence alleged to have been committed by them on the high seas before the steamship in which they were employed as members of the crew had arrived in Calcutta. The steamship "City of Herford" arrived in Calcutta on 14th September 1929 and the accused were then on Board. On 17th September the commander laid a complaint before the Chief Presidency Magistrate against the accused charging them with having been guilty of rioting and causing grievous hurt to two engineer officers. Processes were issued and warrants ordered to be served. The warrants were not executed as the accused, it is said, were not to be found at

the Kidderpore address which they had themselves supplied to the shipping office. Thereafter proclamations were issued against the accused. But the S. S. City of Herford left port towards the end of September 1929 after the evidence of Captain Baker and the two engineers were recorded under S. 512, Criminal P. C. It is said that all the accused subsequently surrendered before the Chief Presidency Magistrate who transferred the case to Mr. Wajed Ali for disposal. The Third Presidency Magistrate, as stated above, acquitted all the accused on the ground that the Chief Presidency Magistrate had no jurisdiction to take cognizance of the case on 17th September 1929 inasmuch as there was no evidence to show that the accused were in Calcutta on the said day. It is against that order of acquittal that the present appeal has been preferred.

After the admission of this appeal only one of the six accused, namely, Samiulla has been arrested and he is represented before us to-day by Mr. Lalit Mohan Sanyal. Mr. Sanyal's contention is that there was no evidence that on the date the processes were issued the accused was in Calcutta and therefore the Court had no jurisdiction whatsoever to entertain any complaint against the accused. A clear and sufficient answer to this contention will be found in Ss. 684 and 686, Merchants' Shipping Act 57 and 58, Victoria Chap. 60, and reference may also be made in this connexion to the case reported in *Emperor v. Salimullah* (1), which is on all fours with the present one. It does not appear from the record that on the date the processes were issued by the Chief Presidency Magistrate the accused were not in Calcutta. They might not have been found by the process server, but it does not follow that they were not in Calcutta, and having regard to the wide terms of Ss. 684 and 686, Merchant Shipping Act, I am not prepared to say that the Chief Presidency Magistrate had no jurisdiction whatsoever in issuing the processes on the date the same were issued. Be that as it may all the accused obeyed the processes of the Court and surrendered before the Chief Presidency Magistrate and subsequently also before the Third Presidency Magistrate. That being so the Court of

1. (1912) 39 Cal 487=13 Cr L J 246=14 I C 593.

the Third Presidency Magistrate had abundant jurisdiction to proceed with the trial of the accused. That not having been done and the acquittal being one which was wrong in law it must be set aside, and so far as the accused Samiulla is concerned being the only one who has been arrested in pursuance of the orders of this Court there must follow an order of retrial. The result therefore is that the accused Samiulla will be retried in accordance with law on charges under Ss. 148 and 324, I. P. C. The other accused have not been arrested and so far as they are concerned the present appeal will remain pending.

Panckridge, J.—I agree.

S.N./R.K.

Order accordingly.

A. I. R. 1933 Calcutta 146

C. C. GHOSE AND PANCKRIDGE, JJ.

Ramani Mohan De—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 919 of 1931, Decided on 3rd May 1932.

(a) **Evidence Act (1872), S. 133** — Where first statement requires corroboration from independent sources, such corroboration cannot be sought in accomplice's evidence recorded in Sessions Court—Criminal Trial.

Where the first statement required corroboration from an independent source, such corroboration could not be sought in the evidence of an accomplice recorded in the Sessions Court. Corroboration must be had from independent sources, and if such corroboration could not be had then the first statement was not corroborated at all and that being so, ordinarily it would be very unsafe to act on the first statement which was not corroborated. [P 147 C 1]

(b) **Evidence Act (1872), S. 26** — Statements made by accused to daroga showing place in jungle where occurrence took place are not admissible being confession made to police officer while in custody—They are not made admissible by Evidence Act (1872), S. 27.

Statements made by the accused to the daroga showing the place in the jungle where the occurrence in question viz., taking away a female child and having sexual intercourse with her took place, cannot be admitted in evidence they being in the nature of a confession made to a police officer while in custody. S. 27 has no application and would not make the statements admissible. [P 147 C 1]

Hemendra Kumar Das—for Appellant.

Manindra Nath Mukerji — for the Crown.

Judgment.—In this case the accused who is said to be a boy aged 13 years has been found guilty under S. 376, I. P. C., and has been ordered to be detained in a reformatory school for a

period of six years in lieu of imprisonment. There was a charge under S. 304, I. P. C. But the jury acquitted the prisoner under that charge. The facts, shortly stated, are as follows: It is alleged that the accused Beni took a child named Hasi away on the afternoon of 18th April 1931, had sexual intercourse with her and afterwards removed the girl to his own house with the help of his mother, kept her there for the night and the next day also. The child, Hasi, was aged about six years. Some time in the afternoon or thereabouts on the last mentioned day, the girl died and the suggestion is that somebody belonging to Beni's house must have thrown away the dead body of the child into a pit in which it was found on the next day at about 10 or 11 a. m. Thereafter the matter was reported to the child's father and the dead body was taken home. Investigation followed and the accused was committed to take his trial in the Sessions Court. Evidence was led by the prosecution to prove that the deceased child was last seen alive with Beni and that the search for the child was at first infructuous and it was not until the third day, i. e., Monday the 21st April that a boy named Putul made certain statements to the police on which they were both arrested and sent up to Moulvibazar to have their confessions recorded by a Magistrate. The confessions made by the two boys Beni and Putul were recorded by the Magistrate on the same night and the accused were remanded to *hajal*. As stated above, there was a preliminary inquiry by the Subdivisional Magistrate of Moulvibazar who committed the present accused to stand his trial in the Sessions Court.

At the hearing of this appeal, the main point which has been argued is this that Beni's confession before the Magistrate having been retracted before the Subdivisional Officer, and also in the Sessions Court, before it could be used in evidence against Beni, it required corroboration. It is pointed out in the charge that such corroboration was to be found in the evidence of Putul recorded in the Sessions Court, Putul was an accomplice. Of that there cannot be any doubt and the learned Sessions Judge in an earlier part of his charge pointed out quite correctly that where a confession or statement, before it could safely be used against the

confessor or the maker of the statement, required corroboration, such statement or confession could not be corroborated by the statements or the evidence of an accomplice. But in a later part of the learned Judge's charge he has apparently directed the jury to find for themselves whether the confession or statement of Beni did not derive corroboration from the evidence of Putul recorded in the Sessions Court. In other words, he has directed the jury to this effect that while the confessional statement of the accused could not be acted safely against the maker, i. e., the accused who made the confessional statement, the corroboration was to be sought in the evidence of accomplice recorded in the Sessions Court. This in our opinion, is wholly wrong and it is against the elementary rule that where the first statement required corroboration from an independent source, such corroboration could not be sought in the evidence of an accomplice recorded in the Sessions Court. Corroboration must be had from independent sources, and if such corroboration could not be had then the first statement was not corroborated at all and that being so, ordinarily it would be very unsafe to act on the first statement which was not corroborated.

In the second place, it has been argued that the statements made to the daroga by Beni showing the place in the jungle where the occurrence in question took place, could not be admitted in evidence, they being in the nature of a confession made to a police officer while in custody. It is said that under S. 27, Evidence Act, such statements are admissible in evidence. When one looks at the terms of S. 27, one realizes at once that S. 27 and the rule laid therein can have possibly no application whatsoever to the circumstances of this case and the statements made to the daroga must be treated as if they were statements made to a police officer in custody and in the nature of a confession. That being so, that statement must be ruled out and should not be treated as admissible in evidence against the accused. There is another circumstance to which we desire to call attention. It does not appear on the record that the retracted confession of Beni received any confirmation or support from the evidence of the medical gentleman who examined the child and who was called to give evidence. At the

time when the medical gentleman examined the dead body of the child, the body was found to be in a state of decomposition and the medical gentleman was unable to say whether the offence of rape had been perpetrated by the accused on the child. In other words, there was no evidence to suggest that an offence punishable under S. 376, I. P. C., so far as the medical gentleman was concerned had been committed.

This being the state of the record, it follows from what has already been stated on the first two points concerned that the conviction by the jury on a charge of this description cannot be allowed to stand. The result is that in our opinion the conviction and sentence must be set aside and the case must be sent back for retrial in the light of the observations which follow. So far as S. 376 is concerned, having regard to the state of the record, we are of opinion that the accused should be acquitted under that charge. But the evidence on the record points to the fact that while the accused might not have committed the offence punishable under S. 376, he may have committed an offence punishable under S. 354. But this is a matter for inquiry and in sending the case back we desire that the District Magistrate should inquire whether or not the accused had been guilty of an offence punishable under S. 354, I. P. C., and we accordingly direct that he will take the necessary steps in this behalf. The accused who is on bail will remain on the same bail pending further orders of the District Magistrate.

S.N./R.K.

Case remanded.

A. I. R. 1933 Calcutta 147

MALLIK AND REMFRY, JJ.

Nabani Nath Mukherjee and another
—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 883 of 1930, Decided on 21st April 1932.

Criminal P. C. (1898), S. 476—Express finding that in interest of justice inquiry should be made into offence is essential.

In the absence of an express finding that it was expedient in the interests of justice that an inquiry should be made into the offence, a complaint made under S. 476 is not maintainable : *A I R 1928 Cal 862 and A I R 1930 Cal 352, Rel. on.* [P 148 C 1]

S. C. Taluqdar, Surajit Chandra Bahiri and Sailas Chandra Taluqdar—for Appellants.

Manindra Nath Mukerji—for the Crown.

Mallik, J.—This is an appeal under S. 476-B, Criminal P. C. It has arisen in this way : One Nabani Nath Mukerji brought a case of cheating under S. 417, I. P. C., against Prafulla Chandra Ghose. Nabani's brother Aparnath Mukherji was a witness for Nabani. The case against Prafulla ended in acquittal. The trying Magistrate thereupon called upon Nabani and Aparnath to show cause why they should not be proceeded against under S. 211, I. P. C., and when they showed cause the Magistrate, after considering the cause shown by them, decided to make a complaint under S. 476, Criminal P. C. Nabani and Aparnath thereupon came up to this Court and filed the present appeal. The hearing of the appeal was stayed in view of the fact that Nabani had filed a civil suit in the Calcutta Small Cause Court relating to the facts on which he had instituted the criminal case of cheating. The civil suit has ended in the dismissal of Nabani's case.

The order made by the learned Magistrate under S. 476 cannot in our opinion be maintained. In the order made by him the learned Magistrate nowhere found that it was expedient in the interest of justice that an inquiry should be made into the offence under S. 211, I. P. C. It has been held in the case of *Keramat Ali v. Emperor* (1), as also in the case of *Surendra Nath Jana v. Kumuda Charan* (2) that it is only when a Court is expressly of opinion that it is expedient in the interest of justice that an inquiry should be made that an order under S. 476 can be made. As there was no such express finding in the present case the order of the Magistrate under S. 476 must be vacated. The appeal is accordingly allowed and the appellants will be discharged from the bail-bonds.

Remfry, J.—I agree.

S.N./R.K.

Appeal allowed.

1. A I R 1928 Cal 967=113 I C 812=55 Cal 1312.

2. A I R 1930 Cal 352=126 I C 416.

* A. I. R. 1933 Calcutta 148

PEARSON AND M. C. GHOSE, JJ.

Sudam Chandra Bag—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 885 of 1931, Decided on 11th January 1932.

(a) Criminal P. C. (1898), S. 494—Trial—Magistrate permitting Public Prosecutor to withdraw one accused from prosecution so that his evidence might be available against other accused—Such person is competent witness in law.

The trial Magistrate has a wide discretion under S. 494 to permit the Public Prosecutor to withdraw from the prosecution one of the accused in order that his evidence might be available for the charge against the other accused who is being tried jointly with him and such a person is a competent witness in law: *A I R 1929 Cal 319, Foll.* [R 149 G 1]

* (b) Evidence Act (1872), S. 114, Illus. (b)—Co-accused against whom charge is unconditionally withdrawn is more reliable witness than accomplice under conditional pardon.

The co-accused against whom the charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in cases of both : *25 Bom 122, Rel. on.* [P 149 C 2]

* (c) Evidence Act (1872), S. 27—Police officer interviewing person charged with offence of being in possession of cocaine and walking with him to place pointed out by him where cocaine was discovered—Accused held to be under police custody and statements held admissible under S. 27.

Where a police officer, although he arrested a person charged with being in possession of cocaine after the finding of the cocaine with him, interviewed the accused and was with him for a considerable time and walked with him to the place where the accused pointed out the spot where the cocaine might be found:

Held : that the accused was in police custody at the time when he made the statement as to the spot where the cocaine could be found and his statement was admissible under S. 27.

[T 149 C 1, 2.

S. K. Sen, Hiralal Ganguli and Arifalal Mukherji—for Petitioner.

Khondkar and Anilendra Nath Roy Chaudhury—for the Crown.

M. C. Ghose, J.—The petitioner Sudam Chandra Bag was convicted by a Magistrate under S. 14, Dangerous Drugs Act, for possession of a quantity of cocaine and sentenced to rigorous imprisonment for nine months and a fine of Rs. 1,000. On appeal the learned Additional Sessions Judge upheld the conviction but reduced the imprisonment to six months and the fine to Rs. 500. It is urged in this Court that there is no legal evidence to connect

the accused with the possession of the cocaine. It appears that one Suren Haldar was a co-accused with the petitioner. After some evidence was taken the Magistrate on the prayer of the Public Prosecutor discharged him under S. 494, Criminal P. C., and thereafter the Public Prosecutor examined him as a prosecution witness. The learned counsel has urged that Suren Haldar, in the circumstances, was not a competent witness.

After hearing the learned counsel who quoted many cases, and after hearing the learned Deputy Legal Remembrancer I am of opinion that Suren Haldar was a witness competent in law. The trial Magistrate was within his discretion in permitting the Public Prosecutor to withdraw from the prosecution of Suren Haldar in order that his evidence might be available for the charge against the other accused who was being tried jointly with him: see the case of *G. V. Raman v. Emperor* (1). It is also urged that even if Suren's evidence be competent in law his evidence was pointed and should not be accepted without proper corroboration. There is some force in this argument of the learned counsel though it is to be observed that the co-accused against whom the charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon: see the case of *Queen-Empress v. Hussein Haji* (2).

It is next urged that there was no evidence to connect the accused with the place where the cocaine was found. So that no presumption can be drawn that the accused was in possession of the same. The evidence is that the petitioner Sudam took a police officer to two separate places which upon his direction were dug out and the incriminating cocaine was found there. The learned counsel urges that the alleged statement of the accused was made at a time when he was not in police custody and therefore his statements are not evidence under S. 27, Evidence Act. I am of opinion that this argument is not correct upon the facts. Though the police officer deposed that he arrested the accused after the finding of the cocaine, it is clear upon the evidence that he had interviewed the peti-

tioner and was with him for considerable time and walked with him to the two places where the petitioner pointed out the spot where the cocaine might be found. In the circumstances there is no doubt as to the fact that the accused was in police custody at the moment when he made the statement as to the spot where cocaine could be found. The Courts below were correct in finding, that the accused was in actual possession of the cocaine. In the circumstances I am of opinion that the petitioner was rightly convicted and that the sentence imposed by the Sessions Judge is not, in the circumstances of the case, too severe. The Rule is discharged. The petitioner, if on bail, must surrender to his bail and serve out the sentence.

Pearson, J.—I agree.

R.M./R.K.

Rule discharged.

* A. I. R. 1933 Calcutta 149

PEARSON AND MALLIK, JJ.

Rama Aiyar and another — Petitioners.

v.

S. P. Das Gupta — Opposite Party.

Criminal Revn. No. 671 of 1931, Decided on 8th December 1931.

* Criminal P. C. (1898), S. 203—Lorry purchased on hire purchase system—Owner forcibly dispossessing purchaser on alleged breach of contract—Purchaser filing complaint and asking for search warrant—Magistrate dismissing complaint but ordering return of lorry to purchaser on having bond from him to produce it whenever required—Magistrate's order held proper.

A lorry was purchased on a hire purchase system—The owner some time after this forcibly removed the lorry from the purchaser's possession on an alleged breach of contract. The purchaser then filed a complaint against the owner and asked for a search warrant. The Magistrate dismissed the complaint under S. 203 but ordered that the lorry be handed over to the purchaser on taking a bond from him that he would produce it whenever required:

Held: that in the above circumstances the order of the Magistrate was proper. He had a right to order the resumption of status quo, so that the rights of the parties might be determined in a civil Court, as the matter of the alleged breach of contract was one concerning the civil Court: *A I R 1931 Cal 455, Dist.*

[P 150 C 1, 2]

Suresh Chandra Talukdar and Parimal Chandra Guha—for Petitioners.

B. B. Das and Ram Das Mukherjee—for Opposite Party.

Pearson, J.—The petitioners are the representatives of the Commercial Credit

1. *A I R 1929 Cal 319=121 I C 678 = 56 Cal 1023.*

2. (1901) 25 Bom 422=2 Bom L R 1095.

Corporation Ltd. This company let out motor lorries and cars on the hire purchase system, and in the present case the hirer was the opposite party to this rule. The hirers had made various payments in fulfilment of his contract, when some dispute arose between the parties and the petitioners managed to take forcible possession from the hirer and removed the car to their own premises. The hirer thereupon filed a complaint before the Presidency Magistrate and asked for a search warrant for the lorry. The Magistrate made the order, upon the complainant giving a bond to produce it whenever required. The present petitioners came in and alleged that the hirer had been guilty of various breaches of the contract and defaults in payment, and they had given notice more than once that the hire of the vehicle would be terminated and possession resumed by the hirers in terms of the agreement. The Magistrate passed orders dismissing the complaint under S. 203, Criminal P. C., but maintaining the order making over the vehicle to the complainant. Against that order this rule is directed.

It is said that the Magistrate has no jurisdiction to make such an order and that the case is on all fours with the case of *Brojendra v. K. S. Sama* (1). The facts in that case were very different, though it has the similarity that the question arose over a motor bus taken on the hire purchase system. But there the position was that the owner had by some trick taken possession of the bus, and the hirer had recovered possession again by some other strategy or trick. Thereupon the owners had made a complaint of theft and obtained an order for delivery of the bus which order the High Court set aside. The present case is very different: the hirer has been forcibly dispossessed of his lorry and the Magistrate has ordered it to be restored to him. On the one side it is alleged that the party had a right to terminate the contract and resume possession: on the other side it is alleged that no such right existed. Very obviously this was a dispute of a civil nature, and if the right to recover possession had matured, the natural way for the owners to enforce that right is by proceedings in the civil Courts. Whether they had acquired that

right depended upon facts which were in dispute between the parties. In the circumstances of this case I see no reason why on principle the Magistrate should not order the resumption of the status quo so that the determination of the rights of the parties might be properly sought before the civil Courts, as it should have been in the first instance. It appears to me that the language of the section is wide enough to cover an order such as this, and that there was no lack of jurisdiction in the learned Magistrate. It is unnecessary to comment on the Magistrate's view of the nature of the contract between the parties, because even assuming the petitioners here remained the owners, the question whether they were entitled to terminate the hire in the events that had happened was a matter for determination in the civil Courts. The rule is therefore discharged.

Mallik, J.—I agree.

B.V./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 150

MALLIK AND REMFRY, JJ.

B. S. Corbet and others—First Party.

v.

Sonaulla Basunia—Second Party.

Criminal Ref. No. 195 of 1931, Decided on 14th April 1932, made by Addl. Sess. Judge, Rangpur.

Criminal P. C. (1898), S. 133 — Person raising his low land and causing overflow of rain water into other lands cannot be proceeded against under S. 133.

A proceeding under S. 133 was started against a person on the ground that he by raising the level of his low land caused an overflow of surplus rain water into other lands.

Held: that S. 133 did not apply and the persons damaged by the tortuous act may have their remedy by civil suits: *A I R 1914 All 213, Foll.* [P 151 C 1]

Radhicanranjan Guha—In support of the Reference.

Mallik, J.—This is a reference made by the Additional Sessions Judge of Rangpur. It arises out of a proceeding under S. 133, Criminal P. C. It appears that one Sonaulla Basunia purchased some brickfield land which was low-lying and into which surplus rain water from neighbouring lands used to flow during the rains. It appears also that Sonaulla has now raised the level of that low-lying land of his with the result, that it has prevented the flow of surplus rain water from the adjoining lands

causing an overflow into other lands. The learned Judge has recommended that the proceeding should be cancelled on the ground that the learned Magistrate had no jurisdiction to deal under S. 133, Criminal P. C., with the present case.

The reference, which is not opposed before us, should in my opinion, be accepted. The facts of the present case seem to be on all fours with the facts of the case in *Sagarnath Sahu v. Parmeswar Narain* (1), where it was held that in a case like the present one, S. 133 would not be applicable and that if it is found that any injury has been caused by any tortious act of the man against whom proceedings under S. 133 are sought, then the persons who have been damaged may have their remedy by civil suits. For the reasons given above I would accept the reference and cancel the proceedings under S. 133, Criminal P. C.

Remfray, J.—I agree.

S.N./R.K. Reference answered.

1. A I R 1911 All 213=23 I C 181=15 Cr L J 229=36 All 203.

A. I. R. 1933 Calcutta 151

GUHA AND M. C. GHOSE, JJ.

Dinajpur Trading and Banking Co. Ltd.—Appellants.

v.

Probbhash Chandra Sen and others—Respondents.

Appeal No. 500 of 1930, Decided on 27th June 1932, against Original Order of Dist. Judge, 24-Parganas, D/- 9th August 1930.

(a) Provincial Insolvency Act (1920), S. 75—Petition by creditor—Prayer to join co-debtors—Other creditor allowed to intervene as creditor but his debts not proved—Prayer disallowed—Intervenor is aggrieved party.

A person who is allowed to appear in the proceedings filed by another creditor and intervened in the same, as a creditor though his debts had not at the time been proved is a person aggrieved by an order disallowing a prayer for joining certain other persons as debtors made by another creditor: *A I R 1927 Cal 163, Ref.* [P 152 C 2]

(b) Provincial Insolvency Act (1920), S. 75 (3)—Admission of and proceeding with appeal is grant of leave.

The fact of an appeal having been admitted and allowed to be proceeded with is tantamount to the granting of leave as contemplated by S. 75 (3): *A I R 1928 Pat 388, Rel. on.* [P 153 C 2]

(c) Civil P. C. (1908), O. 11, R. 1—Interrogatories for discovering other party's evidence cannot be allowed.

A party is not entitled to administer interrogatories for obtaining discovery of facts which

constitute exclusively the evidence of his adversary's case. [P 153 C 2]

(d) Hindu Law—Joint family—Coparceners are not necessarily partners in other coparcener's business—Contract Act (1872), S. 239.

From the mere fact that a person carrying on business is a coparcener in a joint Hindu family, it does not necessarily follow that all his coparceners are his partners in that business. The fact of partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour and skill in the business and to share the profits and losses in the same: 27 Bom 157, *Ref.*

[P 153 C 2]

Bankim Chandra Mookerjee for Girija Prosanna Sanyal with Sourindra Narayan Ghose—for Appellant.

Dr. Bijon Kumar Mukerji, Rupendra Kumar Mitter and Apurbadhan Mukherji—for Respondents.

Guha, J.—This appeal is directed against an order passed by the learned District Judge of the 24-Parganas, on 9th August 1930, exercising jurisdiction under the Provincial Insolvency Act 1920. The facts of the case giving rise to the appeal may be briefly stated: On an application of two creditors, Manmatho Nath Parkait and Sudhir Chandra Parkait filed on 26th November 1929, an order of adjudication was passed by the learned District Judge. In the application by the creditors it was stated that acts of insolvency had been committed by Mahendra Chandra Sen and Sris Chandra Chaki carrying on a business in paddy as a partnership firm, and in the list of properties mentioned in the application it was stated that the firm styled Mahendra Chandra Sen and Sris Chandra Chaki owned one rice mill standing on about 8 or 9 highas of lease-hold land on Bura Sihtala Road, Sahapore in the district of 24-Parganas. It appears that on 24th February 1930, one Nalini Mohan Rai Chaudhuri put in a petition before the Court, stating that both Mahendra Chandra Sen and Sris Chandra Chaki had brothers. Mahendra Chandra Sen, it was stated had three brothers, and Sris Chandra Chaki had four brothers; all these brothers, the Sen Brothers and the Chaki Brothers were members of two Hindu joint families, and all of them were interested in the rice business referred to in the petition for insolvency, who participated in the profits of the said business, and had share in the same. The petition for insolvency and the application of Nalini Mohan Rai

Chaudhuri that there are other partners in the firm were considered by the learned District Judge, on 24th February 1930, and it was ordered by consent of all parties that the firm of Mahendra Chandra Sen and Sris Chandra Chaki and its partners Mohendra and Sris, who had appeared in Court after service of notice, be adjudged insolvents. It appears from the order sheet that on 25th March 1930, the alleged debtors, according to the application of Nalini Mohan Rai Chaudhuri, Provas Chandra Sen, Prosanno Chandra Sen, and Surendra Chandra Sen, as also Kshitish Chandra Chaki, Satis Chandra Chaki, Kamakhya Chandra Chaki and Bhabesh Chandra Chaki filed their objections before the learned District Judge.

The objections raised by the Chaki Brothers on the one hand and by the Sen Brothers on the other controverted the allegations made in the application of Nalini Mohan Rai Chaudhuri and the objectors prayed for the rejection of the said application. It was stated by the objectors that they were not jointly and severally liable for the debts incurred by Mahendra Chandra Sen and Sris Chandra Chaki, and that neither the Sen Brothers nor the Chaki Brothers were members of joint Hindu families. On the objections raised by the persons named above sought to be impleaded in the proceedings as debtors, the learned District Judge raised the following issues: (1) Are the opposite party viz., Provas Chandra Sen, Surendra Nath Sen Prasanna Chandra Sen, Kshitish Chandra Chaki, Satis Chandra Chaki, Kamakhya Chandra Chaki and Bhabesh Chandra Chaki partners of the Insolvent Firm, Mahendra Chandra Sen and Sris Chandra Chaki; and (2) Is the present petition made by Nalini Mohan Rai Chaudhuri maintainable as against the opposite party? The material issue raised for determination in the case by the learned District Judge, was directed to the question whether the Sen Brothers and the Chaki Brothers mentioned above were or were not to be adjudged insolvents along with Mahendra Chandra Sen and Sris Chandra Chaki, so that the properties belonging to the members of the two families, of the Sen on the one hand, and the Chakis on the other—might be added to the assets of the Firm of Mahendra Chandra Sen and Sris Chandra Chaki.

On 23rd June 1930 petitions were filed by creditor Nalini Mohan Rai Chaudhuri praying for reasons stated therein that the opposite parties, the three Sen Brothers and the four Chaki Brothers, as also the insolvents Mohendra and Sris might be directed to answer interrogatories set forth in the petitions filed in Court. Notices were issued on the parties to show cause why they should not be directed to answer the said interrogatories. On 30th June 1930 after hearing the parties concerned, the learned District Judge declined to allow the interrogatories. Thereupon the proceedings were allowed to continue. Witnesses in support of the cases of the parties were examined. From an order recorded on 28th July 1930 it appears that Jogendra Chandra Chackerbatty, the Managing Director of the Dinajpur Trading and Banking Co. Ltd., appeared by a pleader, and was allowed to intervene as a creditor in the proceeding pending before the learned District Judge. On the materials placed before the Court, consisting of oral and documentary evidence, the learned District Judge dismissed the application of the creditor Nalini Mohan Rai Chaudhuri. The Dinajpur Trading and Banking Co. Ltd., has appealed to this Court.

A preliminary objection was taken to the hearing of the appeal by the learned advocate appearing for the respondents, the three Sen Brothers and the four Chaki Brothers. It was contended before us on behalf of these respondents, that the Dinajpur Trading and Banking Co. Ltd., had no right of appeal as the company was not in a position of a creditor whose debt had been proved. It was further contended that the order of the learned District Judge was not such an order which was made appealable by the Provincial Insolvency Act, in view of the provisions contained in S. 4 read with S. 75 and Sch. 1 of the Act. The Dinajpur Trading and Banking Co. Ltd., was allowed to appear in the proceedings in the Court below and intervened in the same, as a creditor. The debt of the company had not at the time been proved; but all the same it could not, in our judgment, be said that the company was not a "person aggrieved" within the meaning of the Provincial Insolvency Act: see in this connexion the decision of this Court in the case of *Rustomje*

Dorabjee v. K. D. Brothers (1). We hold that the Dinajpur Trading and Banking Co. Ltd., was a "person aggrieved" within the meaning of the Provincial Insolvency Act and had therefore a right of appeal, although the debt of the company had not, till the time when it was allowed to intervene in the insolvency proceeding, been proved before the Court.

In regard to the second contention bearing upon the preliminary objection urged before us, it is to be noticed that S. 4, Provincial Insolvency Act, empowers the District Judge to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court of which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. This section read with S. 75 and Sch. 1, Provincial Insolvency Act, does confer a right of appeal to the aggrieved party in a case in which an order of the present description has been made by the District Judge. Furthermore, it appears to us that even on the assumption that the provisions relating to appeal as contained in the Provincial Insolvency Act do not cover an order of the nature which we are considering in the present case, there could be no doubt that in view of S. 75, Cl. (3) the order was appealable with the leave of this Court. In the present case, the appeal having been admitted and allowed to be proceeded with, it was, in our judgment, tantamount to the granting of leave as contemplated by the Provincial Insolvency Act. The view we take of the matter is in consonance with the decision of the Patna High Court in the case of *Gopal Ram v. Magni Ram* (2). The preliminary objection raised on behalf of the respondents must therefore be overruled.

On the merits, the learned advocate for the appellant has in the first place, urged before us that the refusal by the learned District Judge of the application of Nalini Mohan Rai Chaudhuri for compelling the respondents before us, viz., the Sen Brothers and the Chaki Brothers

to answer the interrogatories filed in Court, was wholly unjustifiable in law. The learned District Judge in refusing to allow the interrogatories, expressed the opinion that the creditors could not be allowed to prove their case by extracting information from the alleged partners of the insolvent, instead of proving their case by producing evidence; that the creditor Nalini Mohan Rai Chaudhuri was fishing for information of facts which it was his business to prove. The interrogatories have been placed before us and we have given our best attention to the contents of the said interrogatories.

It appears to us to be clear that the learned Judge's view in the matter of his disallowing the interrogatories is correct. A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case. In our judgment therefore, there is nothing wrong in the learned District Judge's decision in disallowing the interrogatories as filed in Court. As it has been indicated already, the object of the creditor Nalini Mohan Rai Chaudhuri and that of the creditor, the Dinajpur Trading and Banking Co. Ltd., the appellant before us, were to have Mahendra Chandra Sen and his three brothers, as also Sris Chaki and his four brothers, adjudged insolvents, so that the properties owned by the Sen Brothers and the Chaki Brothers might be added to the assets of the Firm Mahendra Chandra Sen and Sris Chandra Chaki. We have been asked by the learned advocate for the appellant to proceed with the presumption against the respondents, the Sen Brothers on the one hand and the Chaki Brothers on the other, on the question of their being members of two joint Hindu families. Even on the supposition that there was any such presumption arising from the facts and circumstances of the case before us, from the mere fact that a person carrying on business is a coparcener in a joint Hindu family, it does not necessarily follow that all his coparceners are his partners in that business. The fact of partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour and skill in the business and to share the profits and losses in the

1. A I R 1927 Cal 163=99 I O 76=58 Cal 866.

2. A I R 1928 Pat 388=107 I C 80=7 Pat 375 (F B).

same : see in this connexion the decision of Chandavarkar, J., in the case of *Vadital v. Shah Khushal* (3) (His Lordship then considered evidence and concluded). On the whole, we have no hesitation in agreeing with the learned District Judge in his conclusion that the evidence in the case before us is quite inadequate for the finding that the Sen Brothers at Bogra and the Chaki Brothers at Pabna were partners of the rice-mill at Calcutta. In the result, the appeal fails, and is dismissed. The parties are to bear their own costs in this appeal.

M. C. Ghose, J.—I agree.

M.N.

Appeal dismissed.

S. (1903) 27 Bom 157=4 Bom L R 968.

** A. I. R. 1933 Calcutta 154

MUKERJI AND GUHA, JJ.

H. V. Low & Co., Ltd.—Defendants—Appellants.

v.

Pulinbiharilal Singha and others—Plaintiffs—Respondents.

Appeal No. 274 of 1930, Decided on 5th April 1932, against original decree of Sub-Judge, Asansol, D/- 5th August 1930.

** (a) Charge, floating—Creation by debentures is not the only instance.

Debentures of companies, though they afford the most ordinary examples of floating security are not the only instances of it; a floating security may be a security created by an individual and by means other than the issue of debentures. [P 156 C 2]

** (b) Charge, floating—Outstanding feature explained.

For a floating charge, it is not necessary that the entire book debts or the entire assets of the business should be charged, but that the governing idea is to allow a going concern to carry on its business in the ordinary course, the effect of which would be to make the assets liable to constant fluctuation. The element of fluctuation due to ordinary wear and tear is different from what would be consequent on the power of disposal in the ordinary course of business, which is the outstanding feature of a floating charge: *English Cases reviewed*. [P 157 C 2]

** (c) Charge, floating—Illustration.

Charge created over sub-soil rights, kuthi, pits, machineries, etc., is not of the nature of a floating charge. [P 158 C 1]

** (d) Charge, floating—Mere uncertainty of the charge amount or object charged is not sufficient to make floating charge.

Mere uncertainty as to what the amount of the charge or what the object charged would be can hardly suffice to satisfy the requirements of a floating charge: 54 Cal. 518, Ref. [P 158 C 1]

** (e) Mortgage—Moveables subsequently brought on premises can be validly hypothecated.

Hypothecation of not only the moveables

existing on the premises at the time, but also in respect of moveables which might be subsequently acquired and brought there is valid in India: 13 Cal 262; 2 B L R A C J 230; 25 Mad 406; 23 Cal 592; 8 Bom L R 344; 4 Bom L R 577; 10 All 133; 16 Mad 429; 31 Cal 667; A I R 1924 All 833 and A I R 1926 All 161, Ref. [P 159 C 1]

(f) Transfer of Property Act (1882)—Act is not exhaustive.

The Act does not contain the whole law in the subject of transfer of property particularly on mortgages: 34 Cal 223 and A I R 1919 Cal 607, Ref. [P 161 C 2]

** (g) Transfer of Property Act (1882), Ss. 67 and 60—Mortgage debt can be split by consent.

In a mortgage the debt and the lien can always be split up by consent and where on such splitting up, a mortgagor has been sued for recovery of nothing more than a proportionate share of the mortgage debt, the mortgagee is entitled to relief provided the burden of the mortgage does not increase: 15 Bom 186; 15 Bom 257; 28 Mad 555; 28 All 174 and 30 Cal 755, Ref. [P 162 C 1]

** (h) Transfer of Property Act (1882), Ss. 67 and 60—Splitting of mortgage by consent—Rights of third parties are not to be affected.

The rights of persons who have acquired an interest in the mortgaged estate, since the making of the mortgage, of which the mortgagee has notice cannot be defeated or impaired by any subsequent arrangement to which they are not parties: 30 Cal 755; 1 C L J 937; 2 C L J 203; 33 Cal 613; 6 C L J 46 and 28 Mad 555, Ref. [P 161 C 1]

** (i) Transfer of Property Act (1882), S. 60—Persons entitled to part of rights of redemption can redeem whole subject to equities.

No doubt a person entitled to redeem only a part of the mortgage is ordinarily entitled to redeem the whole but that would only be so subject to the equities of the persons interested: 38 Mad 810, Foll; 22 Mad. 209; 44 I C 77 and 48 I C 669, Diss. from.; *Pearce v. Morris*, (1869) 5 Ch 227, Ref. [P 165 C 1]

Sudhir Ray, Jitendranath Ray, Debendranath Bhattacharya and P. C Basu—for Appellants.

N. N. Sircar, Rupendrakumar Mittra, Susilchandra Sen, Santimay Majumdar and Shibsaran Sarkar—for Respondents.

Judgment.—This is an appeal from a preliminary decree for sale. The appellants are Messrs. H. V. Low & Co., Ltd., who were defendants 3 (ka) in the suit. The following are the facts of the case: The plaintiffs are the landlords. Mauza Chalbapur belongs to them in zamindari right. The surface of the said mauza had been settled long ago with the proprietors of Searsole estate in mukarrari rights. On the assumption that the sub-soil was in the khas possession of the plaintiffs, one Kalikumar Misra, on 17th

October 1913, executed a kabuliyat, which was duly registered, in their favour, taking what is commonly known as a coal mining lease of the said mauza for a term of 499 years. It was stipulated that royalty at certain rates would have to be paid monthly for the coal taken and, in default of such payment, interest at the rate of 1 per cent per month would be charged; it was agreed that a minimum royalty of Rs. 600 would have to be paid for the first year, of Rs. 3,000 in the second and in the third years, and of Rs. 4,800 for the fourth year and yearly thereafter, and that, in case of default, interest at the rate aforesaid would also have to be paid; and there were other terms and conditions. The kabuliyat also contained the following stipulation:

"Further, the right I have got on the basis of this settlement, the machineries of the said kuthi, the engine and the boilers, etc., will all long remain under first charge for the said royalty and minimum royalty."

Disputes arose between Misra and the proprietors of the Searsole estate and litigation followed, but into the details thereof we need not enter. On 14th July 1915 a deed of anganama (partition, or specification of shares) was executed and duly registered between Misra on the one hand and Kumar Pramathanath Malia Bahadur of Searsole on the other, the two parties entering into a partnership for carrying on the coal business of the said mauza and, amongst other terms and conditions, it was provided that Misra shall have a six annas share and Malia shall have a ten annas share in the underground coal of Mauza Chalbapur and the business relating thereto. It was further provided in this deed that it would remain in force for 499 years and its terms would be binding upon the parties and their respective heirs and successors-in-interest. On 16th January 1919, Malia wrote to the plaintiffs thus:

"After having taken settlement from you of the subsoil right of Mauza Chalbapur, the late Kalikumar Misra made me a partner (cosharer) to the extent of 10 annas of the said property, and I am in separate possession of the same after partition Now his widow—Sreemati Basanti Debi—has written a letter to you for registering my name in respect of the said 10 annas share. Therefore, you shall register my name in respect of the 10 annas share. I shall continue to pay separately the minimum royalty and the royalty payable in respect of the said 10 annas share to you from the date of settlement."

A similar letter, as appears from the words of the letter just set out, had been written two days before by Misra's widow, Sreemati Basanti Debi, to the plaintiffs for mutation of her name in respect of six annas share in the property. The mutation asked for in both the letters was effected and in the plaintiffs' books two separate accounts were opened and royalties and other dues were charged and received separately from the parties in respect of their 10 annas and six annas shares respectively. While this state of things continued, the present suit was instituted on 15th April 1929. The claim in the suit was for recovery of amounts due for the period 1330 B. S. to 1335 B. S. with interest and costs after deduction of certain amounts paid and received on account of the 10 annas share of Malia on declaration:

"of a first and preferential charge on the 10 annas share of the principal defendant (i. e. Malia) in the subsoil right settled with him in respect of Mauza Chalbapur and the kuthi, pits, machineries, pumps, boiler, headgear, engine, trammelines, and the equipments and houses, etc., comprised therein."

The ten annas share of the mauza, in respect of which the claim was made as aforesaid, was described in the schedule to the plaint as consisting of underground coal in 1,067 specified bighas of land, some lying on the southern and some on the northern side of the mauza, which Malia had got by amicable partition with Misra. Raja Pramathanath Malia Bahadur and his two sons were the principal defendants, i. e., defendants 1 to 3. On 6th August 1929 the plaintiffs applied to the appellants, Messrs. H. V. Low & Co., be added as defendants. It was alleged that in 1925 the appellants had obtained against Malia a decree on consent for a large sum of money with declaration of a first charge for the decretal amount on the colliery and its appurtenances to the extent of the interest of the Malias therein. The plaintiffs alleged that they had come to know that the said appellants were about to have the property sold in execution of the said decree and they prayed that the appellants might be made party defendants. They were accordingly added as defendants 3ka. In the plaint as originally framed, Sreemati Basanti Debi was joined as pro forma defendant 4, but she was subsequently made a principal defendant by a petition, which the

plaintiffs made on 4th August 1930, in which it was stated:

"She has been made a pro forma defendant as the plaintiffs have not prayed for any relief against the said defendant personally. The said defendant Basanti Debi has made a full payment for the period in suit, and no money is due. But she has right of redemption. Under the circumstances it is necessary to make the defendant a principal defendant and the plaint should be amended accordingly."

This prayer also was granted. Defendant 5 was added as a party on 5th March 1930, he being the receiver appointed by the Court, in respect of the interest of Malia in the aforesaid properties, in the suit in which the aforesaid consent decree had been passed. The Subordinate Judge made a preliminary decree on 5th August 1930 for the entire amount claimed together with interest at the stipulated rate from the date of institution of the suit till the expiry of the period of grace, and declaring the total amount as a first charge on the ten annas share of the leasehold and its fixtures, etc., belonging to defendants 1 to 3, and giving defendants 1 to 3, 3 ka and 5 three weeks' time to pay in the decretal money. From this decree the present appeal has been preferred on 20th September 1930. In the meantime on 27th August 1930, the period of grace having expired and there having been no redemption, a final decree for sale was passed.

The first contention urged on behalf of the appellants is that the charge created by the lease, on which the plaintiffs' claim is based is a "floating charge" whereas their own charge by virtue of the consent decree is a specific one and so the latter charge must have preference. To explain the true nature and characteristics of a "floating security" a large number of decisions has been cited. *Wheatley v. Silkstone and Haigh Moor Coal Co.* (1), *Tailby v. Official Receiver* (2), *Driver v. Broad* (3), *Government's Stock and Other Securities Investment Co. v. Manila Ry. Co.* (4), *In re Yorkshire Woolcombers Association, Ltd., Houldsworth v. Yorkshire Woolcombers Association, Ltd.* (5), *Illingworth v.*

Houldsworth (6), *Evans v. Rival Granite Quarries, Ltd.* (7), *National Provincial Bank of England, Ltd. v. United Electric Theatres, Ltd.* (8) and *Hamer v. London, City and Midland Bank Ltd.* (9). After the exhaustive review of the characteristics of a floating security by North, J., in *Wheatley v. Silkstone and Haigh Moore Coal Co.* (1), and the description of a floating security given by Lord Macnaghten in *Tailby v. Official Receiver* (2), which was criticized by Vaughan Williams, L. J., in *Houldsworth v. Yorkshire Woolcombers Association, Ltd.* (5), and then amplified by Lord Macnaghten himself in *Illingworth v. Houldsworth* (6), it would be futile to attempt to explain it further. For the purposes of the arguments, that have been addressed to us on behalf of the appellants, some observations from the cases cited will presently have to be referred to. It may however be conceded at once that debentures of companies, though they afford the most ordinary examples of floating security, are not the only instances of it: a floating security may be a security created by an individual and by means other than the issue of debentures. Its essential elements, so far as debentures issued by a company are concerned, were described by Romer, L. J., in the case of *Houldsworth v. Yorkshire Woolcombers Association, Ltd.* (5), at pp. 291, 295 and 298 in these words:

"The term 'floating' is one that until recently was a mere popular term. It certainly had no distinct legal meaning. It is not a legal term. It has recently been used in more than one statute, but when the Courts have to consider whether the charge is a floating one within the meaning of the term as used in the Acts of Parliament, and in particular within the meaning of the Companies Act, 1900, one must, I think, deal with the question of substance to be answered according to the circumstances of each particular case. I certainly do not intend to attempt to give an exact definition of the term 'floating charge,' nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge: (1) if it is a

1. (1885) 29 Ch D 715=54 L J Ch 778=52 L T 798=33 W R 797.

2. (1888) 13 A C 523=58 L J Q B 75=60 L T 162=37 W R 513.

3. (1893) 1 Q B 599.

4. (1897) A C 81=66 L J Ch 102=75 L T 553=45 W R 353.

5. (1908) 2 Ch 284.

6. (1904) A C 355=73 L J Ch 789=91 L T 602=53 W R 113=20 T L R 638.

7. (1910) 2 K B 979=79 L J K B 970=54 S J 580=26 T L R 509.

8. (1916) 1 Ch 192=85 L J Ch 106=114 L T 276=1916 H D R 56=80 J P 153=14 L R 265=60 S J 274=32 T L R 174.

9 (1918) 87 L J K B 973=118 L T 571.

charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company would be changing from time to time; and (3) if you find that by the charge it is contemplated that until some future step is taken by or on behalf of those interested in the charge the company may carry on its business in the ordinary way, as far as concerns the particular class of assets I am dealing with."

In the same case Cozens Hardy, L. J., gave what may be said to be a more positive description of a floating charge. He said :

"My view is that the floating charge need not be on the whole undertaking nor on the whole property of the company. It must, I think, embrace both present and future property and property of a particular class. It must, I think, contain expressly or by necessary implication a right to the company to deal with it for a certain time as though the charge had never been executed. When these conditions are found, I think you have a floating charge within the meaning of the Act."

These observations may be supplemented by what Buckley, L. J., said in *Evans v. Rival Granite Quarries, Limited* (7), summarizing the decisions on the point. He said

"A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done, which causes it to crystallize into a fixed security."

Bearing those observations in mind, if one examines the character of the charge created in the present case, one finds certain elements present or absent. In the case of debentures, it is the company's undertaking that is charged, but the company may deal with any of the assets in the ordinary course of business until the charge crystallizes or becomes a fixed charge, and this happens when there is winding up or when the debenture-holder takes some steps to enforce his security. Mortgages by tradesmen of their stock-in-trade and effects belong to the same class of securities, in so far as the securities attach to the subjects charged by them in the varying condition in which they happen to be from time to time. It may be conceded that

for a floating charge, it is not necessary that the entire book-debts or the entire assets of the business should be charged, but it is nevertheless apparent that the governing idea is to allow a going concern to carry on its business in the ordinary course, the effect of which would be to make the assets liable to constant fluctuation. This element is entirely absent in the present case; what is charged being the leasehold and the machineries, engines, boilers, etc., that is to say, the moveables that would be brought on to the premises. With the charge on them, not a single screw could be removed except perhaps for the purpose of being replaced; and neither the moveables nor any parts of them could be disposed of by the lessee. The element of fluctuation due to ordinary wear, and fear that is present here is widely different from what would be consequent on the power of disposal in the ordinary course of business, which marks the outstanding feature of property subject to a floating charge. Then, as Lord Macnaghten observed in *Tailey v. Official Receiver* (2) at p. 541 :

"It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation."

And as Buckley, L. J., pointed out in *Evans v. Rival Granite Quarries, Limited* (7) :

"It is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security."

Now what is the event, on the happening of which, or what is the act or the nature of intervention of the mortgagee, which is required to crystallize the security in the present case? Clearly no act or intervention on the part of the mortgagee is necessary. What however is said is that, until royalty or minimum royalty is due or is in default, the charge will not fasten on the property. This, in our opinion, is not the kind of event contemplated; as soon as the royalty or minimum royalty accrues due, it forms

a charge on the assets specified, and no extraneous event is necessary for the charge to fasten itself. This element too is wanting in the present case. It has been argued on behalf of the appellant that there are certain elements of uncertainty which make the charge created of the nature of a floating charge, namely, that it cannot be predicated of a given time as to what the amount of the charge or what the object charged would be. These elements of uncertainty can hardly suffice to satisfy the requirements of a floating charge such as the expression means in law. Were it otherwise, it would be easy to defeat a charge as regards an annuity periodically payable, or a charge as regards interest—simple or compound—accruing in future, by regarding it as a floating charge and creating a specific charge for a fixed amount upon the subject-matter in the meantime. In our judgment, the charge created in the present case is not of the nature of a floating charge, if the expression is to be understood in its recognized meaning

"ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp,"

as Lord Macnaghten observed in *Illingworth v. Houldsworth* (6). In the case of *J. D. Jones & Co., Ltd. v. Ranjit Roy* (10), in which the facts were that the restriction put upon the borrower company in disposing of their stock-in-trade in the ordinary way of business was not very great to all appearances and the articles comprised in the security were not entirely the stock-in-trade, but there were plant, machinery, implements, utensils, furniture and so forth, and the lender company was to continue in possession, but his representative would not prevent the business being carried on in the usual way, Rankin, C. J. observed:

"Although in this case the security may not be in the fullest sense a specific security, it is not also entitled to be described as coming within the proper definition of a floating security. It is possible to hold that anything may be regarded as a floating security until the full rights of the mortgagee settle or fasten on or bind the subject-matter finally; but it seems to me that the element of possession which is contemplated by the deed and which according to the evidence was actually given at the time pre-

vents our holding that we have before us a purely equitable charge of the character coming within the description of a floating charge."

Merely variability of the amount or the subject of the charge is not the element, the presence of which would make the security a floating security. The first charge created by the kabuliyat attached to the property immediately as the lease began to run, and, though the amount as well as the subject of the charge varied from time to time, it never detached itself and on the other hand always retained its priority over any charge however specific subsequently created. The contention next urged on behalf of the appellants was that the kabuliyat did not in fact create a charge, but merely recorded the possibility of a charge being created in future; and, in support of this contention, reference was made to the decision in the case of *Madho Misser v. Sidh Binaik Upadhyu* (11). The relevancy of this case, in which, by the terms of the document concerned, no charge was in fact created but it was only provided that on a certain contingency happening certain consequences would follow, from which it might be inferred that, in that event, a charge would arise on the land involved, is not apparent. It may be pointed out that even a floating security, which the appellants contend is all that the kabuliyat creates, is, as observed by Buckley, L. J., in *Erans v. Ilirul Granite Quarries, Ltd.* (7) (at p. 999), "not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it."

So far as the leasehold is concerned it was in existence at the date of the kabuliyat. As regards the machineries, etc., there was an element of "possibility" in the sense that the security would attach to them as and when they would be brought on to the premises. If, on this element of futurity, the charge created by the kabuliyat is to be condemned, then the contention, in order to be effective, must be a contention questioning the validity of a charge in respect of moveables not in existence at the date of the kabuliyat and maintaining that the true effect of the transaction was merely to create a lien which, in certain events, may have to give precedence to a specific charge subsequently created. But such a contention has not been definitely urged,

10. A I R 1927 Cal 692=103 I C 748=54 Cal 519.

11. (1887) 14 Cal 687.

and, obviously, for a very good reason. In most modern systems of law, the hypothecation of moveables is either not permitted at all or is fenced in by a multitude of rules, which are absolutely necessary for prevention of fraud: Ghose's Law of Mortgage, 5th Edn., p. 115. Though not accompanied by delivery of possession, the validity of such hypothecation has been recognized in India, and it has sometimes been enforced even against bona fide purchasers without notice: see *Deans v. Richardson* (12), *Shyam Sundar v. Chaita* (13), *Ko Kywetnee v. Ko Koung Bane* (14), *Shirram v. Dhau* (15), *Srish Chandra Roy v. Mungri Bewa* (16), *Damodar Lakshmidas v. Atmaram Narayan* (17), *In the matter of Ambrose Summers* (18) and *Punithavelu Mudaliar v. Bhaskygn Ayyangar* (19). The charge having been not merely of the moveables existing on the premises at the time, but also in respect of moveables which might be subsequently acquired and brought there, may be said to have been in respect of property which had not yet come into being. Though a transaction of this character is not governed by the Transfer of Property Act or by the Contract Act, its validity can hardly be disputed. In the case of *Misri Lal v. Mozhar Hossein* (2) it was held that a mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction and is in the nature of an agreement to mortgage moveable property that was to come into existence in future. That such a transaction creates a lien which may be enforced by a suit was held long ago in the case of *Tilakdhari Lal v. Furlong* (21). In the case of *Collyer v. Isaacs* (22) Sir George Jessel, M. R., observed:

"The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more

at law, assign what has no existence. A man can contract to assign property which is to come into existence in future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."

"It has long been settled," said Lord Macnaghten in *Tailby v. Official Receiver* (2),

"that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate that intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified."

In *Holroyd v. Marshall* (23) the occupier of certain mill premises had covenanted with his landlord to assign to him all machinery which might thereafter be brought by him (the occupier) into the mill, and the sheriff seized the machinery which he had so brought in and Lord Westbury in one of his classical judgments observed thus:

"It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of the class of which a Court of equity would decree the specific performance. . . . It follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he in the meantime was a trustee of the property in question."

The principle has been adopted in this country in numerous cases amongst which may be mentioned *Bansidhar v. Sant Lal* (24), *Palaniappa v. Lakshma-*
23. (1862) 10 II C 191=33 I J Ch 193=5 Jur (n s) 213=7 L T 172=11 W R 171.
24. (1886) 10 All 193=(1888) A W N 35.

12. (1871) 3 N W P 54.

13. (1871) 3 N W P 71.

14. (1866) 5 W R 189.

15. (1901) 4 Bom L R 577.

16. (1904) 9 C W N 14.

17. (1905) 8 Bom L R 344.

18. (1896) 23 Cal 592.

19. (1901) 25 Mad 406=12 M L J. 282.

20. (1886) 13 Cal 262.

21. (1869) 2 B L R A C 230.

22. (1881) 19 Ch D 342=51 L J Ch 14=45 L T 567=30 W R 70.

nan (25), *Baldeo Parshad Sahu v. Miller* (26), *Ram Sarap v. Mohan Lal* (27) and *Babu Ram v. Ram Sarup* (28). In many of the cases just cited it has been held, following *Joseph v. Lyons* (29) and *Hal-las v. Robinson* (30), that the equitable title arising in a transaction of this kind would not avail against a subsequent transferee without notice of that title. Even assuming that a distinction between equitable and legal titles can or, in any event, should be made in this country, the appellants would, in order to be entitled to preference, have to show that they took the charge created in their favour bona fide and without notice of the charge which accrued in favour of the plaintiffs under the terms of the kabuliyat. The kabuliyat itself having dealt with the leasehold as well as the moveables, it would be impossible for the appellants to establish such a position and it is not a matter of surprise therefore that this precise contention has not been expressly put forward.

Nextly, it was argued on behalf of the appellants that the terms of the kabuliyat which created the lease could not be varied by the letters of the 14th and 16th January 1929 to which reference has already been made and which to have such an effect required registration and reliance in this behalf was placed upon the cases of *Durga Prasad Singh v. Rajendra Narain Bagchi* (31) and *Lalit Mohun Ghosh v. Gopali Chuk Coal Co. Ltd.* (32). This proposition is not disputed on behalf of the plaintiffs-respondents who however do not rely on the letters as varying the terms of the kabuliyat or as creating new leases in respect of 10 annas and six annas respectively of the property, with new conditions as to payment of royalty and other dues in proportion. Their case is that the original lease stood good, but that, by the request contained in the letters, which was complied with a new arrangement came into being, under which the proportionate dues of the two

sets of cosharers were to be realized separately. It is not necessary to read the letters as containing more than what they actually purported to say; in our opinion, the true view to take of them is to hold that they purported to intimate to the plaintiffs the fact that there had been a division of the leasehold between Misra and Malia and that they had, as between themselves, agreed to pay the royalty, etc., due on their respective shares separately, and asking the plaintiffs to have that fact recorded in their books and to receive their dues separately from them in accordance with those shares. It was an arrangement, which it was not obligatory on the plaintiffs to agree to, but to which they might as well agree for the sake of convenience of realization, keeping all the essential terms of the lease intact.

Similarly, it was also contended, on behalf of the appellants, that the charge that was created by the kabuliyat which was a registered document, would not be varied except by a registered document. Two decisions were cited, one of which is an authority for the proposition that the terms of a registered mortgage bond—the particular term in that case was as regards interest—cannot be varied except by an instrument duly registered, so as to fetter the equity of redemption: *Tika Ram v. Deputy Commissioner of Bara Banki* (33) and the other which has laid down that an express and unambiguous stipulation in a mortgage-deed cannot be varied or contradicted by reference to preliminary negotiations: *Abdullah Khan v. Basharat Husain* (34). These cases have no application here. Under the Transfer of Property Act, charges are not required to be created in writing, but under S. 17, Registration Act, if a charge involving an interest of the value of one hundred rupees and upwards in immovable property is created by an instrument at all, that instrument must be a registered one. If the appellants argue that the charge, having been created by a registered instrument and proved by the document itself, its terms could not be varied by proof of any oral agreement or statement in view of S. 92, Evidence Act, and its proviso (4), that argument has to be regarded as

25. (1893) 16 Mad 429.

26. (1904) 31 Cal 667.

27. A I R 1924 All 833=75 I C 816

28. A I R 1926 All 164=89 I C 410.

29. (1884) 15 Q B D 280=54 L J Q B 1=51 L T 740=38 W R 145.

30. (1885) 15 Q B D 298=54 J J Q B 364=38 W R 246.

31. (1910) 37 Cal 293=4 I C 713.

32. (1912) 39 Cal 284=12 I C 728 (F B)

33. (1899) 26 Cal 707=26 I A 97=7 Sar 120 (P C).

34. (1913) 35 All 48=40 I A 31 (P C).

well founded. And whatever diversity there may have been amongst the Courts in this country on the question whether the words "oral agreement or statement" in S. 92 include evidence of acts and conduct of the parties from which an agreement may be inferred—it being remembered that, under S. 100, T. P. Act, a charge may be created by act of parties as well—after the decision of the Judicial Committee in *Maung Kyin v. Ma Shwe La* (35), it is very difficult to support the decisions of the Calcutta High Court, which went in favour of admitting evidence as to acts and conduct of parties in such circumstances. But it is unnecessary to discuss the matter further, because it has been conceded on behalf of the plaintiffs-respondents, that it is on no other charge than what the kabuliyat created on which the plaintiffs rely. In para. 5 of the plaint there is a passage, not very well expressed, which may perhaps suggest what has been contended for on behalf of the appellants, namely, that it was the plaintiffs' case there that when jamas were separately recorded in the plaintiffs' books there was a first charge created afresh for the amounts payable for each of the two shares in respect of the properties respectively appertaining thereto. But even so, no such thing has been attempted to be proved and that is not the plaintiffs' case now.

The case of the plaintiffs-respondents thus is that under the lease and the charge which were created by the kabuliyat, and notwithstanding that the lease related to the entire property and the charge also extended to the entire property for the entire amount of royalty, etc., payable for it, they are entitled to sue for the 10 annas share of the leasehold which belonged to Malia and to enforce the charge to that extent on the said share only. Their case is that they are entitled to do so by reason of an estoppel which arises in their favour. Now, it cannot be denied that, as observed by Subramania Ayyar, J., in *Huthasanan Nambudri v. Parmaswaran Nambudri* (36) at pp. 211 and 212 "a mortgage for an entire sum is from its very purpose indivisible" and that :

"character of indivisibility exists not only with
35. A I R 1917 P C 207=42 I C 612=44 I A
286=45 Cal 820 (P C).

36. (1898) 22 Mad 209.

reference to the mortgagee, but also to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor mortgagee, nor persons acquiring through either a partial interest in the subject, can under the mortgage get relief except in consonance with the principle of indivisibility."

It is true therefore that it is not competent to a mortgagee to release the share of an individual mortgagor by receiving from him what he may conceive to be his rateable share, and that any payment made by an individual mortgagor can only be properly treated as made for the whole body of mortgagors and should be credited in reduction of their joint debt. But this rule has its exception in cases where there has been a severance of interest of the mortgagees or of the mortgagors. S. 67, T. P. Act, in its exception (d), provides for a case where :

"the mortgagees have, with the consent of the mortgagor severed their interests under the mortgage."

Section 60 of the Act, last paragraph, affords another instance :

"where a mortgagee, or, if there are more mortgagees than one, all such mortgagees has or have acquired, in whole or in part, the share of a mortgagor."

The effect of the word "only" introduced into this paragraph by the Amending Act of 1929 need not be considered here, as the amendment came into force after this suit was commenced. But these are not the only instances of severance that may be conceived or allowed. It is true that the provisions of the Act are to be primarily looked to. But the Act does not contain the whole law on the subject of transfer of property : *Satyabadi Behara v. Harabati* (37), *Shafikul Huq Chowdhry v. Krishna Golinda Dutt* (38). It certainly does not profess to codify the whole law as to mortgages. There are other exceptions to the rule as to indivisibility of mortgages, which have been recognized in numerous cases, e. g., where the mortgagee recognizes a partition of the mortgaged property amongst the co-mortgagors, or where there has been a severance of the interest of the mortgagors with the consent of the mortgagee, as for example, where a part has been previously redeemed. In the cases to be found in the books, a divergence of opinion appears on the question whether under the Transfer of Property Act

37. (1907) 34 Cal 223=5 C L J 192.

38. A I R 1919 Cal 607=47 I C 428.

in a suit for enforcement of the mortgage on the residue all the owners, in whose hands the equity of redemption was, were to be made parties or not, or in other words, whether the suit would be maintainable without the equity of redemption being fully represented. This question does not arise in the present case in which all interested parties have been made parties to the suit. Another question, on which considerable diversity of judicial opinion is noticeable, is whether as between the mortgagors and the mortgagee the mortgagee is entitled to release a portion of the hypothecated property and impose the whole lien on the residue or whether the whole of the debt being secured by the whole of the property each parcel of the property, as between the different parcels, is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of the entire property. This question also does not concern us here, because it cannot be urged that what is sought to be charged on the 10 annas share is anything more than 10 annas of the entire debt.

If neither of these two special considerations arises, the weight of authority is overwhelming that the debt and the lien can always be split up by consent and in no case has it been held that, where, on such splitting up, a mortgagor has been sued for recovery of nothing more than a proportionate share of the mortgage debt, the mortgagee is not to have relief. In the case of *Lakshuman Giriraya Naik v. Mudhab Krishna* (39), after a mortgage executed by three mortgagors there was a partition by them of their equity of redemption, by which each became entitled to an undivided one-third in the same; two of the mortgagors then redeemed their two shares on the basis of paying two-thirds of the principal and interest due and two-thirds of a sum said to be due on account of excess assessment and took possession of their shares; and the other mortgagor was allowed to redeem his one-third share on the footing that one-third of the mortgage debt was payable by him, it being said:

"The parties had severed their interests, and the mortgagee has chosen to recognize that partition as shown by his allowing two of them to redeem their two-third shares by giving them possession."

39. (1890) 15 Bom 186.

In *Mahadaji Hari v. Ganpatshet* (40) certain mortgagors (cosharers) having after the mortgage transaction effected a division among themselves and apportioned their liability under the mortgage debt according to their shares with the acquiescence of the mortgagee, it was held that though the mortgagee was not bound to recognize the arrangement made by the mortgagors among themselves, still, as he appropriated the amounts paid by some of the mortgagors in paying off their respective shares of the mortgage debt without there being a special direction to that effect from the mortgagors, he was entitled to recover the remainder of that debt from the share of the mortgagor (cosharer) by whom it was due. And in *Venkatachella Chetty v. Srinivasa Varada Chariar* (41) it was held that where a division of a joint family is effected by consent, an arrangement by some of the members with a mortgagee of the joint family property, by which their shares were to be released on payment of their share of the debt, is binding on members who are not parties to the arrangement, so long as they are not called upon to pay more than their share of the debt as settled by partition. There are cases in which it has been recognized that, if a plaintiff (mortgagee), suing on the basis of his mortgage for either sale or foreclosure, thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the mortgage in respect of the remainder, there is nothing in law to prevent his doing so, and that the only thing in such a case is to see that the burden on the mortgagors sued does not increase by the course adopted: *Sheo Tahal Ojha v. Sheo dan Rai* (42). Amongst the cases of this Court, which may be cited in this connexion, it would be sufficient to refer to only one, namely, that of *Hari Kissen v. Veliat Hossein* (43) which has been frequently followed ever since and never dissented from.

As already observed, this is not a case in which any question arises as regards the burden having increased in any way. It is a perfectly simple case, in which

40. (1890) 15 Bom 257.

41. (1905) 28 Mad 555=15 M L J 442.

42. (1905) 28 All 174=2 A L J 630=(1905) 244 (F B).

43. (1908) 80 Cal 755=7 C W N 723.

the two cosharers effecting a division amongst themselves apportioned their liability under the lease, which was the subject of the charge, with the consent or acquiescence of the plaintiffs, the holders of that charge. The liability was originally a joint one, but by severance separate liabilities were created, and the result of this severance was that each item of debt, as it accrued, was to be discharged in two parts by the two cosharers separately. It was at the request of the cosharers themselves, that the debts were allowed to be separately discharged. So far as the liability for the period in suit is concerned the plaintiffs, acting under the aforesaid arrangement, received the entire amount of the dues of defendant 4 and appropriated it in discharge of her liability (vide plaintiffs' petition of 4th August 1930) and thus placed themselves in a position, in which it became impossible for them to proceed against the two cosharers conjointly on the basis of their original undivided security. The Malias, therefore cannot be heard to say either that the amount claimed is not recoverable from them or that their share of the property should not be sold for its recovery.

But it is not enough to deal with the question as one between the mortgagors on the one hand and the mortgagee on the other, because the case before us is one in which the rights of a third party, namely, the appellants, have intervened and these rights would certainly require protection. The matters which have to be considered in this connexion are: firstly, whether the splitting up, to which the appellants were not parties, can be regarded as valid as against them; and secondly, whether the appellants' right to redeem has been prejudiced by the mode in which the charge has been sought to be enforced. So far as these matters are concerned there is again some divergence of judicial opinion, but upon a question which does not arise in the present case. This conflict has been pointed out by Mookerjee, J., in the case of *Mir Eusuff Ali Haji v. Panchanan Chatterjee* (44) at pp. 805-6 in the following words:

"To put the matter in another way, as between the mortgagor and mortgagee, the latter is entitled to release a portion of the hypothecated property and diminish his own security to that extent. It is not obligatory upon him to

proceed against all the properties rateably or to exhaust them for the satisfaction of his debt. This principle is recognized in the cases of *Raghu Nath Pershad v. Harlal Sadhu* (45), *Hara Kumari v. Eastern Mortgage and Agency Co. Ltd.* (46) and *Krishna Ayyar v. Muthukumarasawmiya Pillai* (47). While therefore we adhere to the view taken in the cases of *Imam Ali v. Baij Nath* (48) and *Hakim Lal v. Ram Lal* (49), namely, that a mortgagor who has a security upon two or more properties, which he knows belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected: *Kettlewell v. Watson* (50), we are of opinion that this doctrine has no application to the present case, where the release took place at a time when the appellants had not purchased any interest in the mortgaged premises, and the mortgagors alone were the persons affected by the release. We must not however be assumed to adopt the rule laid down by the learned Judges of the Allahabad High Court that such release may be granted even to the prejudice of persons, who had previously acquired an interest in the mortgaged properties. That view is clearly opposed to principles of equity, justice and good conscience, and though recognized in *Sheo Prasad v. Behari Lal* (51), *Sheo Tahal Oja v. Sheodan Rai* (52), *Ghafur Hasan Khan v. Muhammad Kifayatullah Khan* (53) and *Pirbhu Narain Singh v. Amir Singh* (54), was not adopted in *Ram Ranjan v. Indra Narain* (54) and the case of *Krishna Ayyar v. Muthukumarasawmiya Pillai* (55), if it lays down a similar principle, cannot to that extent be supported. The contrary view, which accords with the rule adopted by this Court, was followed in *Ponnusami Mudaliar v. Srinivasa Naicken* (56).

In the present case, this diversity of judicial opinion does not matter, for it cannot be said that the burden has in any way been increased. The burden imposed is exactly proportionate in view of the terms of the lease. There may be difficulty in regarding the appellants as subsequent transferees, so as to treat them as standing in the shoes of the mortgagor and to bind them by the estoppel, which arises against their transferor, Malia, because, although at the request of the two cosharers, royalties, etc., were being separately received from them, the debt for the period sued for in

45. (1891) 18 Cal 320.

46. (1907) 7 C L J 274.

47. (1905) 29 Mad 217.

48. (1906) 33 Cal 613=3 C L J 576=10 O W N 551.

49. (1907) 6 C L J 46.

50. (1892) 21 Ch D. 685.

51. (1902) 25 All 79=(1902) A W N 203.

52. (1905) 28 All 19=(1905) A W N 165=2 ALJ 413.

53. (1907) 29 All 862=(1907) A W N 88.

54. (1906) 33 Cal 890=10 O W N 862.

55. (1905) 29 Mad 217.

56. (1908) 81 Mad 393.

44. (1910) 15 O W N 800=6 I C 842.

the present suit was not split up until after the appellants came on the field and took a second charge. The position is that at the date of the suit the plaintiffs had not received their dues for the period in suit from any of the two parties (vide para. 6 of the plaint), but they chose to split up the debt in conformity with the arrangement which the parties had entered into inter se and, acquiescing in it instituted the suit, to which they made the appellants party defendants, on 6th August 1929 and thereafter accepted the six annas share of the dues from defendant 4 (vide the plaintiffs' petition of 4th August 1930). The splitting up, having been subsequent to the charge created in appellants' favour, the general rule which has been applied to many similar cases will apply, namely, that the rights of persons who have acquired an interest in the mortgaged estate, since the making of the mortgage, of which the mortgagee has notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties; in other words, if a mortgagee with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt against such purchaser. Amongst the cases, that may be referred to in this connexion, may be cited the following: *Hari Kissen Bhagat v. Veliat Hossein* (43), *Surjiram Marwari v. Barhamdeo Persad* (57), *Surjiram Marwari v. Barhamdeo Persad* (58), *Imam Ali v. Baij Nath Ram Sahu* (48), *Hakim Lal v. Ram Lal* (49) and *Venkatachella Chetty v. Srinivasa Varada Chariar* (41).

But then, it was contended, on behalf of the appellants, that, though they are entitled to a part only of the equity of redemption, they have an absolute right to redeem the whole estate. It was argued that, though they are owners of the equity of redemption of only a share in the mortgaged estate, they cannot be compelled to redeem their share only, their right and obligation being to redeem the whole. In support of this proposition, passages from text-books have been cited and reliance has been placed on several cases, amongst which it is

necessary to refer to three. One of these cases is *Pearce v. Morris* (59), in which it was said that it cannot be disputed that the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming the estate separately, and cannot be compelled to redeem it separately his right being to redeem the whole subject to the equities of other persons interested. Another case is *Hall v. Heward* (60), in which it was observed further that such partial redemption cannot be allowed except as a matter of arrangement or unless there is a special bargain. The third case is that of *Huthasanan Nambudri v. Parameswaran Nambudri* (36), in which it was held that a person entitled to a part only of the equity of redemption had the right to redeem the whole, notwithstanding the mortgagee's objection that he should not be permitted to redeem more than his share of the equity.

The last mentioned decision has been adversely commented on in *Rathna Mudali v. Perumal Reddy* (61), and was not considered to be supported by *Pearce v. Morris* (59) and *Hall v. Heward* (60), upon which it purported to be based. The decision has been followed in two cases of this Court, namely, *Baikantha Nath Dey v. Mohesh Chandra Dey* (62) and *Protap Chandra v. Peary Mohan* (63), in which it was held that, in an ordinary case, the partial owner of the equity of redemption is entitled to redeem the whole mortgage and there was no question in these cases of the other partial owner or owners having discharged their liability under the mortgage. So far as the English law on the point is concerned, it is not necessary to consider it at any length, because there is a pronouncement of the Judicial Committee in the case of *Yadalli Beg v. Tukaram* (64), which states what that law is. In that case 16 fields had been mortgaged, of which one was subsequently sold to the respondents and later on, under a consent decree passed between

57. (1903) 1 C L J 387.

58. (1905) 2 C L J 202.

59. (1869) 5 Ch 227=39 L J Ch 342=22 L T 190
=19 W R 196.

60. (1886) 32 Ch D 430=55 L J Ch 604=54 L T
810=34 W R 571.

61. (1912) 38 Mad 310=17 I C 837.

62. (1918) 44 I C 77.

63. (1918) 48 I C 669.

64. A I R 1921 P C 125=57 I C 535=47° I A
207=16 N L R 154=48 Cal 22 (P C).

the mortgagee and the mortgagor, it was provided that, unless within a year certain payments were made, 9 out of the 16 fields including the one sold to the respondents should be given to the possession of the mortgagee; the respondents were no parties to the consent decree or the suit, in which it was passed and they sued, claiming to redeem the 9 fields. Their Lordships said:

"The only question that arises is whether they (i. e., the respondents) are entitled to redeem the whole of the 9 fields, or only the field conveyed to them subject to the mortgage over the whole. According to the English law the respondents would have been entitled to redeem the mortgage in its entirety subject only to the safeguarding of the equal title to redeem if any other person who had a right of redemption, a point which has not arisen so far in the present case. The respondents, being transferees of part of the security by English law, if it applied, would on the one hand be entitled to redeem the entire mortgage on the properties generally, and correlative could not compel the mortgagee to allow them to redeem their part by itself. This would be as the result of principle unless something had happened which extinguished the mortgage whole or in part, such as an exercise of a power of sale originally conferred on the mortgagee by his security or such conduct on the part of the transferees as would estop them from asserting what normally would have been their right."

There being nothing in the Transfer of Property Act to the contrary, the right of the appellants, ordinarily, no doubt, would be to redeem the whole, but that would only be so, subject to the equities of the persons interested. The position being that the owner of the six annas share had satisfied her dues in respect of her share, the practical effect of which was to extinguish the charge to that extent, and the plaintiffs having, in effect, released that share from the burden of the charge and kept it out of the suit, the appellants cannot, in our judgment, ask for liberty to redeem that share. We think we should agree in the view expressed in case of *Rathna Mudali v. Perumal Reddy* (61), in which it was said that the question whether the Court will allow redemption on the whole of the mortgage, at the instance of a person entitled to a part only of the equity of redemption, must depend on the circumstances of each case and the rights acquired by the mortgagee or by third parties subsequent to the mortgage and we must respectfully dissent from those cases in which it has been suggested that in all circumstances and irrespective of

any considerations, the right as well as the liability of the owner of a part of the equity of redemption is to redeem the whole. And we agree with the observations of Sadasiva Ayyar, J., in that case to this extent: that, in our opinion, no distinction in this respect need necessarily be made between cases where the mortgage is split up: (a) by the mortgagee releasing certain of the properties or a certain share of the properties comprised in the mortgage; (b) by himself purchasing a portion of the joint property; and (c) by the joint owners of the equity of redemption effecting a partition of their properties either by mores and bounds or by agreeing to hold the property in common in definite shares instead of jointly.

Lastly, it has been contended that the plaintiffs are not entitled to a personal decree against the appellants. The judgment of the Court below is explicit that the plaintiffs did not claim such a decree and we do not see that any such decree has been passed. But the Subordinate Judge appears to have made defendants 1 to 3, 3 ka, i. e., the appellants and No. 5, liable for Rs. 2,010-2-0 as costs payable to the plaintiffs. We see no justification for this order in so far as it is against the appellants and defendant 5. This portion of the decree therefore will be set aside. The result is that the appeal will succeed only to the extent indicated above and the rest of the decree passed by the Court below will stand. The appellants will get their costs from the plaintiffs-respondents, the whole of their costs for the paper book and a hearing-fee as on the amount of their success, the same being assessed at 10 gold mohurs. Other parties will bear their own costs in the appeal.

K.S. *Appeal partly allowed.*

A. I. R. 1933 Calcutta 165

MUKERJI AND GUHA, JJ.

Gopal Ukeru—Plaintiff—Appellant.

v.

B. N. Ry. Co. Ltd.—Defendant—Respondent.

Appeal No. 36 of 1929, Decided on 18th February 1932, against original decree of Sub-Judge, 4th Court, 24-Parganas, D/- 15th November 1928.

(a) *Damages—Suit for—Work done against railway company—Defendant not producing relevant material for ascertaining measure—*

ment—Plaintiff's claim will not fail for mere non-proof.

The rule that in a suit for work done by a contractor against his employer it is for the plaintiff to prove his claim and if the evidence he has called for the purpose is not reliable he can get nothing beyond what the defendants have admitted can hardly be applied to a case where the defendant is a railway company and the defendant's measurements were not properly made and the defendants have not been able to produce all relevant materials in connexion with the measurements they made. [P 167 C 1]

(b) Damages—Suit for — Claims for work done and reimbursement for expenses incurred for being ready for other promised work are maintainable—Contract Act (1872), S. 73—Civil P. C. (1908), O. 2, R. 3.

In a suit by a contractor against a railway company, the claim was based on two distinct causes of action; one was founded on the original contract for which the claim was for price of work done and the other founded on a promise for other work and a requisition in connexion therewith under which the plaintiff was to maintain an efficient staff in order to comply with which he had to incur expenses and for which expenses he claimed to be reimbursed by way of compensation.

Held: that so long as the damages claimed are not regarded as damages for breach of the original contract, but as compensation for loss incurred by reason of the plaintiff having had to arrange for the new work that was promised, the said claim would not be obnoxious to the claim for the price of the work done under the original contract. [P 168 C 2]

(c) Civil P. C. (1908), O. 41, R. 22—Decree for damages—Only one party appealing—Damages regarding one item liable to be enhanced may be set off against another liable to reduction if items arise out of same cause of action.

In an appeal against a decree for damages, even though some particular item or items in an account may be found by the Court of appeal against the non-appealing respondent, and on that footing the amount for which a decree has been granted by the lower Court may have to be enhanced, still the decree might be supported by showing that in respect of some other item the Court below made a mistake. But this rule does not apply to decisions founded upon different rights or causes of action: *A I R 1927 Mad 801, Rel on.* [P 169 C 2]

(d) Civil P. C. (1908), O. 41, R. 33—Applicability and scope.

The terms of O. 41, R. 33, are very wide and the rule should be cautiously applied and only in cases where but for recourse to it the ends of justice would be defeated: *48 I C 78, Ref.* [P 169 C 2]

Rupendra Kumar Mitter and Pro-matha Nath Mitra—for Appellant.

Bergram and Prosanta Bhushan Gupta—for Respondent.

Judgment.—This is an appeal by the plaintiff whose suit for price of work done and for damages, together with interest, has been decreed in a modified form against the defendants, the B. N.

Ry. Co. Ltd. The plaint is not quite artistically drawn, but the plaintiff's case, put quite shortly, was as follows: in February 1920 the defendant company gave the plaintiff contract work in connexion with the construction of the Tal-char Coal Field Railway for a portion designated as from chainage 314 to 330; that the plaintiff commenced work under the contract and continued to do so till 11th September 1924; that before the date last mentioned the work from chainage 324 to 330 was suspended pending decision of a proposed change in the plan; that by that date the earthwork in chainage 314 to 315 had been almost completed, while that from chainage 315 to 321 had been partially completed, the total work done in chainages 314 to 324 being two-thirds of what had been proposed; that on the said 11th September 1924 the defendants stopped the work which the plaintiff was doing, but at the same time required him to maintain an efficient arrangement so that, when necessary, he might resume the work or take up any other work that might be given him in substitution; and that by the end of December 1924 the defendants asked the plaintiff to discontinue the arrangement and thereafter finally cancelled the contract. The suit was instituted on 18th August 1926. The claim was laid at Rs. 42,000 odd after deduction of payments which the plaintiff had received. The work which the plaintiff did, fell under three categories, viz. earthwork, bridgework, and buildings and miscellaneous work. The rates for the different items of these works were scheduled in three contracts, viz. Ex. A, Ex. A (1) and Ex. A (2) respectively, and the plaintiff also claimed that in respect of certain matters there were modifications or variations made subsequently on his representation.

In the written statement filed on behalf of the defendants many of the allegations in the plaint on which the defendant's liability was founded were denied, and appended thereto were three schedules which show at a glance on what points the parties differed on the question of measurements, rates or accounts. Some of the statements contained in the written statement are not quite accurate: the Subordinate Judge has pointed out in what way they are wrong, and nothing has been said before

us to challenge the correctness of these findings. It was pleaded that the plaintiff could legitimately get Rs. 2,221 as his dues for works done. A further amount of Rs. 2,074-4-0 was afforded on the ground of alleged loss due to stoppage of work, etc., but without prejudice. The Subordinate Judge was of opinion that the plaintiff was entitled to these two amounts, viz. Rs. 2,221 + Rs. 2,074-4-0 = Rs. 4,295-4-0, and allowing a further amount of Rs. 3,172-13-0 on certain heads gave the plaintiff decree for Rs. 7,468-1-0 with costs in proportion to his success.

The contentions urged on behalf of the appellants fall under certain specific heads and it will be convenient to deal with them separately item by item. We first of all take up the main item of work, i. e., earth work in Sch. A to the plaint. (The judgment after considering the evidence on record and finding that no reliance could be placed on the measurements produced by either party proceeded.) In this unsatisfactory state of things it is not quite easy to determine how the case is to be decided. Here we cannot follow the rule which Mr. Tulloch suggested in Ex. 8, to which reference has already been made, and say that the quantity claimed by the contractor should be paid, because we are of opinion that the plaintiff's claim is not a genuine one. One view that may be taken is that it was for the plaintiff to prove his claim, and if the evidence he has called for the purpose is not reliable he can get nothing beyond what the defendants have admitted. But this rule can hardly be applied to a case where, as here, the defendants' measurements were not properly made and the defendants have not been able to produce all relevant materials in connexion with the measurements they made. Mr. Austin's evidence makes it perfectly plain that the Railway Engineers have a double duty to discharge: they have to see to the interest of their employers and they have a further duty to the contractor and see that the latter is satisfied that his just dues are paid. Consequently once the measurements made by the defendants are considered unsatisfactory the contractor's claim acquires a good deal of strength. The question is to what extent can we or should we accept the plaintiff's case.

There are two facts established upon

the evidence about which there can hardly be any doubt or dispute. One such fact is that the plaintiff was not satisfied with the measurements as regards the banks, while he readily agreed to those as regards most of the cuttings. His conduct in referring to sign the measurements, his complaint to Mr. Tulloch and to the Agent [vide Ex. B and Ex. H (12)], his insistence in getting Mr. Tulloch and the other high officials to the spot to look into his complaint, are matters which point unmistakeably to his having entertained a genuine grievance. On the other hand there is not the faintest doubt that his allegation that he had completed two-thirds of the entire work and that

"the defendants did not take the measurement at the proper time when he told them to measure the banks and three lacs cft. of earth was thus washed away in all"

is a myth. The correspondence to which reference has already been made establishes beyond doubt that he was not particularly anxious to have his works measured and that, in fact, it was with some difficulty that the defendants could get him to dress up the banks and make them ready for measurement. The story of so large a quantity of work having been washed away was in our judgment an invention resorted to because the plaintiff knew that he would not be able to support his claim on the spot at least to that extent. From the claim he put forward that quantity must be excluded. As regards the rest it is not possible to arrive at any conclusion with any degree of mathematical precision. But regard being had to the fact that the defendants in whom the duty lay of making a proper measurement have not been able to place before us such first-hand materials as would have satisfied us that these measurements were right, and as it is not possible at this distance of time to re-measure the work we think we ought to allow the rest of the plaintiff's claim. (The judgment then considered the plaintiff's claim with regard to rates, classification, rates and stores recruiting and fuel charges and cost of building cooly sheds and proceeded.) So far we have dealt with the part of the plaintiff's claim under Sch. A to the plaint which relates to prices for work done. We have now to turn to the plaintiff's claim under Sch. B to the plaint,

i. e., under the head of damages. Mr. Bagram, appearing on behalf of the respondents has complained, and in our opinion rightly, that from a perusal of the plaint it is not easy to ascertain what is the contract or whether it is one contract or more, or whether the plaintiff has sued on their basis or for their breach. He has contended that if an employer prevents completion of the work given to a contractor, and if the work is only partially completed the contractor may sue for damages or he may treat the contract as at an end and may sue for price of the work done, but that these are only alternative remedies and he cannot have both. He has cited the following passage, in support of his contention, from *Hudson on Building Contracts*, Edn. 4, Vol. 1, p. 495 :

"Where the employer prevents completion, e. g., in the case of wrongful forfeiture, or of the builder being ejected from the site the builder may sue for breach of contract. If the builder has done nothing the measure of damages is the loss which he would otherwise have earned on the principle involved in *Inchbold v. Western Neilyherry Coffee Co.* (1) and see *Masterton v. Brooklyn Corporation* (2). If the work is partially completed the measure of damages is the contract price, deducting therefrom what it would have cost to complete the work when it was stopped. But instead of suing for damages the builder may, at his option, treat the special contract as at an end, and sue for the value of the work actually done and of the material supplied, or he may sue alternatively for damages or for the value of the work and materials : *Mayne on Damage, Ilanche v. Colburn* (3), *Trickett v. Badger* (4) and *Lodder v. Stowey* (5), p. 453."

It seems to us that the plaint, though very clumsily drawn, need not necessarily be read as laying a claim for price of work done and also for damages under one and the same contract. The contract in the present case was only a contract as regards the rates having regard to the kinds of work that were to be done and did not fix the work itself as lying within particular chainages ; it gave the defendant the right to stop the work with 10 days' notice ; and it was open to the defendants to call upon the plaintiff to do any substituted work in the

place of the original one. The true view to take of the plaint is that it combines two distinct causes of action ; one founded on the original contract for which the claim was price of work done, and the other founded on a promise for other work and a requisition in connexion therewith under which the plaintiff was to maintain an efficient staff in order to comply with which he had to incur expenses and for which expenses he claimed to be reimbursed by way of compensation. So long as the damages claimed are not regarded as damages for breach of the original contract, but may be treated as compensation for loss incurred by reason of the plaintiff having had to arrange for the new work that was promised, the said claim would not be obnoxious to the claim for the price of work done under the original contract. Judged by this test the first alternative claim for Rs. 3,000 for "loss of profit over remaining work" can not possibly stand, and it has not been pressed before us. As regards Rs. 400 for costs of implements and Rs. 200 for cost of building shed that too have been abandoned, obviously because such a claim has no legs to stand upon. The remaining items canvassed before us are the following :

- | | |
|---|---------|
| 1. Advance lost upon labour : | |
| 8 Masons at site. | Rs. 800 |
| 150 coolies at site. | " 1,600 |
| 100 coolies abroad (being recruited). | " 1,000 |
| 2. Costs of Staff : | |
| 2 agents at Rs. 50 for 4 months from September 1924 to December 1924. | " 400 |
| 2 servants at Rs. 15 for Ditto. | " 120 |
| 3. Damages for unemployment. | |
| Of the plaintiff as he had to wait for six months at Rs. 500 per month. | " 3,000 |

All these items in 1, 2 and 3 are, according to the plaint, claims for damages on the footing of the men concerned being detained at the spot by reason of the alleged requisition of the defendants that the plaintiff was to remain in readiness for the work that was promised in substitution. Regarded as a claim for damages on the ground of the defendants not having given him the substituted work which they promised we do not think the plaintiff has really any case. The promise was a purely gratuitous one, made only for the plaintiff's benefit, and Mr. Mitter who has placed the plaintiff's case before us with great ability and care has not been able to lay his finger

1. (1864) 17 C B (n. s.) 738=13 W R 95=11 L T 845=10 Jur (n. s.) 1129=34 L J C P 15.
2. (1845) 7 Hill (n. y.) 16.
3. (1831) 8 Bing 14=1 M & Scott 51=5 Carr & P 58.
4. (1866) C B N S 296.
5. (1904) A C 442=73 L J P C 82=20 T L R 697=68 W R 181=91 L T 211.

on any material which would go to suggest that the plaintiff was called upon to maintain any staff or incur any expenses. Such a claim in our judgment, is entirely unsustainable. But the Subordinate Judge has given the plaintiff a decree for a certain amount on these heads and we have therefore to examine his grounds for his doing so.

The judgment of the Subordinate Judge on the question of damages is faulty. He has treated the question of damages as if it arose both on account of breach of the original contract and also on account of nonfulfilment of the promise for substituted work that was made. He held that so far as keeping masons, recruiting coolies and maintaining a staff was concerned, the story was in the main untrue and on the weekly statements, Ex. J series, he held that the men who were there were not sufficient to complete the dressing of the banks in order to get them ready for measurement. He found however that the defendants had offered to pay Rs. 559-7-0 as damages for sudden stoppage of work, and being thus misled into thinking that a claim for damages on that ground was maintainable he went into the question as to what should be the measure of such damages. He found that the plaintiff's accounts showed that the plaintiff had advanced Rs. 3,000 or a little less which he had not been able to recover. It would appear from what he has said in his judgment that if the old work had not been stopped or if any substituted work had been given the plaintiff could have recovered the advances. He seems further to have been of the opinion that if this loss was taken into consideration in making the classification and Rs. 10-8-0 had been allowed as the initial rate for the chainages for which the said rate was claimed, the plaintiff would have got an additional sum of Rs. 2,887-12-0 which is very nearly what the plaintiff alleged he had lost upon advances on account of labour. He therefore allowed Rs. 2,887-12-0 on the ground of damages in the place of Rupees 559-7-0 which the defendants had offered. As already observed this part of the Subordinate Judge's judgment cannot be supported, at least not on the ground on which it was based. But we have already said that the learned Judge was not entirely to blame for it; because it does not appear to have been urged before him

that an alternative claim for damages for stoppage of work was not maintainable along with a claim for price of work done, and also because an offer to the extent of Rs. 559-7-0 on account of such damages was made by the defendants themselves. We have been asked by Mr. Bagram to hold that this claim for damages has been wrongly allowed.

The defendants have not filed any appeal from the decree of the Court below and have not even preferred any cross-objections to the plaintiff's appeal. Mr. Bagram has relied upon the words of O. 41, R. 22 and O. 41, R. 33 for his contention that it is open to us to consider the validity of the judgment in so far as it has dealt with the question of damages. His contention in substance is that even though some particular item or items in an account may be found by the Court of appeal against the respondent and on that footing the amount for which a decree has been granted by the lower Court may have to be enhanced, still the decree might be supported by showing that in respect of some other item the Court below made a mistake. We think this contention is sound subject to the qualification that the rule does not apply to decisions founded upon different rights or causes of action. We are in agreement with the interpretation put upon O. 41, R. 22 by Srinivasa Ayyangar, J., in the case of *Sriranga Thathacharia v. Srinivasa Thathacharia* (6) in which he held that under R. 22 it is not open to a respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections. As regards O. 41, R. 33 we think it would be enough for us to say that though the terms of the rule are very wide, the rule should be cautiously applied and only in cases where but for recourse to it the ends of justice would be defeated: *Shib Chandra v. A. C. Dulcken* (7).

In the present case the claim for damages that has been allowed by the Subordinate Judge, though it is unsupportable in law as a claim for damages for breach of a contract, cannot be regarded as unjust on its merits, seeing

6. A I R 1927 Mad 801=104 I C 472=50
Mad 866.

7. (1918) 48 I C 78.

that in the opinion of the learned Judge the plaintiff was put to loss and this loss was not sufficiently taken into account in making the classification. Though we are not prepared to rely on the account filed by the plaintiff it is more than clear to our minds that the plaintiff had made a bad bargain in going in for this contract. The insistence with which he clamoured for higher rates for the hard soil before all the superior authorities concerned is a clear indication that he had incurred some loss, no matter through whose fault or in whatever way it may have happened. He had worked well and was in the good books of the defendants as appears from the letters already referred to. He did not hesitate to forgo all his prospects by taking recourse to a devise to hoodwink Mr. Bennett, if only to get a better classification in order to be able to recoup himself as appears from the letter Ex. 4 (b). In his letter Ex. 4 (m) to the Deputy Chief Engineer he complained that he had made advances to coolies to the extent of Rupees 2,000 but that the coolies had absconded. The railway authorities themselves considered him as somewhat hard hit or else they would scarcely have offered him some compensation for stoppage of work. We are therefore unable to regard the decree for damages which the Subordinate Judge has made as calling for our interference even though such interference would be warranted by R. 33, O. 41 of the Code. There remains now only the question of interest, which is the claim under Sch. C to the plaint to be considered.

Interest.—We see no reason to differ from the view which the Subordinate Judge has taken of this matter. The result is that in our opinion the appeal should be allowed in part, the decree passed by the Court below being enhanced by Rs. 1,912-8-0 + Rs. 131-12-0 = 2,044-4-0. As regards the costs of this appeal in view of the highly inflated claim which the appellant made, we would allow him only the paper-book costs and Rs. 100 as hearing-fee.

M.N.

*Appeal partly allowed.**** A. I. R. 1933 Calcutta 170**

RANKIN, C. J. AND C. C. GHOSE, J.

Ram Singh—Plaintiff—Appellant.

v.

Century Insurance Co. Ltd.—Defendants—Respondents.

Appeal No. 30 of 1932, Decided on 13th July 1932, against original decree of Buckland, J., D/- 15th January 1932.

*** Insurance—Fire—Renewal is fresh contract—Property burnt between date of expiry and date of renewal—Company is not liable.**

A term of a fire insurance policy was as follows : " The company hereby agrees with the insured that if, after payment of the premium, the property above described shall be destroyed or damaged by fire, or lightning at any time between 3rd November 1927 and 4 o'clock in the afternoon of 3rd November 1928, or during any subsequent period for which the insured shall pay to the company and the company shall accept the sum required for the renewal of the policy, the company will pay or make good all such loss or damage." The policy was renewable but was not renewed before its expiry. Premium for renewal was sent on 18th November and was received and accepted on 26th November. The property was destroyed by fire on 20th November. Claim was sent on 22nd November and received on 28th November when the company intimated that it cancelled the renewal. In a suit by the insured :

Held : that the renewal of a policy is a fresh contract dating back to the date of the expiry of the original contract and the acceptance of the premium on the 26th being under a mistake as the property was non-existent on that date the transaction of renewal was void and the company was not liable: *Pritchard v. Merchants & Tradesmen Mutual Life Insurance Society*, (1859) 27 L. J. P. C. 169, *Rel. on.* [175 C. 1]

L. P. E. Pugh and Shekar Bose—for Appellant.

S. N. Banerjee and J. C. Sett—for Respondents.

Buckland, J.—The plaintiff in this suit claims to recover the sum of Rupees 20,000 together with interest and costs under a policy of insurance against loss by fire being No. 1260486 issued by the defendant company on 26th November 1927 in respect of building No. 57, Abbotabad Cantonment, which was destroyed on 20th November 1928. The policy, as stated, was issued on 26th November 1927 and insured the plaintiff in the sum of Rs. 20,000 against fire in respect of the building owned by him at Abbotabad for one year from 3rd November 1927 to 3rd November 1928, upon which date the policy is stated to be renewable. On 20th November 1928 the premises insured were completely destroyed by fire, but on the 18th the plain-

tiff had posted to the defendant company a cheque for Rs. 85 on account of the renewal premium. Actually the amount of the renewal premium was Rs. 100, but he was allowed a discount amounting to Rs. 15 by reason of which the company, on receipt of the cheque on 26th November 1928, sent him two receipts, one for Rs. 85 and another for Rs. 100 formally renewing the policy. At that time the company had no knowledge of the fire, and a letter informing them as to the fire was despatched on 22nd and received on 28th November. This appears from a letter written by the company bearing the latter date in which they confirmed as follows a telegram sent to the plaintiff on the same day :

"Renewal receipt No. 88 under policy No. 1260486 for Rs. 20,000 covering 57 cantonment hereby withdrawn and cancelled stop premium of Rs. 85 being returned to you stop our letter of 26th November and enclosures are also hereby withdrawn and cancelled stop letter follows."

Summarizing the position the insured sent his cheque in renewal of the policy before the fire ; the company formally renewed the policy in ignorance of the fire ; subsequently on learning of the fire they purported to withdraw and cancel the renewal receipt. For the present purpose it is not suggested that the plaintiff ought to have informed the company of the fire before the company could post the renewal receipt, nor for the present purpose has it been suggested that everything was otherwise than perfectly bona fide. I say "for the present purpose" because though three issues were submitted and accepted I have been invited by learned counsel on both sides first to try issue 1 as it may determine the whole suit. The issues are as follows : (1) Was the policy in force on 20th November by reason of the payment and acceptance of the renewal premium on 26th November ? (2) Was the renewal of the policy, if any, procured by fraudulent concealment of the fact of the destruction of the risk by the plaintiff ? (3) Did the plaintiff commit any breach of condition of the policy as alleged in para. 6 of the written statement. At the hearing Mr. Banerjee for the company stated in relation to issue 3 that he would confine himself to the particulars given in paras. 6 (i), 6 (ii) b, 6 (iii) and 6 (v) of the written statement. Before considering the question to be

determined I should state that neither side wished to call any oral evidence nor has the evidence taken on commission been referred to and I gave every opportunity to tender any documentary evidence which it was desired to use. I have been informed that all material documentary evidence has been exhibited and it consists exclusively of the very few documents to which I shall have to refer. I further wish to draw attention to the letter of 28th November 1928 from the company to the plaintiff which says :

"As the fire is stated to have taken place on the 20th instant we are not liable as we had clearly intimated to you in our letter of the 14th idem that we would not cover the risk until we receive your further instructions which did not reach us until the 26th instant."

On my drawing Mr. Banerjee's attention to this passage, he said that nothing turned upon it, and he did not desire to go into any question which that paragraph might be considered to have foreshadowed. The contention advanced on behalf of the plaintiff which purports to be expressed in issue 1 and to which no objection has been taken, even if the point has not been expressly pleaded, is that actually there was no renewal; that the word "renewal" is really misused in the policies, that under the policy itself the plaintiff was continuously insured until and by reason of the renewal. This is based upon the clause of the policy which runs as follows :

"The company hereby agrees with the insured (but subject to the conditions printed on the back of this policy, and to any other conditions thereon otherwise expressed) that if, after payment of the premium, the property above-described or any part thereof, shall be destroyed or damaged by fire or lightning at any time between 3rd November 1927 and 4 o'clock in the afternoon of 3rd November 1928, or during any subsequent period for which the insured shall pay to the company, and the company shall accept the sum required for the renewal of this policy, the company will pay or make good all such loss or damage etc."

It is submitted that though the policy might lapse, and indeed would have lapsed and come to an end on 3rd November 1928, if either the insured had declined to renew or the company had refused to accept his premium nevertheless it continued to have effect until the matter of the renewal was determined one way or another and that, in that view the policy was for a year or a "subsequent period." If that is the correct construction of the document it is contended that the plaintiff was insured at

the time of the fire, and that it was not open to the defendant company, on learning of the fire after the policy had been renewed, to withdraw and to return the premium. On the other side it has been argued for the company that the policy was for one year, but that it could be revived upon payment and acceptance of the renewal premium which must be taken to be subject to the continued existence of the subject-matter of the policy, and that the company was entitled to withdraw and cancel the renewal, the property having been destroyed before it received the premium and issued the receipt. I have been referred to passages in several text-books including Lord Halsbury's *Laws of England*, Vol. 17, 526, in which the learned author sets out the following passage :

"When the policy provides that there shall be no insurance until the renewal premium has been accepted by the insurance office, and a loss accrues during the 15 days and before payment of the premium it seems that in the absence of any condition so framed as to show a contrary intention, the insured is not entitled to recover."

The policy with which this suit is concerned does not provide *totis in verbis* that there shall be no insurance until the renewal premium has been accepted by the insurance office as Mr. Pugh has been careful to point out, for such a provision would cut the ground from beneath his feet. But it is a matter for consideration whether the terms of this policy do not come to the same thing in that, the word "or" being used disjunctively, the clause contemplates not a continuing period indefinite in length, but two periods of which the first ends on 3rd November 1928 after which the next period begins during which the policy holder will not be insured until the renewal premium has been paid and accepted. Two cases are referred to under the passage quoted and indeed a considerable number are cited in the text-books quoted. I have invited learned counsel for the company to cite the authorities themselves, but he has assured me that after having read them all, none would furnish any assistance except one to which I shall refer presently. I am also referred to a well-known authority on the law of fire insurance (Bunyan's *Law of Fire Insurance* 6th Edn., 241) where the following occurs:

"If the premium is not paid within 15 days and the fire occurs, the acceptance of the premium by the office in ignorance of the disaster

will not revive the policy. If neither party were aware of the fire unless there was express agreement that the insurance should date back by the insertion of some words equivalent to "lost" or "not lost," it would be open to the office to contend that the acceptance of the premium being for the renewal of the insurance assumed that the subject-matter of the insurance continued to exist."

Passages have also been read from a recent edition of the well-known book on fire insurance by Welford and Otter Barry, 3rd Edn., 181, where among others occurs the following:

"The effect of the revival is not to continue the contract formerly existing, but to establish an entirely new one. If therefore a loss has already happened without the knowledge either of the insured or the insurers the revived policy will not, even if ante-dated to the date at which the former policy expired, be treated as applying to such loss unless it is clearly the intention of the parties that it shall do so."

I observe that earlier the learned author discusses two opposite views expressed as to the renewal of a policy, whether it is a fresh contract or whether it is a continuing contract relating back to the original policy, and not a fresh one, and writes that the view as to the renewal of a fire policy being a fresh contract appears to be correct, and if this is so it should dispose of Mr. Pugh's point, but obviously the terms of the policy should be considered in each case. I will now consider *Pritchard v. Merchants and Tradesmen Mutual Life Insurance Society* (1), the only authority cited in the course of the argument and one to which constant reference is to be found in the text-books. That was a Life Insurance case and by the policy the premium had to be paid on or before the 13th October in every year during the life insured. It was provided that the policy should be void if the premium was not paid within 30 days after it became due, but it might be revived within three calendar months on satisfactory proof of the health of the insured. It appears that the person whose life was insured died on 12th November 1855, and on 15th November 1855, that is, more than 30 days from the due date for payment of the premium, but within three months the annual premium was paid and the company gave a renewal receipt, neither the plaintiff nor the defendant being aware of the fact that the person insured was already dead.

1. (1858) 27 L J O P 169=3 C B (n.s.) 622=4 Jur (n.s.) 207=6 W R 340.

The question was whether in such circumstances the sum assured was recoverable from the insurance company. The learned Judges all agreed that the plaintiff was not entitled to recover. Williams, J., observed that the payment was void and ineffectual as it was made and received on the implied understanding on both sides that the insured was then alive. Crowder, J., said that the premium was accepted under mistake, and the transaction was altogether void. It is contended that the case is materially different because the policy was to be void if the premiums were not paid by the due date though it could be revived within a certain period, whereas in this particular case the policy continued to be operative. That appears to me to beg the question. If this policy does run on, as Mr. Pugh expressed it, then the matter is not open to further argument, but it appears to me the more correct to say that the renewal of a policy is a fresh contract dating back to the date of the expiry of the original contract. *Pitchard v. Merchants Insurance Society* (1) is not on all fours with the case, but it appears to me that there are principles underlying it which make it applicable. The passage which makes most appeal to me is that to be found at the conclusion of the judgment of Crowder, J., where he observes that:

"the common sense of the matter is entirely in favour of the defendant. They accepted the premium under a mistake, and the transaction is altogether void."

There is no question in this case of mistake in the technical sense, but the common sense of the matter must be that the company would not have accepted the premium had they known that the loss had already occurred. They would have been entitled to decline it in any case, and can it therefore be said that having accepted it in ignorance of the fire they are bound by the terms of the policy to pay on a loss which had already occurred when they accepted it? I find it impossible to accept this view on any reasonable basis and, for the reasons stated, it appears to me that the contention of the defendant company is correct and that the suit must be dismissed with costs.

Rankin, C. J.—This is an appeal from the judgment and decree of my learned brother Buckland, J., who dismissed the

suit of the plaintiff whereby he claimed Rs. 20,000 upon an Insurance Policy issued by the defendant company against risk of fire in respect of certain premises of plaintiff No. 57 Abbotabad Cantonment in the North-western Provinces. The policy was originally issued on 3rd November 1927. The number of the particular policy with which we are concerned is 1260486. We have been referred to the terms of the policy which for the present purposes are as follows:

"The company hereby agrees with the insured that if, after payment of the premium, the property above described, shall be destroyed or damaged by fire or lightning at any time between 3rd November 1927 and 4 o'clock in the afternoon of 3rd November 1928 or during any subsequent period for which the insured shall pay to the company, and the company shall accept the sum required for the renewal of the policy, the company will pay or make good all such loss or damage."

The policy extends, to begin with, till 4 o'clock on 3rd November 1928 and unless something had been done by that time, the effect of the policy had been expended. On 27th October accordingly, some time before 3rd November the company issued a reminder asking for its premium. There was correspondence upon the question whether or not on this and certain other policies the plaintiff could get 15 per cent commission. The company was minded to allow 15 per cent commission. By its letter of the 31st October it wrote to the plaintiff asking him to send a remittance for the renewal premium less 15 per cent discount when the necessary renewal receipt would be issued. The company pointed out to the plaintiff that as the policy had already expired they had wired him accepting his terms as to discount. On 8th November the plaintiff sent a cheque for premiums on two other policies and asked the company to renew them. With reference to the policy now in question they said:

"as regards the renewal of the policy No. 1260486 for Rs. 20,000, we beg to say that we will get it renewed during next month."

On the 14th November the company wrote to the plaintiff to say:

"you state in the last paragraph of your letter that you wish to renew the policy some time next month, i.e. December. In this connexion I have to inform you that the policy in question has already expired on the 3rd instant and you are therefore not covered in the meantime. Should you desire to take out a fresh policy at any later date, please let us know when we shall hold the risk covered."

It is reasonably clear therefore that until the company received the request and had an opportunity to decide upon the matter, the plaintiff was not covered at all. On the 18th November the plaintiff sent a cheque for Rs. 85 in payment of the renewal premium for the above policy and he said: "kindly send us the renewal receipt and oblige." It was quite open to the plaintiff, particularly in view of the language of the company's letter of the 14th November to write to the company to say:

"we want some sort of credit for the time since the 3rd November until the time when you receive this letter because we never pay money for nothing,"

and I daresay that had they so done the company would have been equally pleased to give them either a new policy altogether dating from the date of the receipt of the plaintiff's letter or would have been equally pleased to extend the period for a corresponding number of days in November 1929. The plaintiff asked for nothing of the sort. He knew that until his letter reached the company he would not be covered. He did not think it necessary, apparently, to haggle about the short period during which, as he knew, he was not being covered. He did not make any particular stipulation for any concession of that kind. It may be that such a matter was not worth troubling about. The letter having been sent with the premium on 18th November, a fire occurred on the 20th. The plaintiff's letter was not received in Calcutta at the branch to which it was addressed until the 26th. It is quite true that the plaintiff had in the meantime, namely on the 22nd, written to the company to say that a fire had occurred, and making a claim. What would have happened if he had telegraphed to the company to say that a fire had occurred we may imagine for ourselves; but he sent a letter which did not arrive in Calcutta until the 28th. The company immediately repudiated their liability and withdrew their acceptance of the premium. The question is whether in these circumstances when this fire occurred on 20th November 1928 the plaintiff was or was not covered. It is not contended that mere posting of the letter of 18th November effected an insurance in itself. It is not contended that the company on 26th November, when they accepted the policy, had any

knowledge of the fire; but it is said that as a matter of construction of the clause which I have read from the policy, the company when it accepted the premium in ignorance of the fire on 26th November entered into a contract to the effect that if between the 3rd November and the 27th a fire had occurred, they would indemnify the plaintiff in respect thereof. Mr. Pugh has put this contention in two ways—in one way, as a matter of construction of the contract; and in view of the terms of the renewal of the receipt—he says that the plaintiff with retrospective effect became on 26th November covered as from the 3rd. Another way he puts it is that the plaintiff at least became covered from the date when he despatched the money, namely, the 18th November.

In my judgment both the conventions are equally unfounded. It is not usual when stipulating for fire insurance to stipulate with reference to the past. The risk to be guarded against is a risk in the future. The language of this policy is plain and intelligible enough if that primary condition be considered. Speaking of the future it is sensible enough to say that the plaintiff will be covered during the year or during any subsequent period for which he should pay the premium to the company and the company accepts it. The idea is that the ordinary course of business will be that the insurance for the year will be fixed up before that year begins. The language of the policy which is not a matter for any wonder is adapted to the ordinary condition. We are to consider whether it is the intention of this language to put a case in which the company is accepting the insurance premium in respect of a fire taking place in a house on the footing that the fire may or may not have taken place and that if it has taken place the company is going to pay for the damage. If that is so we will have found something unusual in the way of fire insurance contracts. I see in the clause no foundation for an argument that such an unusual contract is contemplated by the clause.

Mr. Pugh argues that if the defendant company can say that they are not liable for any risk that eventuated before the 26th, then they have taken some of his money for nothing; that they have no business to take his money for the period between the 3rd and the 26th and that

for this reason we must hold that when the insurance company accepts the renewal policy out of time it takes the risk of an accident having happened in the meantime unknown to itself. In my judgment the position is very clear. The plaintiff might well have stipulated for a reduction in his premium of a few rupees or he might quite well have stipulated that the year should be reckoned to run from the 26th. He did nothing of the sort. He asked for the policy to be renewed. He did not in any way put himself to the trouble of taking care that he lost no sum of money however trivial. That does not mean that the company when it accepted the premium on the 26th had undertaken to insure a building which might or might not have been consumed by fire at the time. It appears to me that the judgment of the learned Judge has very fully and carefully examined the relevant principles and that the learned Judge has arrived at a conclusion which is entirely correct. The appeal fails and must be dismissed with costs.

C. C. Ghose, J.—I agree.

M.N. *Appeal dismissed.*

A. I. R. 1933 Calcutta 175

GUHA AND M. C. GHOSE, JJ.

Jagat Kishore Acharya—Appellant.

v.

Kamaruddin and others—Respondents.

Appeals Nos. 246 to 262, 264 to 277 and 279 to 302 of 1929, Decided on 24th May 1932 against appellate decrees of Dist. Judge, Mymensingh, D/- 3rd September 1928.

(a) Bengal Tenancy Act (1885), S. 52—**Claim for enhancement for excess area—Assessment on measured area must be proved.**

Where there is nothing to show when a tenancy was created, whether there was any measurement of the lands comprised in the tenancy either at the first, any intermediate or the last assessment or adjustment of rent, it is necessary for the landlord to base his claim for enhanced rent for excess area upon some measurement either actual or agreed upon on the basis of which rent was assessed or adjusted : *A I R 1928 Cal 553, Foll.*; *A I R 1924 Cal 374, Rel. on*; *A I R 1926 Pat 197, Disc.*; *A I R 1921 Cal 345 and 5 C L J 588, Ref.*

[P 176 C 2]

(b) Bengal Tenancy Act (1885), S. 35—**Limit of enhancement is to be finally settled by first appellate Court on facts of each case.**

The facts and circumstances in each case have

to be taken into consideration in determining the limit of enhancement so that it may not be unfair or inequitable to the parties concerned. The discretion so exercised in the matter of enhancement of rent should not be interfered with in second appeal, but it would not be right to say that discretion in the matter of enhancement of rent, on the ground of its being fair and equitable, could be exercised by the trial Court only and that it was not open to the final Court of facts to use its own discretion, based upon facts and circumstances of the case before it.

[P 177 C 2; P 178 C 1]

Pares Ch. Mitter, Dwarka Nath Chuckerbutty, Basak and Kali Kinkar Chuckerbutty—for Appellants.

Nasim Ali—for Respondents.

Biraj Mohan Majumdar—for Deputy Registrar.

Guha, J.—These appeals have arisen out of suits for realization of arrears of rent, brought by Raja Jagat Kishore Acharyya Chowdhury. The claim was made by the plaintiff in the suits for additional rent for excess area in the possession of the tenant defendants in the suits, on the basis of area recorded in the last cadastral survey, under Ch. 10, Bengal Tenancy Act. The plaintiff also claimed enhancement of rent on the grounds of a rise in the average prices of staple food crops, as also on the ground that the productive powers of the land held by the tenants have been increased by fluvial action. The points raised for determination in the suits, on the averments made in the pleadings of the parties, so far as the main controversy between the parties was concerned, were the following: "Are the defendants holding any land for which they do not pay rent, and are they liable to pay additional rent for the same? What was the standard of measurement when the lands in suit were settled? What amount of increase, if any, is the plaintiff entitled to recover under S. 30 (b), Bengal Tenancy Act? Has there been any increase in the productive power of the lands due to fluvial action? If so, to what increase of rent is the plaintiff entitled therefor?"

The Munsif of Bajitpur gave his decision allowing the plaintiff's claim in the suits in a modified form. There were decrees passed for arrears of rent at as. 12-6 per kani of '65 acre per kani, as per area ascertained in the settlement operations. The plaintiff was also allowed enhancement of rent at the rate of 8 as. in the rupee, from 1333 B. S. It is to

be noticed that the decision and decrees passed by the Munsif were based on the findings arrived at by him, that the unit of linear measure was to be taken to be $24\frac{1}{2}$ inches a cubit (hath), and not 18 inches as asserted by the plaintiff; and that the plaintiff was not entitled to any additional rent for excess area as contemplated by S. 52, Bengal Tenancy Act. The enhancement of rent under S. 32 was allowed by the Munsif, after comparison of prices as contemplated by that section, and after negating the contention of the defendants that the lands comprised in the tenancies could not bear enhancement for reasons stated by them. On appeal the District Judge of Mymensingh has affirmed the decision of the trial Court, so far as the plaintiff's claim for additional rent for excess land was concerned, but has reduced the enhancement allowed by the trial Court to 4 annas in the rupee. It may be mentioned that the learned District Judge accepted the plaintiff's case that the standard cubit prevailing in the pargana was one of 18 inches; but observed that whether a cubit of that length was actually used in working out the present areas was quite a different matter. The plaintiff has appealed to this Court.

The main question in controversy between the parties centred round the plaintiff's assertion that in the year 1891 there was a compromise arrived at as between the landlord and the tenants, by which rents were fixed at a certain rate per kani; so that if the plaintiff could show that any tenant defendant was in possession of more lands than he was paying rent for, the plaintiff was entitled to get additional rent for excess area, in view of the provisions of S. 52, Ben. Ten. Act. Reference is necessary in this connexion to the findings arrived at by the learned District Judge, hearing upon this part of the plaintiff's case. The learned Judge has in the first place mentioned that the plaintiff has really made no attempt to prove that there has been any actual increase: no evidence was given to show that any of the defendants had obtained lands by encroachment or otherwise, and has then found that no actual increase had been proved. The defendants knew that areas were entered in the plaintiff's papers, but they did not accept any measurement with reference to which the areas were stated. The

lower appellate Court accepted the defendant's case that no actual measurement was made at the time when the compromise was effected in the year 1891, which was a compromise of a dispute in regard to existing rent, and not merely one relating to the rate per kani, and that the tenants never agreed that they would be liable to pay additional rents for the same land as the result of any future measurement. The Cadastral Survey measurements showed increase in areas, but did not necessarily show that the tenants were in possession of any land in addition to the land shown in plaintiff's papers, the identical land appearing to be greater in quantity on account of proper measurement. If there was no measurement at any time, or if there was no measurement which was accepted by the defendants, the rate per kani mentioned in the plaintiff's papers, standing by itself, could not be of any avail to the plaintiff, if the area was never ascertained on proper measurement, and accepted by the defendants. The learned District Judge has observed:

"a mere rate tells you nothing: in order to find out what the rent is, it is also necessary to know the area."

In this view of the case, resting upon definite findings of fact arrived at by the Court of appeal below the plaintiff cannot upon the plain reading of S. 52, Ben. Ten. Act, succeed in his claim for additional rent for excess area, as made in the suits. The conclusion thus arrived at is amply supported by the authority of decisions of this Court. In the case of *Gocool Chunder v. Jamal Hismas* (1), the learned Sir George Rankin, C. J., has restated the settled rule of this Court, that where there was nothing to show when a tenancy was created, whether there was any measurement of the lands comprised in the tenancy either at the first, any intermediate or the last assessment or adjustment of rent, it was necessary for the landlord to base his claim upon some measurement, on the basis of which rent was assessed or adjusted. In view of some comment made on a previous decision of the learned Chief Justice in the case of *Manindra Chandra Nandi v. Kaulat Sheikh* (2), by the learned Judges of the Patna High Court

1. A I R 1928 Cal 559=111 I C 107=55 Cal 680.

2. A I R 1924 Cal 374=79 I C 852=50 Cal 957.

in the case of *Shib Sahai v. Bejoy Chand* (3), it is necessary to examine the decision of this Court in the case of *Durga Priya v. Nazra Gain* (4), which according to the learned Judges of the Patna High Court laid down a rule different from the one which was taken to be the settled rule in this Court in *Manindra Chandra Nandi's* case (2), referred to above. In *Durga Priya's* case (4), Mookerjee, Ag. C. J., in delivering his judgment referred to his own decision in *Raj Kumar v. Ram Lal* (5), laying down the rule that the landlord was entitled to additional rent for excess land only when he showed what the quantity of land was at the inception of the tenancy, that the rent was settled with reference to area, that no consolidated rent for the entire area let out was settled, and that the quantity of land at the time of suit was in excess of that originally let out. The learned Judge in remanding the case to the lower Court gave this direction among others: that it was to be considered whether the rent was assessed on an area fixed by estimate or determined by measurement.

The learned Judges of the Patna High Court considered that the mention of an area fixed by estimate, in the judgment of Mookerjee, Ag. C. J., made the statement of the learned Sir George Rankin, C. J., as to the settled rule of this Court, inaccurate. It is somewhat difficult to appreciate the observation of the learned Judges of the Patna High Court in this behalf in view of the fact that Mookerjee, Ag. C. J., had not departed from the view already expressed by him in *Raj Kumar's* case (5), noticed above, and also because the expression "an area fixed by estimate" does not militate against the view taken by this Court in *Manindra Chandra Nandi's* case (2). The area fixed by estimate must be such as has been accepted by the tenant, which might very well take place of an area on the basis of or determined by measurement, and approved by the tenant, as mentioned in all the decisions of this Court bearing upon the question. It may be noticed in this connexion that Mullick, Ag. C. J., who delivered the judgment of the Patna

High Court in *Sib Sahai Lal's* case (3), has specifically mentioned that

"in determining the area demised, the parties may either resort to measurement or they may agree to accept an assumed figure"

so that there was no difference made by that Court between an area ascertained by measurement and an estimated area accepted by parties concerned. It is difficult therefore to appreciate how the comment of Mullick, Ag. C. J., in *Shib Sahai Lal's* case (3), as to the settled rule of this Court, obviously indicating that Mookerjee, Ag. C. J., laid down a different rule in *Durga Priya's* case (4), was justifiable.

In the cases before us, no evidence was given by the plaintiff to show that there was any excess land; no attempt was made to prove that the defendants had got possession of any additional lands. If there was no actual measurement in the year 1891 or thereabouts, when the last assessment or adjustment of rent was made; if the areas mentioned in the plaintiff's papers were not based on measurement; and if the tenants never agreed that they would be liable to pay additional rent for the same land as the result of any future measurement as has been found by the Court of appeal below, and to which findings reference has been made above, the plaintiff could not succeed in his claim for additional rent for excess lands as made in the suits. On the question of enhancement of rent as claimed by the plaintiff in the suit, it has been urged before us, that the learned District Judge having found that upon a comparison of prices of two decennial periods, the plaintiff was entitled to an enhancement of about 8 annas in the rupee, he was in error in reducing the enhancement to 4 annas in the rupee. It was contended that the discretion exercised by the trial Court in the matter of enhancement should not have been interfered with by the Court of appeal below. In view of the provisions contained in S. 35, Ben. Ten. Act, the facts and circumstances in each case have to be taken into consideration in determining the limit of enhancement so that it may not be unfair or inequitable to the parties concerned. The learned Judge in the lower appellate Court, after taking all the facts and circumstances into consideration, has come to the conclusion that although on a

3. A I R 1926 Pat 197=90 I O 862=5 Pat 157.

4. A I R 1921 Cal 845=62 I O 463.

5. (1907) 5 C L J 538.

comparison of prices of staple food crops the increase in rent might be taken to be at the rate of about 8 annas in the rupee, a rate of 4 annas would be fair to the landlord and the tenants. The discretion so exercised in the matter of enhancement of rent should not be interfered with in second appeal; and it would not be right to say that discretion in the matter of enhancement of rent, on the ground of its being fair and equitable could be exercised by the trial Court only, and that it was not open to the final Court of facts to use its own discretion, based upon facts and circumstances of the case before it.

In the result the appeals are dismissed with costs. We allow one hearing-fee in the appeals in which Mr. Najim Ali has appeared for the respondents: the hearing fee is assessed at three gold mohurs. The costs for the appearance of the Deputy Registrar as guardian of the minor respondents in some of these appeals have already been paid by the appellant.

M. C. Ghose, J.—I agree.

M.N. *Appeal dismissed.*

A. I. R. 1933 Calcutta 178

COSTELLO, J.

Bajnath Shaw — Defendant — Petitioner.

v.

Corporation of Calcutta — Plaintiff—Opposite Party.

Civil Rule No. 497 of 1932, Decided on 18th July 1932, against order of Small Cause Court Judge, Sealdah, D/- 4th February 1932.

(a) Evidence Act (1872), S. 77—Proof of entry in public document should be either by producing the document or certified copy—Proof of ownership of car is by producing register.

The right way of proving an entry in a public document would be either that the document itself should be produced by a proper official or a duly authenticated copy of the material part of the document placed before the Court. It is irregular for the Court to accept in proof of the ownership of a car a mere statement made in answer to a letter written by the plaintiff, without the person who made the statement being called or a certified copy of the Official Register of Motor Vehicles produced. [P 179 C 2]

(b) Evidence Act (1872), S. 77—Register of Motor Vehicles showing name and address of owner if conclusive against person having same name and address (*Quære*)—Motor Vehicles Act (8 of 1914)—Rules under.

It is more than a little doubtful as to whether it can rightly be said that the mere fact

that the Register of Motor Vehicles shows that a person of a particular name is the owner of a particular car and lives at a certain address as given in the register necessarily for all purposes decides that any person of the same name who happened to be found in that address must be the owner of the particular car. [P 180 C 1]

(c) Tort—Negligence—Running down cases—Burden on plaintiff—Vehicle under management of defendant or his servant—Accident not ordinarily possible—Burden is shifted.

In running down cases the plaintiff is not entitled to succeed unless he gives affirmative proof of negligence on the part of the defendant or his servant. Persons who base a claim on negligence must prove negligence.

Where a vehicle is shown to be under the management of the defendant or his servant and an accident occurs such as in the ordinary course of things does not happen if he who has the management uses proper care, the onus rests on the defendant to disprove that the accident arose from want of care: *Isac Walton & Co. v. Vanguard Motor Bus Co.*, (1908) 25 T. L. R. 13 and *Barnes Urban District Council v. London General Omnibus Co.*, (1910) 100 L. T. 115, *Idem*.

[P 180 C 2]

Woopendra Nath Niyogi -- for Petitioner.

Krishna Lal Banerji -- for Opposite Party.

Judgment. — This rule is directed against a judgment passed by the Judge of the Court of Small Causes, Sealdah, in a suit brought by the Corporation of Calcutta against one Bajinath Shaw for the recovery of the sum of Rs. 69-1-6 for damage caused to a lamp post belonging to the plaintiff Corporation by a motor car alleged to be the property of the defendant. The suit in short was an action for damages for negligence. The defendant denied that he was the owner of the motor car in question. The registered number of the car was 10670 and the registered owner was Bajinath Shaw of No. 225-1, Cornwallis Street, Calcutta. It seems that the accident occurred at night. The witnesses of the occurrence were able to take the number of the car which struck the lamp-post but they apparently had no opportunity of ascertaining the name of the person driving the car at the time or of making any inquiries on the spot as to the ownership of the car. By way of defence to the plaintiff's claim the defendant, as I have stated, denied that he was the owner of the Motor Car No. 10670 or indeed of any other motor car. It is obvious that the defendant was in no wise responsible for the accident or liable for the damage caused.

The main issue and indeed the only issue which seems to have been dealt with by the learned Judge at the trial was the plain and simple question of whether the defendant was the owner of the motor car concerned in the occurrence. It appears that there was considerable delay between the date of the accident and the institution of the suit. The occurrence took place on 3rd April 1930 and the plaintiff's suit was not filed until 27th March 1931. I am informed that in the meantime the Corporation having ascertained from their own records, that the defendant appeared to be the owner of the car entered into correspondence with him as to the question of his liability. It appears that from the very outset this Baijnath Shaw denied that he was the owner of the Car No. 10670. On 13th October 1931, when presumably the plaintiff Corporation of Calcutta, were making ready for the trial of the suit a letter was sent from the Corporation to the Deputy Commissioner of Police, Motor Vehicles Department, in these terms :

" Re-damage to lamp post No. 10, Moyerpur, Road.

Dear Sir,

The above lamp-post was damaged by a passing Motor Car No. 10670 on 3rd April 1930. I beg to request you to let me know in whose name the above car was registered on the date of the occurrence.

An early reply will be very much appreciated."

An answer to that letter was written upon the letter itself by the Deputy Commissioner of Police, Motor Vehicles Department, in the terms :

" The Memo No. 12034, dated 29th October 1931. Returned in original with the intimation that the Motor Car No. 10670 is owned by Baijnath Shaw of 225-1, Cornwallis Street, since 17th August 1928."

This memo was signed by E. A. Hartley for Deputy Commissioner of Police, Motor Vehicles Department. The suit came on for trial on 4th February 1932, and the plaintiff in support of their case called certain witnesses who testified that they had seen the Motor Car No. 10670 strike a lamp-post on the Moyerpur Road. No evidence of negligence on the part of the person driving the car was given beyond the mere fact that the car struck the lamp-post. In order to affect the defendant with responsibility for what happened, the plaintiffs put in evidence the letter of 13th October with the reply of 29th October

1931, endorsed upon it in the way I have described and they called a subordinate clerk from the Motor Vehicles Department to testify that the signature "E. A. Hartley" as appeared on the document was that of the officer acting for the Deputy Commissioner of Police. Beyond that no evidence whatever was given to connect the defendant Baijnath Shaw with the motor car which damaged the lamp-post on 3rd April 1930. It appears however that the summons in the suit was served on the Baijnath Shaw who appeared in the suit and he in fact made no protest against acceptance of the summons. But he, in his written statement denied that he was the owner of the car and at the trial he himself gave evidence to the same effect, and apparently he put forward the suggestion that a mistake had occurred because he himself resides at No. 225, Cornwallis Street, whereas the address of the Baijnath Shaw who is said to be the owner of the car, appears in the Register as 225-1 Cornwallis Street. The learned Judge came to the conclusion that the plaintiffs had sufficiently established that the defendant was in fact the owner of the motor car. He said :

" Defendant denied that he was the owner of the motor car. But it appears from the report of the Deputy Commissioner of Police that this Car No. 10670 is owned by Baijnath Shaw of 225-1 Cornwallis Street and it appears that he is the defendant in this suit. In the plaint his address was given as above and summons was served on him in that address and he appeared and raised no objection that he did not reside there. Hence his identity has been well established."

The learned Judge proceeded to say :
" I find that the defendant is the owner and is liable."

This rule was issued on the ground that the memorandum on the letter of 13th October 1931, was not properly admissible in evidence in proof of the ownership of the motor car. I am bound to say that there is some substance in that contention. The right way of proving an entry in the Register of Motor Vehicles would be either that the register itself should be produced by a proper official or a duly authenticated copy of the material part of the register placed before the Court. It is obviously somewhat irregular for the Court to have accepted in proof of the ownership of the car a mere statement made in answer to a letter written by the plaintiff corporation without the person who made the

statement being called or a certified copy of the official register produced. In any event it seems more than a little doubtful as to whether it can rightly be said that the mere fact that the register shows that a person of a particular name lives at a certain address as given in the register necessarily, for all purposes, decides that any person of the same name who happened to be found in that address, must be the owner of the particular car in question, especially having regard to the fact that it is quite possible that there might be another person of the same name living in the same house, particularly having regard to the frequent occurrence of similar names in this country and to the fact that in a large city like Calcutta often a number of families live in a cluster of dwellings which are described under one denomination. However, as regards that point, the learned Judge seems to have thought that because the defendant lived or appeared to live at 225-1, Cornwallis Street, it had been satisfactorily established that he was the owner of this particular car. The learned Judge came to a finding of fact upon that and in the ordinary way a finding of fact ought not to be disturbed.

I cannot however help expressing considerable doubt as to whether it was properly established that the Baijnath Shaw who appeared as defendant in the suit was in fact the Baijnath Shaw in whose name the car was registered. The defendant gave a categorical denial that he was the owner of this car. For the sole purpose of ascertaining whether there was any good reason for supposing, as was suggested on behalf of the Corporation, that the defendant had wilfully committed perjury, when he made that statement before the trial Court. I thought it right to have the defendant before me and in this Court he has reiterated his denial of ownership. The defendant impressed me as telling the truth. He stated definitely that he had never possessed this or any other motor car at all. But apart from that aspect of the matter, the learned Judge clearly misdirected himself by acting upon the assumption that because he had found the defendant to be the owner of the motor car, that of itself was sufficient to fix him with liability for the accident which happened some 18 months before. Generally speaking in running down cases

or as they are now sometimes called collision on land cases the plaintiff is not entitled to succeed unless he gives affirmative proof of negligence on the part of the defendant or his servant. Persons who base a claim on negligence must prove negligence and in the present case, as I have already indicated, the plaintiff gave no evidence whatever of negligence on the part of the defendant or his servant.

It is true that this is one of the class of cases where the ordinary rule does not apply in its entirety. The law provides that when a vehicle is shown to be under management of the defendant or his servant and an accident occurs such as in the ordinary course of things does not happen, if he who has management uses proper care, the onus exceptionally rests on the defendant to disprove that the accident arose from want of care. The authority for that proposition is the case of *Isaac Walton & Co. v. Vanguard Motor Bus Co.* (1): see also the case of *Barnes Urban District Council v. London General Omnibus Co.* (2). In the first-mentioned case a standard lamp erected on the footpath in front of the plaintiffs' premises was damaged by a motor-omnibus of the defendants colliding with it. The motor omnibus had in fact skidded into the lamp-post, and the Lord Chief Justice (Lord Alverstone) in his judgment at p. 14 said that there was evidence upon which the jury might come to the conclusion that there was negligence on the part of the driver of the vehicle. It may be taken therefore where there is a lamp-post on the pavement and a vehicle collides with it, that of itself is prima facie evidence of negligence on the part of the driver of the vehicle. It is in fact a case where the principle of *res ipsa loquitur* applies and when there is prima facie negligence on the part of the driver of the vehicle in that way the onus then shifts on the defendant to show either he was not the driver, or if the driver is the defendant's servant then that there was in fact no negligence on the part of the driver. Before however a case is taken out of the ordinary rule that the plaintiff must prove negligence in order to succeed it must first of all be positively demonstrated.

1. (1908) 25 T L R 13=72 J P 506.

2. (1910) 100 L T 115=73 J P 63=7 L G R 359.

toed that the vehicle causing the damage was at the time of the accident, as a matter of fact, under the management of the defendant or his servant.

In the present case the plaintiffs made no attempt to show and indeed were not in a position to show who in fact was the driver of the vehicle and whether it was the defendant himself or a person for whose acts he would be responsible. There was in point of fact nothing whatever before the Court to indicate that even if the defendant was really the owner of the motor car No. 10670 at the time of the occurrence on 3rd April 1930, such motor car was under the management of the defendant or his servant at the material time. I am therefore of opinion that even upon the assumption that the car did belong to the defendant, the plaintiffs had not succeeded in establishing their case according to law. I think that on the whole it is extremely dubious whether the defendant Buijuath Shaw had any connexion whatever with the motor car No. 10670 and it is certain that even if he were the owner, the plaintiffs did not establish negligence against him either by affirmative evidence on their part or by shifting the onus of proof on the defendant and his failing to discharge that onus. This rule is accordingly made absolute and the order of the Small Cause Court Judge, Sealdah, is set aside and the plaintiffs' suit dismissed with costs, one gold mohur.

M.N.

Rule made absolute.

I. R. 1933 Calcutta 181

S. K. GHOSE, J.

Ram Kinkar Hazra—Appellant.

v.

Hareram Hazra—Respondent.

Appeal No. 2394 of 1929, Decided on 25th June 1931, against appellate decree of Sub-Judge, Zillah Asansol, D/- 8th May 1929.

(a) Mortgage—Rights of mortgagee—Mortgaged property purchased by two persons—Right to possess property is with prior purchaser whether he is prior or subsequent mortgagee.

As between two purchasers of mortgaged property, quite apart from the right to redeem, the right to possess the property is with the prior purchaser and it does not make any difference whether the purchaser was the first or the subsequent mortgagee: 5 Cal 265 and 31 Cal 737, *Rel. on.*

[F 182 C 1]

(b) Mortgage—Rights of mortgagee—Puisne mortgagee is entitled to sale of property even though sold in execution of decree obtained by first mortgagee in suit to which he was not party—Transfer of Property Act (1882), S. 75.

A puisne mortgagee is entitled to a sale of the property, subject to the rights of the first mortgagee even after the property has been sold in execution of the decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party: 30 Cal 599, *Full.*

[F 182 C 1]

(c) Transfer of Property Act (1882), S. 92—Mortgaged property purchased by two purchasers—Title to equity of redemption is to be determined by priority of sale—He who purchased first is entitled to redeem all subsisting mortgages.

As between two purchasers of mortgaged property the title to the outstanding equity of redemption is determined by the priority not of the respective mortgages but of the respective sales and the person who first buys the equity of redemption whether he be the mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire an absolute title: *A I R 1922 All 135* and *A I R 1925 All 804, Full.*; *A I R 1932 Cal 126, Ref.*

[F 182 C 1]

Brojolah Sastri and Jotish Chandra Sarkar—for Appellants.

Sarat Chandra Ray Chaudhury, Bon Behary Mukherjee and Gopendra Krishna Banerjee—for Respondents.

Judgment.—This appeal deals with a question of competition between two mortgages. Plaintiffs rely upon the first mortgage which was executed on 9th May 1908. There was a decree and in execution of that decree they purchased on 11th November 1916 and obtained possession through Court on 3rd June 1917. Defendants took the second mortgage in January or February 1911, obtained a decree thereon, and in execution of it purchased the property on 13th June 1922, and took possession on 18th July 1923. In neither of the two mortgage suits was the other mortgagee made a party. Plaintiffs allege that they were wrongfully dispossessed by the defendants on 18th July 1923 and so they sue to recover possession. The defence is that the plaintiffs' decree is a nullity as against the defendants who were no parties to it. Then arose the question as to which of the parties was entitled to possession and further, which was entitled to the first right to redeem. This latter question also was definitely raised. The trial Court found in favour of the plaintiffs and declared that they were entitled to get khas possession by redeeming within a certain date. On

appeal the learned Judge of the Court below took the same view. Hence this second appeal by the defendants. Before the learned Judge the decision turned upon the question whether the plaintiff had the preferential right to redeem the subsequent mortgage in favour of the defendants. In discussing the point the learned Judge quotes relevant authorities and gives a summary of the law on the subject. The learned advocate in support of the second appeal has sought to distinguish the cases which are referred to in the judgment by saying that these cases did not decide that the right of the subsequent mortgagee who was not a party to the prior mortgage-decree was lost.

In the case of *Nanack Chand v. Taluckdye Koor* (1) the second mortgagee purchased first. In the case of *Ram Narayan v. Bandi Pershad* (2) the first mortgagee purchased first. What these cases decide was that, quite apart from the question of the right to redeem the right to possess the property was with the prior purchaser and it did not make any difference whether he was the first for the subsequent mortgagee. It was also decided by the Full Bench in the case of *Debendra Narayan v. Ramtaran Banerjee* (3), that a puisne mortgagee is entitled to a sale of the property, subject to the rights of the first mortgagee, even after the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party. In the present case the plaintiffs were the first purchasers and therefore it has been correctly held that they are entitled to possess. But the parties have gone further and raised the question as to which of them has the preferential right to redeem. This depends on who had acquired the equity of redemption from the mortgagor. There is no doubt that as between the two purchasers the title to the outstanding equity of redemption is determined by priority, not of respective mortgages but of respective sales, and the person who first buys the equity of redemption, whether he be the mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire

an absolute title: see Ghose on Mortgage, Edn. 4, p. 623. This is supported by the decision in the case of *Parar Ram Singh v. Pandohi* (4) which was followed in the case of *Ram Baran v. Bhagwati Pande* (5). With regard to the position of a second mortgagee the latest Calcutta decision that I know of is in the case *Kalipada Mukherji v. Basanta Kumar* (6): see the remarks of Mukherji, J., at p. 882 (of 35 C W N). Since the question was raised, and in view of the equities of the case, I consider that the judgment of the lower appellate Court is right, that the plaintiffs have the preferential right to redeem. The second appeal therefore fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

4. A I R 1922 All 135=67 I C 533=44 All 462.

5. A I R 1925 All 801=89 I C 295=47 All 751.

6. A I R 1932 Cal 126=138 I C 177=59 Cal 117.

A. I. R. 1933 Calcutta 182

JACK, J.

Abdul Bari Mia and others—Defendants—Appellants.

Ram Chandra Majumdar and others—Respondents.

Appeals Nos. 3038 and 3039 of 1929, Decided on 2nd December 1931, against appellate decrees of Sub-Judge, 1st Court, Zillah Backerganj, D/- 31st May 1929.

Landlord and Tenant—Rent—Suit for—Claim of abatement cannot be decided in absence of all tenants as parties.

Where two or more persons have a joint right to any land they cannot assert it except jointly.

In a suit for recovery of arrears of rent by some of the landlords against some tenants co-sharers only, a plea of abatement of rent cannot be put forward by tenants who are on record. The claim of abatement cannot be decided in absence of all tenants as parties: A I R 1928 Cal 548, *Expl. and Rel on*; 27 Cal 417 and A I R 1923 Pat 397, *Ref.*; 28 I C 510, *Dist.*

[P 183 C 1]

Sachindra Kumar Roy and Suresh Chandra Talukdar—for Appellants.

Probodh Chandra Kar—for Respondents.

Judgment.—These two appeals have arisen out of two suits for recovery of arrears of rent in respect of the plaintiffs' ten annas share in two howlas for the years 1330 to 1333 B.S. The suits have been decreed for the amount claimed. In these appeals it is urged that as there has been diluvion of portions of the holdings, the defendants are

1. (1830) 5 Cal 265=4 C L R 358.

2. (1904) 31 Cal 737.

3. (1903) 30 Cal 599=7 C W N 766.

entitled to abatement of rent. It is urged that the case of *Rishee Case Law v. Golam Ali* (1) which was followed by the learned Subordinate Judge was not binding upon the appellants, inasmuch as it can be distinguished from the present suit. The point that arises in these appeals is whether inasmuch as it has been found that all the tenants were not impleaded, a plea of abatement can be put forward by the tenants who are on the record. The case referred to was one under the Bengal Tenancy Act, whereas the present cases being cases brought by some of the landlords, against tenants co-sharers only, they are not under the Bengal Tenancy Act, and therefore S. 52 of the Act has no application. But it was held in that case that even if the general law applies, the co-sharer tenants are not entitled to any abatement, as the principles laid down in the case of *Bhupendra Narain Dutt v. Ramon Krishna Dutt* (2) are still applicable. The case of *Kesho Prasad Singh v. Ram Deni Singh* (3) was also referred to. The principle on which these decisions are based is that where two or more persons have a joint right to land, they cannot assert it except jointly. Both these cases referred to S. 188, Ben. Ten. Act, and it was argued here that S. 188 was enacted in order to protect the tenants and the considerations of that kind do not apply to a case like the present where tenants are seeking remission on account of abatement.

But there can be no doubt that the principle is still applicable. It is certainly advisable that where a joint right is claimed by joint tenants, they should all be made parties to the suit, otherwise there is likely to be an additional litigation and confusion in respect of the rights of the tenants, so that although the decisions in the cases which have been relied upon are not binding inasmuch as they were cases under the Bengal Tenancy Act, I think the Court below is right in deciding that the claim of abatement cannot be established in the absence of all the tenants as parties. The new S. 38 (C), Ben. Ten. Act, has been referred to. But that relates to

rai-yati holdings and moreover it refers to a suit which has been properly framed which may very well mean that all the co-tenants should be made parties. In the case of *Khettermani Dasi v. Jiban Krishna Kundoo* (4) that has been referred to in support of this appeal it was held that S. 188, Ben. Ten. Act, cannot be applied by analogy to a co-sharer tenant who brings a suit authorized by the Act. But this decision appears to have been arrived at without reference to the principle referred to above and has not been followed in a later decision in *Rishee Case Law's* case (1) already referred to. These appeals are dismissed. I make no order as to costs.

R.M./R.K. Appeal dismissed.

1. (1915) 28 I C 510.

A. I. R. 1933 Calcutta 183

MITTER AND BARTLEY, J.J.

Akhoy Kumar Sur—Appellant.

v.

Corporation of Calcutta—Respondent.

Appeals Nos. 357, 358 and 359 of 1930, Decided on 14th April 1932, against original orders of Small Cause Court Judge, Sealdah, D/- 2nd April 1930.

Calcutta Municipal Act (1923), S. 159 (2)
—Consolidated rate to be paid by owner of bustee land.

The owner of bustee lands was assessed under the Act. He contended that he was not the owner of bustee but the real owners of bustee were certain tenants to whom he sublet the premises in question, and they paid small rents to him and he had to pay more to Corporation by way of assessment than he got from his tenants as rents.

Held: that there was no case of hardship or prejudice in view of the provisions of S. 159 (2). The Act does not really recognize the existence of a middle man between the owner of the lands in which the bustee is situated and the owners of huts in the bustee. [P 184 C 1]

Khitish Chandra Chuckerbutty, Panchanon Ghosal and Benoy Krishna Ghosh—for Appellant.

Krishna Lal Bannerjee—for Respondent.

Judgment.—These three appeals have been preferred by one Akhoy Kumar Sur, who is said to be the owner of three bustee lands situate in Nos. 11, 12 and 43 Old Ballygunge 1st Lane, against the order of the Small Cause Court Judge of Sealdah, by which he dismissed the appellant's objection regarding the assessment of the bustee lands. The appeals are preferred to this Court under the

1. A I R 1928 Cal 548=111 I C 111=55 Cal 676.

2. (1900) 27 Cal 417=4 C W N 107.

3. A I R 1923 Pat 397=74 I C 454=2 Pat 183.

provisions of S. 142, Cl. (3), Calcutta Municipal Act (3 of 1923). The contention which has been put forward in appeal before us is that the appellant is not the owner of the bustee, but that the real owners of the bustee are certain tenants to whom he has sublet the premises in question. As they pay very small rents to him the result of the assessment in these cases has been that he (the appellant) has to pay more to the Corporation by way of assessment than he gets from his tenants. It seems however that in no stage of the proceedings before this the appellant in these three appeals ever discriminated between the position of the owner of a bustee and the owner of the land in which the bustee is situate. On the other hand he admitted in his deposition on commission that he was the malik of the bustee lands of Nos. 11, 12 and 43, Old Ballygunge 1st Lane. He nowhere said that some other person is the owner of the bustee as distinguished from the owner of the bustee lands. There is really no case of hardship or prejudice if we look to the provisions of S. 159, Cl. (2), Calcutta Municipal Act, which distinctly provided that "whenever the consolidated rate is leviable upon a bustee the owner of the land contained within such bustee may recover from the owner of each hut standing thereon one half of the consolidated rate payable in respect of the land on which the hut stands, and (ii) the entire consolidated rate payable in respect of the hut."

The Calcutta Municipal Act does not really recognize the existence of a middle man between the owner of the lands in which the bustee is situate and the owners of huts in the bustee. In these circumstances it seems to us that there is no real substance in the objection which has been taken in these three appeals. The result accordingly is that the appeals fail and must be dismissed. Having regard however to all the circumstances there will be no order as to costs..

B.R./R.K.

*Appeals dismissed.***A. I. R. 1933 Calcutta 184**

MALLIK AND REMFRY, JJ.

Golam Rahman Khan and others—
Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 23 of 1932,
Decided on 6th April 1932.

Criminal P. C. (1898), S. 208—Petition for production of police diaries—Magistrate must take steps for their production unless he deems unnecessary to do so.

Where there is an application for the production of police diaries under S. 208, the Magistrate is bound under that section to take steps for their production unless he deems it unnecessary to do so. [P 184 C 2]

Hiralal Ganguli—for Petitioners.

Khondkar and Monindra Nath Mukerji—for the Crown.

Mallik, J.—This Rule arises out of an application for the transfer of a case or in the alternative for an order on the Magistrate directing production of two police diaries. It appears that the petitioners who were prosecuted under Ss. 307, 326 and 120-B, I. P. C., applied to the Magistrate under S. 208, Criminal P. C., for calling for two police diaries. This was on 18th December 1931 and the learned Magistrate on the petitioner's application passed an order: "Call for the record." When on 7th January 1932, the next day for the hearing of the case the diaries were found not to have arrived, the petitioners again put in a petition before the Magistrate by which they renewed their prayer adding that the two Sub-Inspectors (one of whom was mentioned by name in the petition) who had been in charge of the thanas might be summoned as witnesses to produce the diaries. The learned Magistrate rejected this prayer on the ground that the petitioners had not prayed before for issue of summons on the Sub-Inspector who was named in that petition.

The order of the learned Magistrate whereby he refused the petitioner's prayer for having the two diaries called for and produced in Court cannot in our opinion be supported. The petition was evidently made under S. 208, Criminal P. C. and the learned Magistrate was under that section bound to take steps for the production of the documents wanted by the accused unless he deemed it unnecessary to do so. Here as it would appear from what I have said above the learned Magistrate never considered that it was unnecessary to call for those records. As a matter of fact he on 18th December actually passed an order calling for the records in question. The learned Magistrate in his explanation says that the petitioners in their petition had not given sufficient information to trace the two diaries in question. But it nowhere ap-

appears in the record that it was on that ground that the learned Magistrate rejected the prayer of the petitioners. The informations that are to be found in the petition filed by the petitioners before the Magistrate are sufficient for the tracing of the two documents if a little care be taken to trace them. The result is that the Rule is made absolute and the learned Magistrate is directed to have produced before him the two documents if they are in existence, as alleged by the petitioners.

Remfry, J.—I agree.

S.N./R.K. *Rule made absolute.*

A. I. R. 1933 Calcutta 185

PEARSON AND M. C. GHOSE, JJ.

Narayan Chandra Ganguli—Accused
—Petitioner.

v.

Harish Chandra Saha—Complainant
—Opposite Party.

Criminal Revn. No. 956 of 1931, Decided on 8th January 1932.

Penal Code (1860), S. 499 Pleader asking question under instructions in cross-examination cannot be convicted under S. 500 especially when no malice is admitted to have existed.

The presumption in the case of pleaders asking questions in cross-examination is that such questions are put in good faith for the protection of his client's interests within the exception to S. 499. Where therefore a pleader asks a question in cross-examination in his client's interest under instructions, he cannot be convicted under S. 500 especially when the complainant admits that the pleader has no malice or grudge against him. [P 185 C 2]

S. K. Sen and *Apurba Charan Mukherjee*—for Petitioner.

Dinesh Chandra Roy—for Opposite Party.

Pearson, J.—The petitioner is a pleader who was charged with defamation under S. 500, I. P. C. The Magistrate found that no case had been made out and dismissed the case under S. 203, Criminal P. C. The Sessions Judge however has set aside that order and has directed a further inquiry. This Rule was obtained on the ground that there being admittedly no malice or grudge or want of good faith, etc., the order for further inquiry was wholly illegal. The petitioner was a pleader for the defendant in a certain Title Suit No. 59 of 1930 in the Subordinate Judge's Court at Howrah and it appears that during the cross-examination of one of the witnesses

named Kshiroda Moyee Dasi, the present accused, asked the following question: "Is there any rumour of scandal in the name of Hari's wife." It is conceded for the purposes of the present case that that was an imputation of unchastity against the woman in question. It appears further that that particular question was asked in the course of a commission the actual date of which is in some doubt, but it was either 7th December 1930 or more probably 21st December 1930.

It appears that on 22nd December the petitioner was called upon in a letter from the pleader on the other side to disclose the source of his instructions regarding the asking of that question. His reply was a refusal to do so because the instructions were in the nature of privileged communications. In answer to that the pleader on the other side wrote a letter saying that in consequence of this refusal there remained no other alternative for him except to take such legal steps as his client might be advised. Nothing however was done and no complaint was made at that time at all. Subsequently on 7th April 1931 there was a further commission during which the evidence was taken of defendant 1 in course of her cross-examination it was elicited that the instructions for this particular question in the previous December had been given by herself or by her tadbirkar. Even then nothing was done by way of complaint until 21st May 1931 when the present complaint was made before the Magistrate, directed not against the client but against the pleader. It has been conceded by Mr. Roy that if as a matter of fact the pleader was acting under instructions in putting the question he would be protected from a charge under S. 500. It is quite clear from all the cases both in this and other Courts that the presumption in the case of pleaders asking questions in cross-examination is that such questions are put in good faith for the protection of his client's interests within the exception to S. 499; and further than that there is a definite finding of the Magistrate in so far as he says that he supports the report of the President of the Bar Association, that the complainant admitted that the accused had no malice or grudge against him or his family. The presumption is not rebutted or impugned by the letters that had passed at the end of December.

The letters do not say that he did not put the question under instructions but merely say that he was not prepared to divulge the source of his instructions; and what happened in the following April after the cross-examination of defendant 1 only lends further strength to the fact that that question was asked on instructions. It is difficult, in these circumstances, to understand why the pleader should be brought to Court at all on this charge once the source of the instructions had been divulged, and yet it was not before five weeks had passed or later that the complaint was made. It appears to me that there is no real foundation for the order of the learned Judge and that the fact is that there was no malice or grudge or want of good faith shown in this case at all. The presumption that the question was put upon proper instructions far from being rebutted has been corroborated. If there was any want of good faith arising in this case it is rather to be attributed to the other side implicating the pleader in such circumstances as these. The client was the source of his instructions as regards the objectionable question. It need only further be said that it does in my opinion appear that the question is one which was not irrelevant to the issues in the case and cannot be held to be objectionable on that ground. The question was one of adoption and the answer to the question, if in the affirmative, would have gone to support the probabilities of the case which was being made by defendant 1. In my opinion this Rule must be made absolute. The order of the Sessions Judge is set aside and that of the Magistrate restored. The accused will be discharged from his bail bonds.

M. C. Ghose, J.—I agree.

K.N./R.K. *Rule made absolute.*

A. I. R. 1933 Calcutta 186

JACK AND M. C. GHOSE, JJ.

Probodh Chandra Chakravarty—Defendant—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 206 of 1932, Decided on 15th July 1932.

Ordinance (2 of 1932), Ss. 28 and 47—Conviction under, is not illegal for want of finding whether act is done in furtherance of movement prejudicial to public safety.

Section 28 does not require any finding that the conviction was for an act prejudicial to the

public safety or peace; but it does require that the offence is one which in the opinion of the Court has been committed in furtherance of a movement prejudicial to the public safety or peace. A Magistrate can convict an accused person of an offence committed under the ordinance without actually recording a finding whether the act was committed in furtherance of a movement prejudicial to public safety or peace, and such conviction is not illegal for want of such a finding in view of S. 47. [P 186 C 2; P 187 C1]

Dinesh Chandra Roy—for Petitioner.

Khundkar and *Anil Kumar Roy*—for the Crown.

Judgment.—This Rule has been issued upon the District Magistrate of Rajshahi to show cause why an order directing the petitioner to pay a fine of Rs. 50 under S. 28, Ordinance 2 of 1932, should not be set aside on the ground that there being no finding that the conviction of Paresh under S. 4, Ordinance 5 of 1932, was for an act prejudicial to the public safety or peace, S. 28, Ordinance 2 of 1932, has no application and that the learned Magistrate erred in law in holding otherwise. In the first place it may be pointed out that the section itself does not require any finding that the conviction was for an act prejudicial to the public safety or peace; but it does require that the offence is one which in the opinion of the Court has been committed in furtherance of a movement prejudicial to the public safety or peace. The question is whether on the ground that there is no finding that the offence was in the opinion of the Court committed in furtherance of a movement which is prejudicial to the public safety or peace, the Magistrate erred in law in imposing a fine upon the guardian of the accused.

A preliminary point was raised as to whether inasmuch as under S. 51, Ordinance 2 of 1930, there is a provision that no Court shall have authority to revise any order or sentence passed under this Ordinance this Court has any jurisdiction to interfere with that order or sentence. It has been argued that under S. 107, Government of India Act, read with S. 65 this provision of the Ordinance is ultra vires; but in view of the opinion we are inclined to take on the merits, it is not necessary to come to any decision on the point. On the merits we find that under S. 47 of the Ordinance no Court constituted under this Ordinance shall try any offence unless it is an offence punishable under this Ordinance

or has been committed in furtherance of a movement prejudicial to the public safety or peace. The very fact that the Court passed this order shows that the Court was of opinion that the act constituting the offence was committed in furtherance of a movement prejudicial to the public safety or peace as otherwise the Court would have had no jurisdiction.

Under Cl. (2), S. 47, we find that the question whether or not the offence tried by the Court constituted under the Ordinance was of the nature described in sub-S. (1), that is to say, was committed in furtherance of a movement prejudicial to the public safety or peace shall not be raised in any Court other than the Court trying the offence. The present case is a case of peaceful picketing and was tried by a Special Magistrate empowered under the Notification in the Calcutta Gazette dated 7th January 1932. This Notification empowers such Magistrates to try offences under the Prevention of Molestation and Boycotting Ordinance which are committed in furtherance of a movement prejudicial to the public safety or peace. This again shows that unless the act complained of was one committed in furtherance of a movement prejudicial to the public safety or peace, the trying Magistrate had no jurisdiction; and inasmuch as this point was not raised either in the Court in which the boy was convicted or in the Court in which the father was fined under S. 28 of the Ordinance, this is a point which we should not allow the petitioner to raise in this Court.

It is true that there was no express finding of the Magistrate that the act was committed in furtherance of a movement prejudicial to the public safety or peace; but the very fact that he tried the matter and imposed the fine on the petitioner shows that he must have been of the opinion that it was such an act otherwise he had no jurisdiction to try the case. The accused's plea of guilty in that Court to the offence charged, involves an admission that the act was committed in furtherance of a movement prejudicial to the public safety or peace. In the petition also some of the statements made seem to show that the act was such an act. We find in para. (6) of the petition that the petitioner tried his level best to keep his son Paresh out of the influence of the present political

movement and that the son was led away without his knowledge to picket at a ganja shop in spite of his advice to his children not to join the political movement. We were asked to take judicial notice of the fact that what is described in the petition as "the present political movement" was in fact a movement prejudicial to the public safety or peace and we think that we are entitled to do so. The result therefore is that the Rule is discharged.

K.N./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 187

PANCKRIDGE AND M. C. GHOSE, JJ.

Baldeo Bin—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 779 of 1931, Decided on 16th March 1932.

(a) *Evidence Act (1872), S. 24—Confession of accused caused by inducement, threat or promise—Judge has to decide admissibility of such confession—If he considers it admissible, he must point out to jury that admissibility of evidence does not mean that it is true and that it is for jury to accept or reject it—Criminal P. C., S. 297.*

It is for the Judge to decide for himself whether prima facie the confession of the accused appears to him to have been induced by threat or promise and for that reason to be inadmissible. If he comes to the conclusion that it is inadmissible, he must exclude it from the consideration of the jury. It is not the province of jury to decide the question of admissibility of evidence. On the other hand, if the Judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the evidence as admissible does not necessarily mean that it is true and it is for jury to make up their minds whether they should accept the confession, and in doing so they should naturally be guided to a large extent by their opinion on the question whether the confession was voluntary or not. [P 188 C 2]

(b) *Criminal P.C. (1898), S. 342—Statement of accused under S. 342—Judge omitting to put such statement specifically to jury, but fully explaining to them defence of accused and his reasons why jury should disregard his retracted confession—Judge's omission held not harmful—Criminal P. C., S. 297.*

The statement of accused under S. 342 amounted only to an assertion of innocence and an explanation of how he had made the retracted confession. The Judge omitted to put this statement to the jury, but the language used by the Judge was such that the jury must have throughout appreciated perfectly well what the accused's defence was and the reasons for which he maintained that the jury should disregard the confession made by him.

Held: that no harm was done by the Judge's omission to deal specifically with the statement of the accused. [P 188 C 2; P 199 C 1]

(c) Criminal Trial—Evidence—Irregularity in search does not affect admissibility of property found.

Irregular conducting of search would affect the weight to be attached by jury to the finding of property but would not make such property inadmissible in evidence. [P 189 C 1]

Dhirendra Nath Ghose—for Appellant.

Khundkar and Monindra Nath Mukherji—for the Crown.

Panckridge, J.—The appellant in this case has been convicted of the offence of dacoity and having had a previous conviction he has been sentenced to rigorous imprisonment for a period of seven years. He was tried together with a co-accused. The jury found the appellant guilty by a majority of 3 to 2 and unanimously found the other accused not guilty.

Various points have been taken on behalf of the appellant. It is first of all stated that the learned Judge was in error in failing to draw the attention of the jury to certain portions of the evidence which tended to show that the number of persons present at the occurrence was less than what the Penal Code requires to constitute an offence of dacoity. After perusing the evidence we have come to the conclusion that there is no justification for this argument. Nearly all the witnesses placed the number of the dacoits at some figure between 8 and 12. It is true that a female witness stated that she could not tell by guess how many were there. But even if she had spoken the truth it was hardly possible that there were less than five. We do not think that this point was improperly dealt with by the learned Judge.

Then it is said that the learned Judge failed to draw the attention of the jury to the weakness of the prosecution case as regards identification. The appellant was identified by two witnesses who professed to have recognized him at the dacoity. The Deputy Magistrate who superintended the test identification was called as a witness and he described the procedure which was followed at the identification parade. We consider that the learned Judge summarized the evidence as to the identification parade in a satisfactory manner and left to the jury to say whether they felt justified in giving any weight to this sort of evidence as to identification. Another part of the prosecution case consisted of a

confession made by the appellant to the Deputy Magistrate and subsequently retracted. It was the case of the appellant that this confession was untrue and was induced by threat and persuasion on the part of the police. The learned Judge in discussing the confession drew the attention of the jury to the provisions of S. 24, Evidence Act, and observed that the appellant's confession would be irrelevant:

"If you believe that it was caused by inducement, threat or promise by the police as stated by Baldeo Bin, it is for you to consider whether or not the confession was caused by such inducement, threat or promise."

Strictly speaking, the learned Judge did not state the law accurately on the point. It was for the learned Judge to decide for himself whether *prima facie* the confession appeared to him to have been induced by threat or promise and for that reason to be inadmissible. If he comes to the conclusion that it is inadmissible he must exclude it from the consideration of the jury. The learned Judge appears to have thought that it was the province of the jury to decide this question of admissibility of evidence. In that he was wrong. But even if he had stated the law accurately on this point it would have still been his duty to point out to the jury that the fact that he considered the evidence as admissible did not necessarily mean that it was true and it was for the jury to make up their mind whether they should accept the confession and in doing so they should naturally be guided to a large extent by their opinion on the question whether the confession was voluntary or the reverse. In the circumstances of the particular case there were no materials on which the learned Judge would have been justified in excluding the confession and so we do not think that even if he misdirected the jury with regard to the confession it has occasioned a failure of justice.

A complaint is made that the statement of the accused under S. 342, Criminal P. C., was not put to the jury. When we examine this statement under S. 342, we find that it only amounts to an assertion of innocence and an explanation of how the appellant had made the retracted confession. Having regard to the language used by the learned Judge the jury must have throughout appreciated perfectly well

what the appellant's defence was and the reasons for which he maintained that the jury should disregard the confession made by him. We do not think that any harm has been done by the omission of the learned Judge to deal specifically with the statement of the accused in the Sessions Court.

Finally, it is said that the search in which it is alleged that certain booty of the dacoity was discovered was irregularly conducted. The learned Judge called the attention of the jury to the suspicious circumstances connected with the search. But even if it was irregularly conducted that would merely go to the weight which the jury would attach to the finding of the property in question and would not make such property inadmissible in evidence. We think that the jury were adequately warned with regard to this. The learned Judge seems to have had misgivings as to the guilt of the appellant. But he did not think it justified to refer the case under S. 307, Criminal P. C. Although the charge of the learned Judge is not very satisfactory we do not think that there is such a serious error in it as would justify our disturbing the appellant's conviction. Having regard to the previous record of the appellant the sentence imposed upon him by the learned Judge is not too severe. The appeal is dismissed.

M. U. Ghose, J.—I agree.

B.R./R.K. *Appeal dismissed.*

* A. I. R. 1933 Calcutta 189

PANCKRIDGE AND PATTERSON, JJ.

Moosa Haji Abdul Shakoor — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1058 of 1932, Decided on 30th November 1932.

*** Evidence Act (1872), S. 135—Right of defence to cross-examine prosecution witnesses in the order it wishes—Discretion of Court—Criminal P. C. (1898), S. 256.**

Where the defence wants to cross-examine the prosecution witnesses in a particular order by being allowed to postpone the cross-examination of the complainant on the ground that the cross-examination of the complainant before some other witnesses will embarrass and prejudice the defence case, the mere fact that the complainant, a sickly man, is present in Court and may not come on some other day due to his bad health, is not sufficient to justify the

Court in refusing to accede to the request of the defence; but the Court should exercise the discretion in favour of the defence. [P 190 C 2]

A. K. Basu and Satindra Nath Mukherjee—for Petitioner.

Nirman Chandra Chakrabarty—for the Crown.

Panckridge, J. — In this case we granted a Rule upon the Chief Presidency Magistrate to show cause why an order of the Additional Presidency Magistrate refusing the prayer of the accused to be permitted through his counsel to cross-examine certain prosecution witnesses then present in Court before cross-examination of the complainant should not be set aside.

The petitioner is charged with an offence punishable under S. 406, I. P. C. The stage which had been reached when the incidents which are the subject-matter of this application occurred was that the prosecution witnesses had been examined in chief and charges had been framed. It appears that the learned Magistrate on 27th September directed the petitioner's pleader to give to the prosecution pleader the names of the prosecution witnesses who had already been examined in chief and whose attendance he required for cross-examination on 31st October. The petitioner's pleader gave the names of 11 out of 14 prosecution witnesses, but the complainant was one of the three witnesses whose name was given. On 31st October some of the witnesses whose names had been given by the defence pleader were present in Court as was also the complainant. The Magistrate on that occasion, for reasons which he has given, was not disposed to permit the witnesses to be cross-examined in the order in which the accused desired. On the contrary, he insisted on the cross-examination of the complainant being taken first. The learned counsel appearing for the petitioner was willing to cross-examine the complainant on that date, provided he was allowed to cross-examine the other witnesses then present before cross-examining the complainant. This proposed arrangement however was not allowed by the Magistrate. The learned counsel stated that he had good reasons for wishing to postpone the cross-examination of the complainant until the other witnesses had been cross-examined but that if he informed the

Court what those reasons were he would prejudice his client's case. Learned counsel appearing for the petitioner maintains that the defence has an absolute right to insist that the prosecution witnesses in a warrant case should be cross-examined in the order which the defence counsel desires. The learned advocate who appears for the Crown has directed our attention to S. 135, Evidence Act, which states:

"The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court."

He has further pointed out that S. 256, Criminal P. C., which deals with the procedure to be followed by the defence in a warrant case contains no provisions as to the order in which the prosecution witnesses are to be cross-examined and does not confer any such right upon the defence as is claimed by Mr. Basu. Mr. Basu states that he is able to say from his own experience and from information given him by counsel of extensive experience in the Presidency Magistrates' Courts that it is the practice of the Court always to permit the defence to cross-examine the prosecution witnesses in the order it wishes. We do not feel called upon to decide whether in fact there is a practice having the force of law by which the discretion of the Court which is *prima facie* conferred by S. 135, is controlled in the Presidency Magistrates' Courts or in the Courts of Magistrates generally. It is sufficient for the purpose of this case if we deal with the application on its merits.

We have read the explanations submitted to this Court by both the trying and the Chief Presidency Magistrates. It is to be noted that on 27th October it clearly did not appear to the learned trying Magistrate that there was anything in the circumstances of the case which rendered it undesirable for defence to cross-examine certain prosecution witnesses before the cross-examination of the complainant. We therefore are not disposed to attach much importance to the statement of the trying Magistrate in his explanation to the Chief Presidency Magistrate that the cross-examination of the complainant before the others was necessary for a clear and definite understanding of the defence case. What ap-

parently weighed with the learned Magistrate was the fact that on 19th August it was found necessary to adjourn the case until the 16th September owing to the fact that the complainant was suffering from angina pectoris. It appears that the Magistrate not unnaturally thought on 31st October that as the complainant was present it was desirable to take the opportunity of having him cross-examined at once thereby avoiding the risk of the proceedings being again held up owing to the complainant's state of health. In our opinion, this reason was not sufficient to justify the Magistrate in refusing to accede to the request of the defence counsel who asserted that the defence would be embarrassed unless the cross-examination of the other witnesses preceded that of the complainant. We have made inquiry of Mr. Basu who tells us that out of 11 witnesses there are eight whom he wishes to cross-examine before he cross-examines the complainant, and that after these eight witnesses have been cross-examined he will have no objection to cross-examining the complainant. He also assures us that the cross-examination of these eight witnesses will not take more than two and a half hours. On this assurance we think that if, as is not admitted by the petitioner, the Magistrate has a discretion in the matter, he should exercise it in the petitioner's favour.

We therefore set aside the order complained of, and direct that the defence be permitted to cross-examine the witnesses in the order that they desire subject to the undertaking by Mr. Basu that he will have no objection to cross-examine the complainant after 8 other prosecution witnesses have been cross-examined.

The Rule is made absolute.

K.S.

Order set aside.

A. I. R. 1933 Calcutta 190

PANCKRIDGE AND M. C. GHOSE, JJ.

Eusuf Ali—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 685 of 1931, Decided on 1st February 1932.

(a) Criminal Trial — Objection to admissibility of evidence cannot be taken in appeal.

Courts do not entertain objections on the ground of admissibility of evidence which are

taken for the first time in appeal. A person was prosecuted under S. 193, Penal Code. He did not challenge the fact that he did say in the civil Court that he had paid the money to the plaintiff and reiterated that statement in criminal Court. No objection was taken to the admissibility of his deposition on the ground that it was not one taken according to law as O. 18, R. 5, Civil P. C., had been disregarded, inasmuch as the statement had not been read out to the accused :

Held : that the objection could not prevail in appeal. [P 192 C 1]

(b) Evidence Act (1872), S. 80 — Depositions can be proved only under S. 80 and only when taken according to law.

Depositions are matters required by law to be reduced to the form of a document within the meaning of S. 91, Evidence Act, and the only way they can be proved is under the provisions of S. 80 of the same Act, and this is only when they are taken in accordance with law.

[P 191 C 2 ; P 192 C 1]

(c) Criminal P. C. (1898), S. 297 — Judge can express his opinion if he warns jury that it is not binding on them.

A Judge has a perfect right to express his opinion to the jury provided he makes it clear that his opinion on the facts is not binding on them. Where therefore a Judge in charging the jury expresses his opinion but warns them that they were not bound to accept his opinion if it did not sit in with their own valid objection can be taken to the charge and there is no misdirection in his doing so. [P 192 C 1]

Suresh Chandra Taluqdar and Mahendra Kumar Ghose—for Appellant.

Khundkar and Nirmal Chandra Chakrabarti—for the Crown.

Panckridge, J. — In this case the appellant has been convicted of offences punishable under Ss. 193 and 471, I. P. C. In respect of the offence under S. 193 he has been sentenced to rigorous imprisonment for a period of 18 months. No separate sentence has been passed under S. 471.

It appears that the appellant was a defendant in a money suit before the third Additional Subordinate Judge of Noakhali. His defence was an allegation that the money in respect of which the suit was brought had been paid. He filed a written statement to that effect and he also filed in Court a certain document purporting to be a receipt granted by the plaintiff for the sum which, he alleged, had been paid by him. In due course the suit came on for hearing and the appellant gave oral evidence in which he reiterated that the money had been paid to the plaintiff in the plaintiff's shop. The learned Subordinate Judge disbelieved the defendant's story and decreed the suit. Thereafter a complaint was made

under S. 476, Criminal P. C., and these proceedings were started. The accused was charged with user of a forged document, the user being the filing by him of the receipt in the circumstances we have mentioned and also with giving false evidence, the false evidence being a statement made orally by him in Court that he had paid the sum mentioned in the receipt to the plaintiff. In the Sessions Court the defence of the accused was that the document was a genuine document and that the evidence he gave as to the payment of the money was true. The jury unanimously found him guilty on both the charges. Various points have been raised before us.

It is first of all stated that there should have been an inquiry by the learned Subordinate Judge before the complaint was made and also that the complaint does not state that in the opinion of the learned Subordinate Judge it is expedient in the interest of justice that an inquiry should be held. I do not think that there is any substance in these contentions, and in any event we should be reluctant on grounds such as these to set aside the conviction seeing that the appellant had a remedy open to him under S. 476-B by way of an appeal of which he did not choose to avail himself. A more important point has been raised with regard to the admission of certain evidence. It is stated that the appellant's deposition is inadmissible. The learned advocate for the appellant has drawn our attention to O. 18, R. 5, Civil P. C., which provides that a witness' evidence shall be taken down in writing in narrative form and when completed shall be read over in the presence of the Judge and the witness. It appears from the record that the appellant gave his evidence in chief and in cross-examination on three days and that at the conclusion of each day it was read over to him. At a subsequent stage, on another day he was recalled and some questions were put to him. It does not appear whether on the fourth day the evidence he then gave was read over to him; undoubtedly that part of his evidence in respect of which he was prosecuted was read over but it does not appear that the evidence was read over to him when completed as required by O. 18, R. 5.

There is authority for saying that depositions are matters required by law to

be reduced to the form of a document within the meaning of S. 91, Evidence Act, and the only way they can be proved is under the provisions of S. 80 of the same Act, and this is only when they are taken in accordance with law. It is suggested that the result of the disregard in this case of the provisions of R. 5, Q. 18 is that the deposition in question has not been taken down according to law and therefore is not admissible in evidence. As I pointed out, there are no merits at all in these points because the appellant has never challenged the fact that he did say in the civil Court that he had paid the money to the plaintiff. On the contrary, in the criminal proceedings he has reiterated this statement and he claims to be acquitted not because he did not make the statement alleged but because it was a true statement. We think that it is sufficient to dispose of this point if we only say that in this case, at any rate, we see no reason to make any exception to the salutary rule whereby the Courts do not entertain objections on the ground of admissibility of evidence which are taken for the first time in appeal. There was no objection to the evidence when it was tendered in the Court below and we do not think that even if the objection is sound as to which we express no opinion the appellant should be allowed to take it at this stage.

The only other points that have been raised are certain criticisms on the language of the learned Judge in charging the jury. He certainly has expressed his opinion on more than one occasion, but that he has a perfect right to do if he makes it clear to the jury that the opinion he expresses on the facts is not binding on them; and in fact at the end of his charge to the jury we find him warning the jury in this words:

"I shall once again warn you that you are not bound to accept my opinion if it does not fit in with yours."

In our opinion it was perfectly clear to the jury that the responsibility for the decision was theirs and that they had to make up their minds themselves and not to rely on any opinion as to facts expressed by the Judge. We do not think that the sentence is at all too severe. In the circumstances the appeal is dismissed.

The appellant must surrender to his

bail and serve out the remainder of the sentence.

M. C. Ghose, J.—I agree.

K.N./R.K.

Appeal dismissed.

* A. I. R. 1933 Calcutta 192

PANCKRIDGE AND PATTERSON, JJ.

Nagendra Nath Adhikari—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 477 of 1932, Decided on 25th November 1932.

* Criminal P. C. (1898), S. 476-B—Refusal by Assistant Sessions Judge to make complaint under S. 476—Appeal to the Sessions Judge lies.

Where an Assistant Sessions Judge refuses to lodge a complaint under S. 476, an appeal from his order lies to the Sessions Judge even though the Assistant Sessions Judge is also a member of the Sessions Court: *A I R 1923 Cal 521, Full; A I R 1931 Cal 190, Ref.* [P 193 C 1, 2]

S. K. Basu, Debabrata Mukherji and Parimal Mukherji—for Petitioner.

B. M. Sen—for the Crown.

Panckridge, J.—This is a Rule obtained by the petitioner calling upon the District Magistrate of Burdwan to show cause why an order made by the Sessions Judge of Burdwan who allowed an appeal against an order of the Assistant Sessions Judge of Burdwan and directed under S. 476-B, Criminal P. C., a complaint to be lodged to the effect that the petitioner had committed offences punishable under certain of those sections of the Indian Penal Code to which S. 195, sub-S. (1), para. (c), Criminal P. C., applies should not be set aside. It appears that an application was made to the Assistant Sessions Judge of Burdwan who was the successor of the Assistant Sessions Judge who tried the case in connexion with which the offences are said to have been committed to make a complaint under S. 476. This the learned Assistant Sessions Judge refused to do. An appeal was made to the Sessions Judge under S. 476-B with the result that the order refusing to make a complaint was set aside and the learned Sessions Judge expressed his intention of lodging a formal complaint before the Subdivisional Officer. We are not concerned with the merits of the Sessions Judge's decision because the Rule has been granted on two grounds alone which raise a question of jurisdiction.

It is said on behalf of the petitioner that in the circumstances of the case no

appeal under S. 476-B lies to the Sessions Judge and that if the applicant before the Assistant Sessions Judge desired to question the propriety of the Assistant Sessions Judge's refusal to lodge a complaint his remedy was by way of an appeal to the High Court. To decide this question it is necessary to examine the relevant sections of the Code of Criminal Procedure. S. 476-B provides that in a case where the Court has refused to make a complaint under S. 476 the person whose application has been rejected may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-S. (3). S. 195, sub-S. (3) enacts that a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the decisions of such former Court. In the case of Assistant Sessions Judges S. 108, Criminal P. C., provides that an appeal shall lie to the Court of Sessions subject to the proviso that when an Assistant Sessions Judge passes a sentence of imprisonment for a term exceeding four years or any sentence of transportation an appeal shall lie to the High Court. I do not think it necessary to discuss what meaning is to be attached to the word "ordinarily" in S. 195 or to come to any decision whether appeals from Assistant Sessions Judges ordinarily lie to the Court of Session rather than to the High Court or to the High Court rather than to the Court of Session. It is clear that appeals do lie from convictions by Assistant Sessions Judges some of which are to be dealt with by Courts of Session and some by the High Court. When we turn to the proviso of S. 195, sub-S. (3) we find that when appeals lie to more than one Court the appellate Court of inferior jurisdiction shall be the Court to which the trial Court shall be deemed to be subordinate.

It is clear that these words cover the case, to which the learned advocate for the petitioner has referred, of the Court of Subordinate Judge from whom an appeal lies either to the Court of the District Judge or to the High Court according to the value of the subject-matter of the suit. The question is whether the proviso gives us any indication to what Court an appeal lies from an order made by an Assistant Sessions Judge under S. 476. Mr. Basu contends that sub-S. (3) cannot apply to

Assistant Sessions Judges and Courts of Session for he says that the subordinate Court must be a different Court from the one to which it is subordinate and the proviso contemplates a Court which is subordinate to two different Courts in the sense that appeals lie from it to both those Courts and lays down that in such a case the Court of inferior jurisdiction shall be the Court to which the original Courts shall be held to be subordinate for the purpose of the section. He also points out that Assistant Sessions Judges, Additional Sessions Judges and Sessions Judges are all Judges of the same Court, namely, the Court of Session. That would appear to be the case both from the language of S. 6, Criminal P. C., which only contemplates besides High Courts, Courts of Session and various Magistrates' Courts and also from the language of S. 9 which contemplates the establishment by the Local Government of a Court of Session for every Sessions Division and the appointment of a Judge of such Court and also of Additional Sessions Judges and Assistant Sessions Judges, all of whom are members of the same Court.

In addition to the Code there is also a case of *The Superintendent and Remembrancer of Legal Affairs, Bengal v. Ij-jatull Paikar* (1). In that case it was held that when an offence under S. 193, I. P. C., had been committed in a proceeding before an Additional Sessions Judge and the Additional Sessions Judge had been transferred, the Sessions Judge had jurisdiction to make a complaint under S. 476 because he was the Judge of the same Court, namely, the Court of Session, as the Additional Sessions Judge. I think that there is considerable force in Mr. Basu's argument, but if it is sound it must follow that no appeal can lie under S. 476-B, Criminal P. C., against an order of a Judge of the High Court sitting singly on the original side to a Division Bench of the Court because if it is necessary for the Court from which an appeal is to lie under S. 476-B to be a Court different from the Court making the order under S. 476, that condition will not be satisfied because the High Court exercising its ordinary original civil jurisdiction is the same Court as the High Court exercising its appel-

1. A I R 1931 Cal 190=1931 Cr C 264=192 I C 160=32 Cr L J 842=58 Cal 1117,

late jurisdiction. This very point has been considered and decided in the case of *Ranjanali v. Moolji Sheikh & Co.* (2) where Rankin, C. J., and Buckland, J., held that not only did an appeal lie from a single Judge of the High Court exercising original civil jurisdiction to a Division Bench where a single Judge has made a complaint under S. 476 but also that such an appeal lay by virtue of the provisions of S. 476-B. In taking this view the learned Judges relied upon two decisions: one a Full Bench decision of the Madras Court High Court and the other a decision of the Bombay High Court.

It appears to me that the same considerations apply in the present case. Although, as I have said, Mr. Basu's argument is attractive and the language of the Code is not altogether happily chosen we are of opinion that an appeal from the sentence of an Assistant Sessions Judge does ordinarily lie to a Court of Session even though an Assistant Sessions Judge is a member of that Court. If it cannot be said also ordinarily to lie to the High Court no question arises. But if it can be said "ordinarily to lie to the High Court" proviso (a), sub-S. (3), S. 195, applies and the appeal under S. 176-B must be held to lie to the Court of inferior jurisdiction, namely, Court of Session. These considerations dispose of the matter and since we are of opinion that the grounds on which the Rule was granted have not been shown to be sustainable the Rule must be discharged.

Patterson, J.—I agree.

K.S. *Rule discharged.*

2. A I R 1929 Cal 521=1929 Cr C 184=118
I C 889=30 Cr L J 974=56 Cal 932.

A. I. R. 1933 Calcutta 194

PANCKRIDGE AND M. C. GHOSE, JJ.

Mahomed Ali and others—Appellants,
v.

Emperor—Opposite Party.

Criminal Admitted Appeal No. 573 of 1931, Decided on 14th January 1932.

Criminal P. C. (1898), S. 221—Charge under S. 366, Penal Code, must make clear to what exactly the charge relates—Charge held offended against principles of criminal pleadings.

It must be made plain to the accused charged under S. 366, I. P. C., whether he is charged with kidnapping or with abduction, and whether

it was with intent to compel the victim to marry against her wish or with knowledge that she may be forced or seduced to illicit intercourse. Otherwise it may not be possible to know the exact view of the jury. Separate charges may be framed and the verdict of the jury may be taken on each charge. [P 195 C 1]

Charge under S. 365 ran as follows: "That you on or about 31st August 1930 at N kidnapped M B from the lawful guardianship of her father, M or abducted her with intent that she might be compelled to marry H against her will or knowing it to be likely that she would be forced or seduced to illicit intercourse."

Held: that the charge in this form offended against all the principles of criminal pleading; A I R 1927 Cal 644, *Appr.*; A I R 1930 Cal 209, *Dist.* [P 195 C 2]

S. K. Basu and Parimal Mukherji—
for Appellants.

Khondkar—for the Crown.

Panckridge, J.—This is an appeal by five persons who were charged of offences punishable under Ss. 366, 366-A and 368, I. P. C. They were convicted of the charge under S. 366, but acquitted on the charges under Ss. 366-A and 368. Another man was charged under Ss. 366-A and 368, but was acquitted on both those charges. In respect of offences punishable under S. 366 the present appellants have been sentenced to various terms of imprisonment.

The case for the prosecution appears to have been that a certain young girl who was living in the same bari with her father was forcibly seized by a party of whom some of the accused persons are members and was taken to the house of accused 1. While she was there an attempt was made to force her into marriage with accused 3. She did not consent and she was thereafter taken from place to place and she was finally discovered in the house of a woman who is said to be a woman of the town. The charge under S. 366 is concerned with the original forcible seizure of the girl. The other charges were based upon incidents subsequent to that seizure. The accused have been acquitted of the charges under Ss. 366-A and 368 and I need not deal with them further. But I am by no means convinced that it was convenient or proper to try the accused on those charges at the same time as they were being tried on the charges under S. 366. I now turn to the actual charge under S. 366. It runs as follows:

"That you on or about 31st August 1930 at Nijkuranahi kidnapped Mastura Bibi from the lawful guardianship of her father Majidulla or abducted her with intent that she might be

compelled to marry Husnutulla against her will or knowing it to be likely that she would be forced or seduced to illicit intercourse."

This is the charge upon which the accused were tried and upon which they have been found guilty and in respect of which they have been sentenced. To my mind the charge in this form offends against all the principles of criminal pleading. It seems to me elementary that it should appear plain whether the accused persons are being charged with kidnapping or are being charged with abduction and similarly whether they have been charged with kidnapping or whether they have been charged with abduction it should appear clearly whether the intent alleged was an intent to compel the victim to marry against her will or whether the kidnapping or abduction was with the knowledge that it was likely that the girl would be forced or seduced to illicit intercourse. If one looks to this charge one will find that various combinations of possible circumstances which can be covered by it are numerous. It is perfectly true that the prosecution may be in some doubt in certain cases whether the offence disclosed is that of kidnapping or that of abduction. If this is so, nothing is easier than to frame two charges and take the verdict of the jury upon them both. What has happened in this case is a good example of the mischief that can arise if that rule is not observed. Evidence was called and presumably reliance was sought to be placed by the prosecution on that evidence as to the age of the girl. The jury have brought in a verdict of guilty under S. 366, but whether they have brought in that verdict because they considered the accused guilty of the offence of kidnapping or of the offence of abduction no one is able to say. As I have pointed out in the course of the argument it might well be that the importance of an alleged misdirection in the charge would depend entirely upon which view of the facts the jury had taken. I see that a view similar to my own was taken by this Court in the case of *Mafizaddi v. Emperor* (1) where Cuming and Graham, JJ., laid down that the ingredients of the two offences are different and that the accused is entitled

to know which of the charges he is asked to meet. They add that the two offences are distinct offences and that separate charges should have been framed if it was desired to charge the accused with both the offences. I entirely agree with this view. The learned Deputy Legal Remembrancer has drawn our attention to the case of *Prafulla Kumar v. Emperor* (2). In that case it was argued that it was illegal to frame one count or charge setting out both the offences in the alternative and the Court observed :

"We are not prepared to say that a charge of the latter character contravenes the requirements of the law, far less that there was the least prejudice caused to the appellant thereby."

That was doubtless because the learned Judge specifically ascertained whether the jury considered the accused guilty of kidnapping or guilty of abduction. Having ascertained that the jury were of opinion that he should be convicted of kidnapping, but acquitted of abduction the Court proceeded to deal with the accused on that basis. Therefore whatever the defect in the charge may have been steps were taken to cure it. There the difficulty under which we labour as to the nature of the offence of the accused did not arise. In the circumstances we are of opinion that this case must go back for a retrial and we direct that the accused be tried on a charge framed in accordance with the principles I have enunciated, that is to say, if it is desired to charge him with both kidnapping and abduction, those offences must be made a subject in separate charges. Similarly if it is desired to charge him with abduction either with intent that the girl might be compelled to marry against her will or forced or seduced to illicit intercourse, separate charges must be framed contemplating both sets of circumstances. But, in my opinion, having regard to the unsatisfactory state of the evidence as to the girl's age and having regard to the fact that the accused persons have already been acquitted of charges under Ss. 366-A and 368 the best course will be for the accused to be retried on the simple charge of abducting Mastura Bibi with intent that she might be compelled to marry Husnutulla against her will.

We therefore allow the appeal, set aside the conviction and sentence and

1. A I R 1927 Cal 644=24 Cr L J 805=104 I C 245.

2. A I R 1930 Cal 209=1930 Cr C 209=31 Cr L J 903=57 Cal 1074=125 I C 656.

direct retrial in the manner I have indicated. The recommendation that I have made with regard to limiting the number of charges to one is in no sense mandatory, but merely the result of a first impression of the evidence. If the Public Prosecutor or the Court thinks fit in the interest of justice to try the case on a specific charge of abduction knowing it to be likely that the girl would be forced or seduced to illicit intercourse he will use his own discretion in the matter. Pending the retrial the appellants will be released on bail to the satisfaction of the Deputy Commissioner.

M. C. Ghose, J.—I agree.

W.D./R.K. *Appeal allowed.*

A. I. R. 1933 Calcutta 196

PATTERSON, J.

Probadha Gaolini—Appellant.

v.

Banka Behari Mondal—Respondent.

Appeal No. 242 of 1930, Decided on 24th May 1932, against appellate decree of Offg. Sub-Judge, Birbhum, D. - 9th July 1929.

(a) **Contract Act (1872), S. 24—Object of bond partly to stifle criminal prosecution — Lender, party to object, is not entitled to any relief — (Quære). Whether secondary evidence is admissible — Evidence Act (1872), Ss. 65 and 91.**

Plaintiff's mistress filed a suit against the defendant and it was decreed. Plaintiff acted as agent and conducted the suit. The defendant stood a great chance of being prosecuted for the defences raised. He appealed and the appeal was allowed by consent on the defendant executing a bond in plaintiff's favour for an amount larger than the sum decreed. The purpose being partly to stifle the institution of criminal proceedings, the compromise petition was drafted and filed in plaintiff's presence.

Held: that the plaintiff was not entitled to any relief by way of enforcing registration of the bond.

Quære.—Whether secondary evidence can be allowed to show the nature of the alleged agreement. [P 197 C 1,2]

(b) **Registration Act (1908), S. 77—(Obiter). Suit under—Other claims cannot be joined.**

Obiter.—No other claim can be coupled with the prayer to enforce registration of a document under S. 77: *A I R 1924 Cal 600, Ref.*

[P 197 C 1]

(c) **Registration Act (1908), S. 77—(Obiter). Tampered document.**

Obiter.—Suit to enforce registration of tampered document cannot be maintained.

[P 197 C 2]

Gour Mohan Dutta and Bon Behary Mukherji—for Appellant.

Hari Charan Ganguly and Indu Prokash Chatterji—for Respondent.

Judgment.—The suit out of which this appeal arises purports to be one for registration of usufructuary mortgage bond, but certain other alternative reliefs were also prayed for, namely, that the defendant should be directed to execute and cause to be registered a bond identical with the bond in suit, or to refund the money said to have been advanced by the appellant together with interest. The main facts admitted and found in the course of these proceedings are as follows:

The plaintiff's mistress, Probashi Baishnabi sued the defendant for recovery of a certain sum of money said to have been advanced on a mortgage bond. In that suit the bond was said to have been lost. In fact it was alleged by Probashi that it had been stolen from her by the defendant's son. The defendant denied liability and produced the bond before the Court, bearing endorsements of payments, but in spite of these endorsements and in spite of the fact that the bond was produced from the defendant's custody, the trial Court decreed Probashi's suit, from which it may be inferred that the trial Court believed Probashi's allegation that the bond had been stolen from her possession and that the endorsements were forgeries. It was therefore clear that unless that decree was set aside, the defendant and her witnesses ran a very great risk of criminal proceedings being instituted against them. Against that decree the defendant preferred an appeal, but when the appeal came on for hearing, a compromise petition was filed in which it was prayed that the appeal be allowed and the suit dismissed on a declaration that the plaintiff was not entitled to recover anything on the basis of the bond in suit. It appears that throughout the proceedings referred to above, the plaintiff was present both in the trial Court and in the Court of appeal, that he looked after the suit on behalf of his mistress Probashi, and that the compromise petition was drafted and filed in his presence.

The decree in that suit was for Rupees 300, together with interest and costs, and the present proceedings relate to a sum of Rs. 425 which the defendant borrowed from the plaintiff for payment to Probashi as consideration for the compromise as a result of which the decree in the aforesaid suit was set aside. In the

present proceedings both the Courts below have in effect held that this sum of Rs. 425 was advanced by the plaintiff to the defendant and paid by the defendant to the plaintiff's mistress Probashi, partly in satisfaction of Probashi's decree and partly for the purpose of preventing the institution of the criminal proceedings to which the defendant and her witnesses had exposed themselves in connexion with the former suit. In the circumstances, and having regard to the fact that as the present plaintiff is Probashi's paramour and that he acted as her *tadbirkar* throughout the proceedings in the former suit and in connexion with the drafting and filing of the petition of compromise, it must, I think, be held that the object of the consideration for the bond in suit was an unlawful one, and that the plaintiff having been a party to a conspiracy for stifling a criminal proceeding is not entitled to any relief. The above finding is sufficient by itself for the disposal of this appeal, but certain other points have been urged on behalf of the appellant which may perhaps be briefly alluded to.

In the first place it is, I think, clear from certain recent decisions of this Court: [vide for example *Dwijendra Narayan v. Jogesh Chandra* (1)] that although there may have been some difference of opinion in the past, it is now well settled that no other claim can be coupled with the prayer to enforce registration of a document under S. 77, Registration Act. Then again it is the plaintiff's own case that the bond in suit had been tampered with, that the second page of the document as it now stands is not the same as the second page of the document as it stood at the time of the execution, (though the wording is said to be identical) and that some other thumb impression has been substituted for the thumb impression of the defendant. The trial Court was of opinion that the document had been tampered with while it was in the possession of the defendant's son, but the lower appellate Court, while differing from the trial Court on this point, has not recorded any clear finding as to whether the document was tampered with while it was in the defendant's custody or at some other time. It may further be said that the findings of the lower appellate

Court do not altogether exclude the possibility of the document not having been tampered with at all, as is now alleged by the plaintiff, the allegation of its having been tampered with not having been made until after the expert who was examined before the District Sub-Registrar had expressed his opinion that the thumb impression on the second page was not the thumb impression of the defendant. Be that as it may, the document before the Court is, on the plaintiff's own showing, not the document which is said to have been executed by the defendant. The latter document has according to the plaintiff, ceased to exist in the form in which it was executed, and no suit can therefore be based upon the document now before the Court.

It may further be remarked that even apart from the consideration referred to above, it is very doubtful whether in the circumstances of the present case and in view of the fact that the bond has admittedly been tampered with, the plaintiff

"could on a case properly alleged and proved recover back the actual money lent as money had and received to his use: vide the concluding portion of the judgment of Rankin, J., in the case of *Dula Meah v. Abdul Rahman* (2)."

In this connexion reference may also be made to the case of *Goor Chandra Das v. Prasanna Kumar* (3). Lastly it is clear that even if the bond in suit had not been tampered with, it ought not to have been received in evidence for the purpose of proving the existence of an agreement between the parties, or of proving that the said agreement was of the nature set forth therein, *James Skinner v. R. H. Skinner* (4). It is moreover extremely doubtful whether in the circumstances of the present case, and having regard to the provisions of Ss. 91 and 65, Evidence Act, it would have been proper to allow any secondary evidence regarding the nature of the alleged agreement to have been given in these proceedings. In any view of the matter therefore this appeal must be and accordingly is, allowed and the plaintiff's suit is dismissed. In view of the dishonest nature of the defences raised by

2. A I R 1924 Cal 452=81 I C 641.

3. (1906) 33 Cal 812=3 C L J 363=10 C W N 788.

4. A I R 1929 P C 269=119 I C 633=56 I A 363=51 All 771 (P C).

1. A I R 1924 Cal 600=79 I C 520.

the defendant, and of the fact that the defendant herself was a party to a conspiracy to stifle criminal proceedings, I direct that both parties should bear their own costs in all Courts.

M.N.

Appeal allowed.

A. I. R. 1933 Calcutta 198

MITTER AND S. K. GHOSE, J.J.

Asanuddin Mandal—Plaintiff — Appellant.

v.

Asmatulla—Defendant—Respondent.

Appeal No 2531 of 1930, Decided on 15th March 1932, against appellate decree of Sub.Judge, Zillah, Pabna and Bogra, D/- 23rd June 1930.

Registration Act (1908), S. 17 (2) (ii)—Receipt for payment of mortgage debt requires registration if it purports to extinguish mortgage—Mortgagee in receipt given by him stating that he received Rs. 555, nothing more remained to be paid, and that mortgage bond would be returned when received back from pleader—Receipt not registered—Receipt was inadmissible either to prove extinction of mortgage liability or to prove admission that mortgage bond would be returned when received back from his pleader.

The receipt for payment of money under a mortgage does not require registration under S. 17 (2) (ii) if it does not purport to extinguish the mortgage. But it requires registration if it purports to extinguish it.

Mortgagee gave a receipt to the mortgagor in which he stated "I have received from you Rs. 555; nothing more remains due upon the bond. I cannot return the bond to you now as it is with my pleader. After getting back from my pleader I shall return it to you." The receipt was not registered.

Held: that the receipt purported to extinguish the mortgage and therefore required registration. As it was not registered it was inadmissible either as extinguishing liability or as showing admission of mortgagee that he would return bond after getting it back from pleader.

[P 199 C 1]

Abul Chandra Gupta and Nimal Kumar Sen—for Appellant.

P. K. Sanyal for *Probodh Nath Sanyal*—for Respondent.

Mitter, J.—This is an appeal by the plaintiff and arises in a suit to enforce a mortgage bond which was executed in his favour by the defendant in Ashar 1332 B. S. by which the mortgagor hypothecated certain immovable properties and promised to pay interest at the rate of 30 per cent per annum. The defence of the defendant was that the mortgage had been paid off by the plaintiff agreeing to take Rs. 555 out of the money due under the mortgage and remitting

Rs. 111 due on the mortgage on a particular date, and in proof of that fact the defendant produced a receipt purporting to have been given by the plaintiff the material terms of which are as follows:

"Rupees 666 is due to me upon the mortgage bond of which I have received from you Rs. 555 after remission of the balance. Nothing more remains due upon the bond. I cannot return the bond to you now as it is with my pleader. After getting it back from my pleader I shall enter the endorsement of this payment upon the bond and return it to you."

A question was raised before the Court of first instance that this document was inadmissible for want of registration having regard to the provisions of S. 17, Cl. 2 (ii), Registration Act, as it purported to extinguish the liability in respect of immovable property. The suit was accordingly decreed on contest and the usual preliminary mortgage decree for sale was passed. Against this decision an appeal was taken to the Court of the Subordinate Judge of Bogra and the Subordinate Judge was of opinion that the receipt the material terms of which we have already recited did not require registration as it merely purported to be a receipt in full satisfaction of the mortgage debt. In this view the Subordinate Judge was of opinion that, the admission contained in the receipt should be taken into account along with the deposition of two witnesses examined on behalf of the defendant for the purpose of proving this payment, and the Subordinate Judge was of opinion that the evidence of these witnesses coupled with that afforded by the receipt established beyond doubt the allegation of satisfaction of the mortgage bond made by the defendants. He accordingly dismissed the plaintiff's suit.

Against this decision the present appeal has been brought by the plaintiff and the contention which has been raised before us is that the lower appellate Court has committed an error in law in admitting in evidence this document which was rejected by the Court of first instance on the ground that it required registration. Certain authorities have been cited in favour of this contention of the appellant. Reference has been made to the decision of the Allahabad High Court in the recent case of *Jwala Prasad v. Mohan Lal* (1), where the view contended for by the appellant had

been taken. Of course the Allahabad High Court in an earlier decision, namely, in the case of *Piari Lal v. Makhan* (2), took a different view. The learned advocate for the appellant has also relied upon a decision of the Madras Court. It seems to us that the result of the authorities is that the receipt for payment of money due under a mortgage does not require registration under S. 17, Cl. 2 (ii) if it does not purport to extinguish the mortgage. A large number of cases which are quoted by Sir Dinshah Mulla in his Commentary of the Registration Act at p. 97 of the second edition support this view. But the authorities show that it does require registration if it purports to extinguish the mortgage. Reference may be made in this connexion to the Allahabad case just referred to and to the decision of the Madras High Court in the case of *Neelmani Pattnaik v. Sukadeu Behara* (3) at p. 806 (of 13 Mad).

There can be no doubt on the statement contained in the receipt that the mortgage exonerated the mortgagor from any liability under the mortgage and this document purported to extinguish the liability under the mortgage. It has however been sought to be argued by the learned advocate for the respondent that if it is not receivable in evidence as extinguishing the liability it can be received in evidence for a collateral purpose, namely, for the purpose of showing the admission of the plaintiff that he would return the mortgage bond after endorsement of payment and that he could not return it because the mortgage bond was with his pleader. It is difficult to split up the document in this way. The question with regard to the return of the mortgage bond to the defendants was only introduced because the plaintiff exonerated the defendant from liability under the mortgage bond. No question of the return of the bond can arise unless the mortgage debt was satisfied. It appears clear that on that date the mortgage bond would have been satisfied by the payment of Rs. 555 for the document shows that there was a much larger sum due, and we do not think we can hold that this document can be used for the purpose of proving this payment. We think the Subordinate Judge has not

taken the correct view of the law in this behalf.

The result therefore is that the judgment and decree of the lower appellate Court must be set aside and the case sent back to it in order that it may rehear the appeal after excluding from evidence the receipt in question which was admitted by him at the appellate stage. It will be open to the Subordinate Judge to decide the matter on such oral evidence as to payment which the respondent might offer and on such evidence as has already been tendered as also on such further evidence which the lower appellate Court may take in the exercise of its powers under O. 41, R. 27, Civil P. C. The Subordinate Judge will rehear the appeal in the light of these observations. The costs of this appeal will abide the result.

S. K. Ghose, J.—I agree.

S.N./R.K. Decree set aside.

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MUKERJI AND GUHA, JJ.

Sarat Chandra Ray and others—Defendants—Appellants.

v.

Bhupendra Narain Rai—Plaintiff—Respondents.

Appeal No. 457 of 1928, Decided on 16th March 1932, against original decree of Sub-Judge, Rangpur, D/- 27th June 1928.

(a) **Alluvion and Diluvion—Suit for newly formed chur lands—Pleadings should not be strictly construed—Practice—Pleadings.**

The pleadings in a suit for newly formed chur lands should not be construed too strictly, unless one must do so for some very good reason. In the case of chur lands which are constantly going under water and re-forming it is very difficult, until a full investigation based on a proper survey and comparison of maps is made, to premise with any degree of certainty whether a claim would really lie on the ground of a new formation as being re-formation in situ or a contiguous accretion. [P 202 C 2]

(b) **Possession—Chur lands—Possession is with title-holder—Alluvion and Diluvion.**

In newly formed chur lands in which both parties are merely scrambling for possession, possession lies with him who has title. [P 203 C 1]

Bansari Lal Sarkar—for Appellants.

Atul Chandra Gupta and *Iswar Chandra Chakravarty*—for Respondent.

Judgment.—The plaintiff instituted this suit for declaration of title to and recovery of possession of certain lands as appertaining to Mauza Gajasham of

2. (1912) 34 All 528=16 I C 179.

3. A I R 1920 Mad 742=60 I C 255=43 Mad 803.

which he is the proprietor. This mauza is situate immediately on the north-west of Mauza Khetab Khan of which the proprietors are defendants 1 and 2. At the time of the thak survey of 1856 which is the earliest point of time at which we know anything about the situation of the two mauzas, the river Teesta flowed by their west and south-west. In the plaint the case put forward was as follows: Since the thak the river Teesta gradually shifted its course, and on two or three occasions the lands of Mauza Gatiasham were diluviated and again re-formed in situ; that for the last time diluviation began in 1323 or 1324 and continued till 1327, after which re-formation commenced, the river receding towards the west and throwing up the chur which is the subject-matter of the suit; that in 1329, when the chur became fit for cultivation, the plaintiff attempted to possess it, but defendants 1 and 2 kept him out of possession. Defendants 3 to 37 (with the exception of No. 27 who is dead) were impleaded as persons with whose help this dispossession was continued. The area of the lands in suit was stated as 450 highas and claim was made for declaration of title, recovery of possession and mesne profits, on the ground that the lands were re-formation in situ and accretion to Mauza Gatiasham.

Defendants 1 and 2 in their written statement alleged that the disputed lands had re-formed more than 25 or 30 years ago and that thereafter the river had gradually shifted towards the west and never towards the east, so that the disputed lands had never again diluviated since then; that the area of the disputed lands is not 450 highas but approximately 247 highas, and that they have all along been owned and possessed by them and their father, having been obtained under a decree between him and the plaintiff's predecessor in 1862. The Subordinate Judge made a decree on the footing that a part of the disputed lands fell within the area which the defendants were entitled to under the decree of 1862. The defendants have then preferred this appeal. There is a cross-objection on behalf of the plaintiff. Before proceeding to deal with the appeal and the cross-objection a few more facts required to be stated in order that the precise nature of the decree that has been passed may be rightly understood. It has already been

stated that at the time of the thak survey in 1856 the river Teesta flowed by the west and south-west of Mauzas Gatiasham and Khetab Khan. The thak map of Mauza Dhusmara, which lay on the other side of the river and opposite to Mauza Gatiasham, prepared in 1857, shows that some lands of Mauza Gatiasham were depicted in that map as chak No. 4 being a residuary chak of chit or detached lands of Mauza Gatiasham. The revenue survey maps of Mauzas Gatiasham and Khetab Khan prepared in 1857 show that by that time tremendous changes had been wrought by the river, it having broken its banks on the east and cut several channels through Gatiasham and Khetab Khan and that diluvion as well as alluvion had already taken place in several parts. In 1861 the father of defendants 1 and 2 made a petition to the survey authorities complaining inter alia that the western boundary of Khetab Khan was the flowing river Teesta and had been determined to be so long ago and he was in possession of the said mauza according to the said boundary, but in the thak survey some lands on the western side had been shown as appertaining to Gatiasham and that the boundary line commencing from the north-western corner of his mauza southwards had been incorrectly drawn with the result that a large quantity of lands of Khetab Khan had been wrongly included within Gatiasham.

In the thak map of Gatiasham the flowing river Teesta was shown as on the west of the western boundary line of the mauza (Stations Nos. 1 to 10), and on the south of its southern boundary line (Stations Nos. 11 to 15), and Khetab Khan was shown as lying contiguous to its east (Stations No. 16 to 26). The complaint was that the line should go towards the south-west instead of towards the south-east from Station No. 22 and should run in that direction up to Station No. 10. The Superintendent of Survey found that there were some discrepancies in the thak map of Gatiasham, but he referred the applicant to the civil Court. On that the applicant commenced a suit against the plaintiff's predecessor, being Title Suit No. 155 of 1861, which resulted in a compromise decree. The exact import of the compromise then arrived at is a matter of controversy in this case which will be dealt

with hereafter. It would be sufficient to say here only this: that under it the line between certain stations on the thak map of Gatiasham as drawn at certain bearings and distances would represent the boundary between the lands of the two parties. A decree was passed in 1862 on the basis of that compromise, the copy of the thak map of Gatiasham that was filed along with the petition of compromise forming an annexure thereto. This line will hereafter be referred to as "the decretal line." In 1913 the then predecessor of the plaintiff, as proprietor of Gatiasham, instituted a suit being Title Suit No. 462 of 1913 against certain persons who are not parties to the present litigation, and were not parties to Suit No. 155 of 1861, which ended in a compromise in 1862, alleging that at the time of the thak survey in 1856 some lands of the said mauza were situate on the opposite bank of the river Teesta and they were depicted as chak No. 4 in the thak map of 1857 of Mauza Dhusmara and included within the ambit of that mauza and further alleging that the said lands had undergone successive diluviation and re-formation, claimed title to and recovery of possession of certain lands as forming the re-formation in situ of an alluvial accretion to Mauza Gatiasham and the land of the said chak No. 4. She obtained a decree in the trial Court in a modified form. An appeal being preferred to this Court by one set of defendants the decree was in 1917 varied upon a compromise. The effect of this compromise decree, as far as may be gathered from the papers before us and in the absence of an Amin's map which formed a part of the petition of compromise and of the said decree, was that the plaintiff's title to chak No. 4 was acknowledged, her title to some lands which lay on the east of chak No. 4 and west of Gatiasham as shown in the thak survey, and which lay on the bed of the river at the time of the thak but had since silted up was also admitted and in respect of other lands lying on the north and on the south of the said silted up lands and situate between Gatiasham on one side and Dhusmara on the other, each party acknowledged the title of the other to a half-share therein.

The commissioner who made the local investigation in this case and prepared the case map showed in it amongst other

things the disputed lands, the present position of the river Teesta, as well as the position of its main channel at the time of the revenue survey, and the common boundary line between Gatiasham and Khetab Khan as in the thak and the revenue survey maps. He also drew on it the decretal line as described in the petition of compromise in the suit of 1861. He further depicted on it, at the request of defendants 1 and 2 and under orders of the Court, the thak lines of Mauza Dhusmara and of the disputed lands in the suit of 1913 and also a map of chur Khetab Khan which is alleged to have been prepared by their Amin Mohamed Ismail in 1918. He drew the decretal line in three different ways, one of which he preferred, namely a vermilion dotted line drawn as per specifications given in the petition of compromise in the suit of 1861, drawn from Station No. 22 up to a point near Station No. 10 of the thak map of Gatiashama as corrected with reference to its field book. He found that almost the whole of the disputed lands with the exception of a small strip on the north fell to the south of the said decretal line.

The Subordinate Judge was of opinion that the compromise in the suit of 1861 should be given effect to and so he held that defendants 1 and 2 are entitled to such lands as lay to the south of the decretal line and within the boundary of Gatiasham as shown in the thak map of that mauza. He however would not accept the vermilion dotted line of the commissioner as the decretal line because he was of opinion that when a copy of the thak map of Gatiasham was filed along with the petition of compromise in the suit of 1861, it was the thak map alone and not the bearings and distances as noted in the margin of the map that could not be taken into account. He therefore got the commissioner to draw the decretal line on the basis of the thak map of Gatiasham and without reference to the bearings and distances noted on it. As regards the rest of the area of the disputed land he drew a straight line from the south-eastern corner of Mauza Gatiasham (i. e. Station No. 16 of the thak map of Gatiasham) up to the south-eastern corner of Mauza Dhusmara (i. e. Station No. 88 of the Thak Map of Dhusmara) and held that an irregularly shaped triangular area, consisting of such

of the disputed lands as lay outside the thak boundary of Gatiasham and north of that line, should be held to belong to the plaintiff. He therefore gave the plaintiff a decree in accordance with his prayers in the plaint for the strip of land lying on the north of the decretal line and the triangular area on the south of the thak boundary of Gatiasham. In the appeal which the defendants have filed, their contentions range round three matters: first the triangular area, second the order for costs that has been made against them, and third the decree for khas possession that has been passed as against defendants other than defendants 1 and 2. In the cross-objection preferred by the plaintiff arguments have been addressed to us which are directed to establishing that the suit should have been decreed in its entirety, a very minor point as well having been taken that the Subordinate Judge had no good reason for not accepting the vermilion dotted line of the commissioner as the decretal line.

The judgment of the Subordinate Judge, in so far as it deals with the triangular area, is obscure to a degree and the reasons on which he has proceeded are not easy to comprehend. Learned advocate for the plaintiff-respondent therefore, and in our opinion quite rightly, sought to support the decision of the learned Judge primarily upon grounds other than those that are to be found in his judgment. He next referred to the judgment and put upon the process of reasoning it reveals a meaning which, in our judgment, is the only meaning which would make it sensible. We shall presently deal with these matters but before we do so we propose to dispose of a few points which have been raised before us and which need not detain us long. Considerable argument has been addressed to us on behalf of the appellants, based on the fact that though in the prayer in his plaint the plaintiff has asked for declaration of title to the lands in suit on the ground of their being re-formation in situ of and accretion to his Mauza Gatiasham, there are no specific averments therein such as would be sufficient to found a title by accretion, it being generally recited in it that there was re-formation in situ and accretion. The respondent as well as the Court below have, on the other hand, laid a good deal of stress on the fact that in the

written statement defendants 1 and 2 specifically rested their case upon the fact that

"the disputed land is owned and possessed by the defendants and forms the land in respect of which the decree was obtained their father,"

and did not lay any claim to them on the ground of re-formation in situ or accretion. In our judgment, the pleadings, so far as a matter of this kind is concerned, should not be construed too strictly unless one must do so for some very good reason. In the case of chur lands which are constantly going under water and re-forming it is very difficult, until a full investigation based on a proper survey and comparison of maps is made, to premise with any degree of certainty whether a claim would really lie on the ground of a new formation as being re-formation in situ or a contiguous accretion. The defendants' case that Mauza Khetab Khan never diluviated and the lands in dispute always remained in their present state ever since 1861 cannot be true; it was obviously put forward to ensure the defendants' success on the ground of a title by adverse possession. Their denials of the plaintiffs' case, namely:

"that the lands of Mauza Gatiasham were diluviated several times after the thak survey, and that for the last time the diluviation commenced in 1323 or 1321 and went on till 1327, and then re-formation began in 1328, and their assertion that the disputed land was re-formed long before 25 or 30 years' and thereafter the river Teesta gradually shifted towards the west and the disputed land was never diluviated,"

are also not true. On behalf of the appellants it has been contended that the suit should have been dismissed on the ground of limitation as also on the ground that they themselves had acquired a title by adverse possession. So far as limitation is concerned stress has been laid on the Subordinate Judge's finding which is in these words:

"An analysis of the evidence shows that the plaintiff failed to prove possession of any particular portion of the disputed area at any time."

On the question of adverse possession it has not been disputed that for the appellants to succeed they must trace such possession back to a period prior to 1305 because the last male owner died in that year and thereafter his widow held the estate which the plaintiff has obtained under an adoption made by her in 1324 and he having attained majority within three years before the institution of the suit. But to show such possession reli-

ance has been placed, in particular, upon six documents, Exs. F-1, F, F-11, F-8, F-9 and F-10 which we have been asked to read in conjunction with the entries in the chitta daks of the survey alleged to have been made by the defendants' Amin in 1318 and in the light of the oral evidence adduced in the case. We have done so, but we cannot bring ourselves to differ from the view which the Subordinate Judge has expressed. We agree with him in his conclusion that though there was some sort of a survey of the outer boundary about the year 1318 by the defendants' Amin, as is alleged on their behalf, the chittas must have been prepared much later, and the entries to be found in them cannot be implicitly relied on. As regards oral evidence it is not at all difficult to adduce a piece of evidence here, or a piece of evidence there, to establish a connexion between names appearing in the documents and thus make the documents fit in with a part of the disputed land. The Subordinate Judge was, in our opinion, right in holding that it is difficult to be satisfied on the materials such as they are on the record, that the documents mentioned above related to the plots with which the defendants desire to connect them. In any event these documents can only prove that some parts of the disputed lands were in possession of persons whose names appear in them. They are not documents with which defendants 1 and 2 had any concern and so are of little assistance to these defendants as a means of establishing their title by adverse possession. It is quite possible that these defendants had tenants in parts of this disputed area for the periods that such parts were not under water, but there is no proof of any continuous or systematic possession through tenants by which the title of the rightful owner may be displaced. We think in this case we should apply those principles which are applicable to newly formed chur lands in which both parties were merely scrambling for possession, namely that possession lay with him who had title. We accordingly hold that the suit was not barred, nor was the plaintiff's title, if he had any, extinguished by adverse possession.

To support the decision of the Subordinate Judge as regards the triangular area and also to challenge his decision in so far as it purported to exclude the area

lying to the south of the decretal line and within the thak boundary of Gatiasham or any area at all, it has been urged on behalf of the plaintiff-respondent that the compromise decree in the suit of 1861 should be read as giving the father of defendants 1 and 2 only three chaks of land lying to the south of the decretal line, and that if the defendants have not produced the map which formed an annexure to the petition of compromise and of the decree, and have not shown where those chaks lay, they ought not to be allowed to succeed at all. (The judgment then considered the facts and concluded.) We are unable to hold that the plaintiff has succeeded in establishing his title to the lands or his claim for recovery of possession thereof as against the defendants.

With regard to the point in connexion with the decretal line which has been taken in the respondents' cross-objection it is conceded on behalf of the appellants that the decision of the Court below cannot be supported. The commissioner gave very good reason why his vermilion dotted line should be accepted; that line agreed very closely with the revenue survey boundary line. The Subordinate Judge has, in our opinion, needlessly rejected the said line, and has put an unnecessarily narrow construction upon the petition of compromise in holding that the thak map should be taken divorced from the field book which appears on it. (The Court after upholding the commissioner's findings varied the order for costs and concluded.) In the result the appeal is allowed and the cross-objection is also allowed in part. The plaintiff's title to the portion of the land in suit lying on the north of the vermilion dotted line from Station R to Station 10 should be declared, and he should get a decree for khas possession with mesne-profits to be determined hereafter in respect of that area, and the suit in respect of the rest of the lands should be dismissed. So far as the costs of the Court below are concerned each party should pay his or their own costs; but as regards the costs of this appeal the appellants will get their costs from the respondent, hearing fee being assessed at 10 gold mohurs. There will be no further order for costs in the cross-objection.

M.N.

Order accordingly.

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MUKHERJI AND BARTLEY, JJ.

Abdul Latiff—Plaintiff—Appellant.

v.

Gopeswar Chatterjee—Defendant—Respondent.

Appeal No. 468 of 1928, Decided on 11th May 1932, against original decree of Sub-Judge, Burdwan, D/- 31st August 1928.

(a) Practice—Pleadings—Relationship of parties is to be determined from real contract—Contract.

Whatever might be the words used in the pleadings, the relationship between the parties is to be determined upon the real character of the contract between them. [P 206 C 1]

(b) Contract Act (1872), S. 239—Receipt of share in profits is not conclusive test of partnership—But agreement to share all loss and profit is sure test—Test to determine whether relationship is of partnership or agency enunciated—Contract Act (1872), S. 182.

The receipt by a person of a share in the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of a share of the profits is not a conclusive test of partnership. On the other hand an agreement to share all profit and all loss is an agreement of partnership even though the words "partner" or "partnership" do not occur in the agreement; while even though some losses are to be shared in by the parties, the agreement may show that a partnership was not intended. But a more certain test is to find out whether not only was there a common business but a common interest of all the parties in it, or whether the common business was to be carried on by one on behalf of another so that the latter could be regarded as the principal. [P 206 C 2; P 207 C 1]

(c) Contract Act (1872), S. 239—Participation in profits and not liability for loss coupled with other circumstances held took case out of partnership contract—Contract Act (1872), S. 182.

M was to take the contract of loading and unloading wagons for a company in his own name. There was no evidence that he was under any obligation to disclose the name of *G* who actually did the work to the company; the work was to stand in his own name so far as the company was concerned and there was nothing to suggest that the company was going to hold anybody else liable for any loss that might be caused. There was no evidence suggesting that anybody else than *M* was to have a voice in determining what work was or was not to be undertaken or when the work was to be stopped or whether the contract with the company was or was not to be renewed on the expiry of its period or other matters of that description:

Held: that by themselves these circumstances might not be enough; but taken along with participation in profits and non-liability for the loss, they took the case beyond the pale of a partnership contract. [P 207 C 1]

(d) Contract Act (1872), S. 239—Delegation of work founded not on mutual consent but on assertion of exclusive right—More co-

gent proof is necessary to hold that partnership was intended.

It is nothing extraordinary if in a partnership concern, the duty is delegated to one partner to decide upon what contracts should be undertaken or even to enter into contracts in his own name, and to another to finance the enterprise and to a third to manage or carry out the work; but these are more or less matters of delegation. But when the division of work in the aforesaid way is founded not merely on mutual consent given for the sake of mutual convenience but is founded on an assertion of a right and to the exclusion of others, more cogent proof is necessary to hold that notwithstanding all this the intention was to create a partnership. [P 207 C 2]

(e) Limitation Act (1908), Art. 89—Refusal.

The refusal for Art. 89 need not always be express and may on the other hand be inferred from circumstances, and a failure to comply with a definite demand may sometimes amount to a refusal. [P 208 C 2]

Hiralal Chakravarti and Shyamadas Bhattacharjee—for Appellant.

Bankim Chandra Mukherjee, Purna Chandra Chatterjee and Kamalakhshya Basu—for Respondent.

Judgment.—This is an appeal by the plaintiff from a decree dismissing his suit for accounts and for damages. Shortly put the plaintiff's case was as follows: The plaintiff had worked as a contractor for loading and unloading wagons for the Indian Iron & Steel Co. Ltd., at Santa for a long time. As he had various other businesses to attend to, it was inconvenient for him to look after the said contract work personally, and so he made up his mind to appoint somebody to whom he might entrust the same. The defendant, who is a pleader, on coming to know of his intention, approached him to be so appointed. Upon that it was agreed between the plaintiff and the defendant that the defendant would carry on and look after the business, by bestowing personal labour, and would receive advances from the company and make advances from his own pocket whenever necessary, would keep proper accounts of all income and expenditure and explain the same to the plaintiff, and would be liable to make good to the plaintiff all losses that would accrue by reason of negligent performance of the work; and that the profits would be divided half and half between the parties, but the loss, if any, would be borne entirely by the defendant. The defendant worked under this arrangement from 1st November 1919, till 15th April 1921. During

this period the defendant was negligent in the performance of the work he was entrusted with and was also guilty of misfeasance and malfeasance, and did not render accounts. Consequently, on 15th April 1921, the plaintiff wrote to the company withdrawing the powers which he had conferred on the defendant to receive payments and do other acts on his behalf, and since then all connexion of the defendant with the plaintiff and with the business ceased.

The defendant had paid to the plaintiff in all Rs. 1,200. The prayers in the plaint were that it might be held that the defendant was bound to render account to the plaintiff for the period from 1st November 1919 to 15th April 1921, that he might be ordered to render such account, and that a decree might be passed against him for such amount as might be found due as the result of accounting and also for a sum of Rupees 1,376-3-0 which the company had deducted from the plaintiff's bills, after the defendant had ceased to work, on account of demurrage, back charges and store charges, for work which the defendant had done during the aforesaid period. The defendant took various pleas: it was averred that the suit was not maintainable in the form in which it was laid, because the relationship between the plaintiff and the defendant was not that of principal and agent, but that it was agreed between the plaintiff and the defendant's son Madan Gopal that the plaintiff would renew the contract with the company in his own name that Madan Gopal would allow the plaintiff's name to stand in the office of the company and would carry out the works relating to the contract with his own men and money and keep the accounts, but that the defendant only managed the business for his son and had no liability to account. The terms, according to the defence, were that out of the net profits the plaintiff would get four annas and the defendant 12 annas, but it was admitted that the plaintiff was not to be liable for loss if any. It was denied that any amount had been deducted from the plaintiff's bills as alleged in the plaint. Charges of negligence, misfeasance and malfeasance were repudiated, and on the other hand it was contended that the business, which at the inception of that partnership was in ruins, attained a

flourishing state during the defendant's management. Limitation was pleaded; it being said that the defendant worked till 5th April 1921, on which date he was removed by the plaintiff. It was also asserted that the plaintiff had received not Rs. 1,200 only but in all Rs. 2,517.

The Subordinate Judge held that the suit failed on the preliminary ground that it was not maintainable in the form in which it was laid. He nevertheless dealt with all the issues which had been framed and recorded his conclusions thereon. In the result he dismissed the suit. The first and most important question for consideration in this appeal is whether the suit in the form in which it was brought was maintainable. The Subordinate Judge held that the business in question was a partnership business within the meaning of S. 239, Contract Act, that the plaint was framed as if the relations between the parties were as those of principal and agent, while in reality the parties were partners, and that as the particulars required by Form No. 49, App. A of the Code had not been given, no decree in Form No. 21 of App. D of the Code could be made. He held therefore that the claim for accounts was not maintainable and that, inasmuch as the claim for damages was inseparable from the claim for accounts the latter claim too was incompetent. Now, it is quite true that the frame of the suit was not that of a partnership action, and read carefully, the plaint would seem to suggest that the cause of action was founded on such relations as exist between a principal and an agent, though the terms "principal" and "agent" appear nowhere in it. At the same time it is only fair to say that the defendant in his written statements nowhere explicitly took the plea that it was a partnership that existed between the plaintiff and Madan Gopal; but that, on the other hand, an out and out transfer of the business or rather its goodwill to Madan Gopal was suggested, it being said that the plaintiff was to get a four annas share of the net profits. The Subordinate Judge noticed this difficulty, for he observed:

"The defendant's case as made in the written statement is that the plaintiff transferred his business to the said Madan Gopal in consideration of participation in the net profits of the business to the extent of four annas out of 16

annas, and hence it is clear there was no allegation of partnership in the written statements."

The Subordinate Judge however thought, and in this respect he was right, that whatever might have been the words used in the pleadings, the relationship between the parties was to be determined upon the real character of the contract between them, which in his opinion was a partnership contract. There is no document evidencing the contract, nor any direct oral evidence beyond what the plaintiff and the defendant themselves have given as witnesses examined in the case. There is some evidence proceeding from witnesses who have spoken to what they afterwards heard from the parties themselves; and inferences have also to be drawn from their subsequent conduct. For the purposes of this case Madan Gopal may be ignored, for it is conceded that his name was introduced merely to shield the plaintiff from difficulties that were anticipated, because the defendant had engaged in a business which as a legal practitioner it was not open to him to do, and that the real contracting parties were the plaintiff and the defendant. (Their Lordships then discussed evidence and proceeded.) The essential ingredients of the transaction were that the business was to remain in the name of the plaintiff, and so far at any rate as the company was concerned, it was the plaintiff who would take the work under contract from the company, he would make over the work for management to the defendant, and the defendant would get 12 annas out of the net profits as his remuneration, the plaintiff would get the remaining four annas thereof but would not be liable for the loss if any. The distinction between agency and partnership is sometimes a very subtle one, especially in cases where one party gets as his remuneration a share in the profits and does not remain liable for the loss, and this distinction becomes important when a question arises in connexion with their dealings with third parties. "Partnership" is defined in S. 239, Contract Act, and "Agency" in S. 182, and although every partner is an agent of the firm and his other partners for the purposes of the business of the partnership, S. 242 says:

"No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking by a share of the profits of

such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner."

The receipt by a person of a share in the profits of a business is prima facie evidence that he is a partner in the business, but it is now well settled, notwithstanding many dicta and decisions to the contrary, that the receipt of a share of the profits is not a conclusive test of partnership. In *Ross v. Parkes* (1) Jessel, M. R. observed:

"It is said (and about that there is no doubt) that mere participation in profits inter se affords cogent evidence of partnership. But it is now well settled by the case of *Cox v. Hickman* (2), *Bulter v. Ship* (3) and *Mallon v. Court of Wards* (4) that although a right to participation in profits is a strong test of partnership and there may be cases where upon a simple participation in profits there is a presumption, not of law, but of fact that there is a partnership yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive."

On the other hand an agreement to share all profit and all loss is an agreement of partnership even though the words "partner" or "partnership" do not occur in the agreement, while even though some losses are to be shared in by the parties the agreement may show that a partnership was not intended. In *Lindley on Partnership*, Edn. 7, p. 46, it is said:

"Whatever difference of opinion there may be as to other matters, persons engaged in any trade business or adventure upon the terms of sharing the profits and making good all losses arising therefrom, are necessarily to some extent partners in that trade, business or adventure; nor is the writer aware of any case in which persons who have agreed to share profits and losses in this sense have been held not to be partners."

Again at p. 48 it is said:

"The inference that where there is community of profit there is a partnership so strong that even if community of loss be expressly stipulated against, partnership may nevertheless subsist. In *Cooper v. Eyre* (5), Lord Loughborough is reported to have said, 'In order to constitute a partnership communion of profits and loss is essential.' But there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity."

1. (1875) 20 Eq 331=14 L J Ch 610=24 W R 5=30 L T 331.

2. (1860) 8 H L R 268 = 8 W R 754 = 9 C 1 (n s) 47=30 L J C P 125 = 3 L T 185=7 Jur (n s) 105.

3. (1865) 1 C P 86=35 L J C P 105 = 12 Jur (n s) 247=14 L T 72=14 W R 938.

4. (1873) 4 P C 419.

5. (1788) 1 H B L 37.

Judged by the tests laid down in the propositions quoted above the terms of the agreement, such as they have been alleged on behalf of the parties in this case, would be equally consistent with a partnership as with an agency. But a more certain test is to find out whether not only was there a common business but a common interest of all the parties in it, or whether the common business was to be carried on by the defendant on behalf of the plaintiff so that the plaintiff could be regarded as the principal. On this point there is not, nor indeed could there be any, direct evidence, so long as the terms were not put into writing. But there are the following facts, viz., the plaintiff was to take the contract in his own name, and there is no evidence that he was under any obligation to disclose the name of the defendant to the company.

It was testified in his own name so far as the company was concerned and there is nothing to suggest that the company was going to hold anybody else liable for any loss that might be caused. There is no evidence suggesting that anybody else than the plaintiff was to have a voice in determining what work was or was not to be undertaken or when the work was to be stopped or whether the contract with the company was or was not to be renewed on the expiry of its period (vide Ex. A (9)) or other matters of that description. By themselves these two circumstances may not be enough, but taken along with participation in profits and non-liability for the loss, they may not unreasonably, in our judgment, be regarded as taking the case beyond the pale of a partnership contract.

It is quite true that for a partnership it is not essential that there should be a common stock or that there should be a joint capital or stock, and the dictum that a partnership in profits is a partnership in assets by which they are made is also not universally true. It may be, and indeed it is nothing extraordinary, that in a partnership concern, the duty is delegated to one partner, to decide upon what contracts should be undertaken or even to enter into contracts in his own name, and to another to finance the enterprise and to a third to manage or carry out the work; but these are more or less matters of delegation. But when the division of work in

the aforesaid way is founded not merely on mutual consent given for the sake of mutual convenience but is founded on an assertion of a right and to the exclusion of others, such as appears to have been the case here, more cogent proof is necessary to hold that notwithstanding all this the intention was to create a partnership. These circumstances ordinarily would militate against a supposition of the parties having a common interest in the business, though the business itself is a common one. It has been argued that the stipulation that the defendant was to advance money was inconsistent with the theory of agency, and the fact that he would charge no interest on such advances but get a share in the profits suggests that the intention was to make him a dormant partner, that is to say, one who was not known or appeared to be such and whose real character was concealed under the cloak of a mere lender of money. But on examining the materials on the record we are satisfied that it was never contemplated that the defendant would, in fact, have to make any very considerable advances, and the evidence that there is on the record amply establishes that the business was carried on and was also intended to be carried on with the amount that was due from the company at the inception and with further advances made by the company.

That the relationship between the parties was not that of partners also appears, in our judgment, from the contents of such letters as Ex. 1 (d) written by the defendant to the plaintiff, and Ex. 1 (g) and Ex. 1 (n) which were written by the plaintiff to the defendant and to which the defendant never protested. We see no good reason to think that the letters produced are not genuine. They have a ring of sincerity and truth which, in our opinion, it is impossible for any man to simulate or fabricate. Some argument has been advanced before us, based on the fact that in some letters from the company to the plaintiff the letter was addressed as M. A. Latif & Co., or M. A. Latif and Brothers (vide e.g. Exs. A-6, A-7 and A-9), that in one of the letters (Ex. A-9) the company enquired about the name by which the partnership was to be known, that a bill (Ex. D) was made out in the name of M. A. Latif & Co., and that in some of the

bills Ex. D series the defendant signed for M. A. Latif & Co. But we are not prepared to infer from these that the company meant to suggest that the plaintiff was really carrying on the business in partnership with somebody else. The defendant does not suggest that he was included in M. A. Latif & Brothers; nor can it be contended that because he was signing for Latif & Co. he must have been a partner of that firm any more than an agent working under it. The plaintiff admittedly had various other businesses which were carried on under the name of M. A. Latif & Brothers or M. A. Latif & Co. As regards the letter Ex. A (9) in which the company addressing the plaintiff in December 1920, as M. A. Latif & Brothers enquired of him of the name by which the partnership was to be known, we do not think that this inquiry suggests that there was in fact a legal partnership in existence, far less any such between the plaintiff and the defendant.

On the other hand in March 1921 the company appears (vide Ex. 2 (h), to have referred to the defendant as the "Babu" appointed by the plaintiff for the works and there is also a large volume of documents showing that the company regarded the plaintiff alone as their contractor. One very strong circumstance which in our opinion, completely demolishes the defendant's case as to partnership is that afforded by his own conduct; if there was a partnership which the plaintiff had wrongfully dissolved, as it is his case, it is inexplicable that the defendant should not have raised a protest expressly stating that he was a partner or should have refrained from resorting to the Court within the time allowed by law to assert his rights and to ask for relief. His explanation is that he might thereby get into trouble as he is a pleader. But in this respect his position as defendant to-day is not any better. We cannot but reject this explanation. (Their Lordships then considered the question of shares of the parties and of limitation and proceeded). We have carefully considered these and other materials, e. g., Exs. 1 (f) and 1 (j), to which our attention has been drawn, but we are unable to agree with the Subordinate Judge. In our opinion what has been proved falls far short of establishing a refusal such as Art. 89, Lim.

Act contemplates. It is quite true that the refusal need not always be expressed, and may, on the other hand, be inferred from circumstances, and it would also be correct to say that failure to comply with a definite demand may sometimes amount to a refusal. But we fail to discover in this case anything which would even remotely suggest a repudiation on the part of the defendant of a liability to account or any circumstances from which the failure or omission on his part to render accounts might be construed as a refusal.

It may also be mentioned here that a refusal and time having run therefrom was never even pleaded. In our opinion no part of the claim is barred. It has been suggested in the arguments addressed to us on behalf of the respondent that there was no liability on his part to render account. The ground for this plea it is difficult to make out. When the plaintiff was to get a share of the profits, and when under his agreement it was the defendant's own case that he was to keep the accounts (Madan Gopal being now out of the way) and when it has been established beyond doubt that he handled the cash and never made over the books, it is idle to contend that he was not bound to account. The conclusions which we have recorded above are sufficient to establish the position that the plaintiff is entitled to a preliminary decree for accounts for the period in suit on the footing of the defendant having been an agent liable to render the same. (The judgment then considered other minor points and allowed the appeal and dismissed the cross-objections).

R.K. *Appeal allowed.*

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RANKIN, C. J. AND COSTELLO, J.
Hiralal Murarka and others—Defendants—Appellants.

v.

Mangtural Bagaria—Plaintiff—Respondent.

Appeal No. 82 of 1931, Decided on 15th April 1932.

Presidency Towns Insolvency Act (3 of 1909), S. 108—Administration order under—Estate vests in Official Receiver immediately.

The moment an administration order is pronounced under S. 108, the property of the deceased debtor vests in the Official Assignee and the fact that the order is not drawn up makes no difference. The drawing up of the order is

not a matter which delays the vesting of the property at all as the ordinary *prima facie* rule of all the Courts of law and equity is that the drawing up of the order is not the bringing into existence of the order, though there are many cases in which the drawing up of the order is, in effect, the bringing into existence of the order, namely, those cases where an order has no utility except in so far as it may be enforced: *Metcalf v. British Tea Association*, (1881) 46 L. T. 31, *passim*. *Case law referred.*

[P 210 C 1]

Page—for Appellants.

Advocate-General—for Respondents.

Rankin, C. J.—In this case we have followed with the greatest care the argument of the learned Advocate-General who appears for the plaintiff-respondent in the point before us seems to be a very narrow one. The position however is that, in my judgment the appeal should succeed. The plaintiff brings his suit for certain royalties due to the estate of one Popat Velji Rajdeo upon the terms of a mining lease. The plaintiff claims to be for this purpose entitled to represent that estate under an order dated 11th March 1927, which was an order made in an administration suit, in that the heirs and the widows of the deceased were litigating as to the succession and the Court was asked for a more or less full order for administration of the estate of the deceased. The order in question of 11th March 1927, appointed the present plaintiff Mangtulal to be the Manager and it is in that capacity that he claims to be entitled to recover from the defendants whatever sums are due to Popat Velji Rajdeo's estate.

The point upon which the case turned was a point taken in one of the written statements from the beginning. It was shortly this: This very plaintiff Mangtulal Bagaria on 18th July 1921 applied to the learned Judge exercising jurisdiction under the Presidency Towns Insolvency Act and on 4th August 1924, obtained an order under S. 108 of the Act for administration of the estate of Popat. That order was obtained by him in his capacity as a creditor of Popat. He impleaded in those proceedings certain persons as being the legal representatives of the deceased. In their presence the matter was argued by Mr. Khaitan, attorney for the applicant, and by Mr. Chatterji, attorney for the legal representatives. The plaintiff satisfied the learned Judge that the case was within the

section and the learned Judge pronounced an order of the character set forth in S. 108, an administration order under the insolvency jurisdiction. Now, it is not contended and it is not a matter subject to doubt that upon that order being pronounced and before it was drawn up the property of the debtor vested in the Official Assignee of this Court. The matter is no different than it would have been in the case of an order of adjudication and the position therefore was *prima facie* that the Official Assignee of this Court represented Popat's estate and no other person could claim to represent it. The order having been pronounced it was minuted according to the practice of this Court. When a receiving order is made upon a "judgment summons," or when an order is made by the Judge in Chambers on summons the English practice is that the Judge makes an endorsement of the order upon the summons itself. In this Court that practice is not followed but a minute of the order is made at the time and the fact that an order was pronounced in this case is not capable of dispute as we shall see in a moment that steps were taken and an order was drawn up.

The order as drawn up recited an affidavit of Mangtulal filed on the 30th July and it described Popat Velji Rajdeo as a person who died insolvent. It appears that the advisers of the legal representatives took exception to these passages in the draft and they applied to the learned Judge upon a proceeding which does not appear to be in writing. They applied to him orally, we are told, at his house during the vacation, but the statement of fact which we get from the plaintiff's own petition is that the application was an application to speak to the minutes of the order. Mr. Chatterji was instructed apparently to get the order drawn up without the particular passages objected to. He attended before Ghose, J., and the learned Judge when hearing the application at his house was, of course, attended by an officer of the Court whose duty it was to make a minute of any order which the learned Judge might make. The minute which was made by the Court's officer was this:

"The order for administration in insolvency made on 4th August 1924 is not to be drawn up

by order of (those, J., till after the vacation when the matter will be mentioned to him."

In these circumstances we have to consider what was the effect or nature of the order after that direction was given. What happened, in fact, was that the matter was never mentioned to the learned Judge after the vacation in the exercise of his insolvency jurisdiction or at all, but that, in an administration suit which had been started on 23rd September 1921, various orders were made appointing sometimes one person and then another and finally the plaintiff to manage or represent the property of the deceased. It is contended by learned counsel for the appellants that under S. 109, Presidency Towns Insolvency Act, the property vests in the Official Assignee the moment the order is pronounced. That cannot be disputed. The drawing up of the order is not a matter which delays the vesting of the property at all and cases have been cited to us which show that this is an arrangement entirely consistent with what happens in insolvency in respect of other classes of orders. The case of *In re Manning* (1) is a particularly instructive case upon this point and it is to be noticed that the effectiveness of the order from the time of its pronouncement is not some special doctrine peculiar to the Court of Bankruptcy but it is an ordinary doctrine of every Court. I do not say that there are no exceptions to it. There are exceptions to it under the rules in the insolvency jurisdiction. Thus an order for discharge is by the rules made effective only from the date of the drawing up. But the ordinary *prima facie* rule of all the Courts of law and equity is that the drawing up of the order is not the bringing into existence of the order. There are many cases in which the drawing up of the order, in effect, the bringing into existence of the order, namely, these cases where an order has no utility except in so far as it may be enforced; if for example, a writ of attachment is issued, the Sheriff cannot proceed upon the writ until it is handed out and in effect the order is not an available order until after the drawing up. But the *prima facie* doctrine of all Courts is, as I have said, and it is plain upon the face

of the Civil Procedure Code which requires that all decrees and orders are to be dated as on the date they are pronounced. That being so, on the 4th August there was an order which vested the property in the Official Assignee.

The question is whether the directions made on 4th September brought that position of affairs to an end. In my opinion it did not. In the first place, the order does not say more than that, the order is not to be drawn up till after the vacation. It does not say that it is never to be drawn up. We know from the character of the application made by Mr. Chatterji that there was no such question in the mind of any one at the time. The intention was that the learned Judge at a more convenient time would settle the particular dispute which had taken place upon certain words and that was all. If when the time came learned counsel had mentioned the matter to the Judge and if then the Judge had said

"the order not having been drawn up and perfected, I am now minded to make another order altogether,"

the position would have been very different. I do not say what it would have been because perhaps it is a serious question whether in that event the learned Judge would and could have divested the Official Assignee of the property. It would be a rather extraordinary thing to do because the order had in the meantime enured to the benefit of all the creditors. But if the learned Judge, on having the matter mentioned to him, had purported to say my original order was a mistake and I cancel it, it might very well be that the position would have been as if no such order had been pronounced. It may be pointed out that there was one thing which the learned Judge did not do. The learned Judge might have said:

"the order is not to be drawn up till after the vacation and I stay execution thereof in the meantime so far as the taking over possession by the Official Assignee is concerned."

Staying of execution could not affect the vesting of the property, but the learned Judge it is to be noticed did not even grant a stay so far as the acting on the order is concerned. All that he said was that the particular terms of the order about which there was some little dispute would be settled by him in future. That is the right view to take

1. (1885) 30 Ch D 480=55 LJ Ch 613=34
WR 111=54 LT 83.

of what happened. We are bound by the authorities cited by Mr. Page to hold that the property vested in the Official Assignee and still vests in the Official Assignee. The learned Judge has discussed the general question of the effect of orders before they are formally drawn up and he has observed the well-known doctrine that, until an order is formally drawn up, the Judge can withdraw it, alter it or change it in any way he likes. He still is dominus of the order. It does not require to come under the slip rule or any other principle of law to entitle him to make a variation. One case has been cited by the learned Advocate-General where an order was made for winding up a company. The minutes of the order had been issued to the parties but the order had not been perfected. In the meantime certain persons paid the company's debts and instead of making a winding up order, the learned Judge dismissed the winding up petition. This principle that the learned Judge is dominus of the order until it is drawn up is, in my judgment, of no avail to the plaintiff in the present case. The learned Judge had never at any time, so far as I can see, shown the smallest intention of rescinding the order which he had made. He merely postponed till another occasion the consideration of the question as to how it should be drawn up.

When the defendants took the point that the plaintiff was not entitled to sue it may be that the plaintiff could have gone to the learned Judge or the Judge having jurisdiction in insolvency and got an order which would bring to an end all operation of the order previously made. He did nothing of the kind. Up to this date no one has gone to the learned Judge in insolvency to put the matter right. The position is that the order stands and any creditor of Popat Velji would be prima facie entitled to have it drawn up yet by taking the proper steps. It is to be observed that the plaintiff's own view of the matter is disclosed by some of his affidavits and petitions in the administration suit. As a matter of fact, in one case, he put forward that the learned Judge had ordered that the order was to be in abeyance with a view to making a case that there was no one to protect the assets. That was not a true representation of what

the learned Judge had done at all. It suited the plaintiff because at that time he wanted to have some one else to be appointed administrator. But there are other passages from which it can be seen that the order was an order which was in existence still and was being completed, and he does suggest in one of his petitions at the very time the order was made on 11th March 1927, that there was an order which only required to be formally completed. I have no doubt that this is a case where we should apply the doctrine of *In re Manning* (1) *Blount v. Whitely* (2), *Script Phonography Co. Ltd. v. Gregg* (3), *Ex parte Hookey* (4). I am not prepared to follow the case of *Melcalfe v. British Tea Association* (5). It appears to me that much of what was said on that occasion was unnecessary for the decision of the case which was the very special case of an order conditionally dismissing a suit. Nobody doubts that an order dismissing a suit out and out brings the suit to an end. On the other hand, for the purpose of the drawing up of the order it is in existence. All that the learned Judges in that case ultimately did was to extend the time for appealing and give leave to appeal from the order dismissing the suit. The plaintiff in this case chose to go on in spite of the warning light that was exhibited to him in the written statement of the defendants and the position now is that he never had at the date of the plaint a right to the sum which he now claims nor, so far as I can see, has anything happened since which would entitle him to say that his defect in title has been cured.

In these circumstances the appeal must be allowed and the suit must be dismissed with costs in both the Courts. This order for costs will be against the plaintiff personally.

Costello, J.—I agree.

R.M./R.K.

Appeal allowed.

2. (1898) 79 L T 635=6 Manson 48.
3. (1890) 59 L J Ch 406.
4. (1862) 4 D F & J 416=31 L J Ch 429=10 W R 701=6 L T (ns) 567.
5. (1881) 46 L T 31.

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MUKERJI AND GUHA, JJ.

Nabadwip Chandra Das and others—
Defendants—Respondents.

v.

Loke Nath Roy and others—Plaintiffs—
Respondents.

Appeals Nos 339 of 1928 and 251 of 1929, Decided on 2nd February 1932, against original decrees of Sub-Judge, 3rd Court, Tipperah, D.: 31st May and 1st September 1928.

(a) Civil P. C. (1908), O. 21, R. 54 (2) — Attachment.

To render an attachment effective, the affixing of the prohibitory order on the Court-house is absolutely necessary: *A I R 1928 P C 183, Foll.* [P 212 C 2]

* (b) Civil P. C. (1908), S. 64—Attachment subsequent to execution of mortgage but before its registration does not affect mortgage—Registration Act (1908), S. 47.

An attachment subsequent to execution of the mortgage of the property attached but prior to the registration of the mortgage deed does not affect the mortgage, and the purchase at auction sale of the attached property cannot prevail over the mortgage lien: 32 I C 431, *Dist*; 22 W R 319; 11 All 319 (F B); 20 I C 385; 1 All 165 (P C); 2 C W N 207 and *A I R 1921 Pat 150, Ref.*; *A I R 1927 P C 42*; *A I R 1921 Mad 90*; *A I R 1923 Mad 282*; *A I R 1928 P C 86* and *A I R 1921 Bom 431, Appl*; *A I R 1925 Bom 210* and 40 Mad 204 (F B), *Rel. on.* [P 211 C 2]

Amarendra Nath Bose and Surendra Mohan Ghosh—for Appellants.

Atul Chandra Gupta, Bhagirath Chandra Das and Krishna Kishore Basak—for Respondents.

Judgment.—These two appeals have arisen out of a suit for foreclosure on a mortgage by way of conditional sale and are from the preliminary and the final decrees passed therein. Defendants 6, 7, 8 and 11 are the appellants. Defendant 1 is the mortgagor. He executed the mortgage on 23rd June 1916. On the same day, after being duly signed and attested, the deed was presented for registration and the executant's admission was taken, but the registration was not complete till 27th June 1916, which is the date the certificate of registration bears. Defendant 26, having obtained a decree for money in Money Suit No. 153 of 1915 against defendant 1 on 18th May 1916, put it into execution, and on 20th June 1916 obtained an order for attachment in respect of eight out of the properties covered by the mortgage. Two out of these eight properties are concerned in this appeal. On 21st June 1916 the writ of attachment was signed and issued and made over to the peon. As regards the

said two properties the prohibitory order was served in the locality on 22nd June 1916, but was not posted in the court-house till the 24th. On 24th February 1917 the attached properties were sold in auction and purchased by defendant 26. After the sale was confirmed and possession was delivered to defendant 26, he sold the said eight properties to defendant 29 on 25th May 1919. On 3rd January 1921 defendant 29 sold the two properties with which we are concerned to the appellants.

The first question we have been called upon to determine is what was the effect of the attachment upon the mortgage which defendant 1 made. In the Court below the appellants rested their claim upon the ground that the attachment was prior to the execution of the mortgage. This contention was resisted on behalf of the plaintiffs on the ground that to render an attachment effectual the affixing of the prohibitory order on the court-house is absolutely necessary, and inasmuch as such affixing was later in date than the execution the mortgage lien was not affected by the attachment. The Court below upheld the plaintiffs' contention. It is not disputed now that the view which the Court below has taken is correct; and indeed the correctness of the view can no longer be disputed: see *Muthiah Chetty v. Palanappa Chetty* (1). But, in this Court, it has been argued on the appellants' behalf that in view of S. 59, T. P. Act, no right was created under the deed until it was registered and that inasmuch as the registration admittedly took place after the attachment had been effectively made the mortgage was, having regard to S. 64, Civil P. C., void against all claims under the attachment. There is very little authority directly bearing on the question that has to be considered; the only decision in which something like the present question was dealt with is the case of *Veerakutty Koundan v. Ramasami Asuri* (2). In that case it was held that where between the dates of the execution and of the registration of a mortgage deed another unregistered mortgage bond is sued upon and the mortgaged properties are attached, that mortgage does not acquire priority over the regis-

1. *A I R 1923 P C 139=109 I C 626=55 I A 256=51 Mad 949 (P C).*

2. (1916) 32 I C 431.

tered mortgage either by reason of the decree thereon or by an attachment, order obtained in the suit. The effect of an attachment however does not appear to have been specifically considered in that case and so the decision is not of much assistance.

A number of decisions have been relied upon by the appellants to fix the point of time at which a document can be said to be registered: *Mt. Rohimoonnissa v. Abdulloh Khan* (3), *Harder v. Ram Lal* (1), *Veerappa Chetty v. Kadiresan Chetty* (5) and *Mohammed Ewar v. Birj Hall* (6). It is unnecessary to discuss these because it can never be and indeed has not been contended on behalf of the respondent that the mortgage deed in the present case was a registered document at the date when the attachment was effected. It has then been contended that in the case of a document, of which registration is compulsory, title does not pass until registration has been effected: *Paperaddi v. Norasireddi* (7), *Sheenarain v. Darbari* (8) and *Tilakdasi Singh v. Gour Narain* (9). But S. 17 of that Act says that a document which is registered operates from the time of its execution and not from the time of its registration. The real question to be considered therefore is whether this operation by virtue of S. 17 of the Act in respect of a deed duly executed but not registered, is in any way affected by an attachment effected in the meantime, having regard to the provision contained in S. 64, Civil P. C.

In some recent decisions of Indian Courts the effect of non-registration in the case of deeds of gift of which registration is compulsory under the law has been considered, and these decisions have subsequently been examined by the Judicial Committee. In the case of *Kalyanasundaram Pillai v. Karuppa Mooppanar* (10) the facts were these: a Hindu executed a deed of gift of part of his immovable property and delivered it to the donee, and on the following day adopted

a son and three days after he registered the deed. It was held that on delivery of the deed to the donee there was acceptance of the transfer within the meaning of S. 123, T. P. Act, 1882 and thereafter the gift became effectual subject to registration as required by S. 123. The opinions of the learned Judges of the Division Bench of the Madras High Court in that case will be found in *Kalyanasundaram Pillai v. Krishnaswami Aiyar* (11) and the judgment in the Letters Patent appeal therein is reported in *A. I. R. 1923 Mad. 282*. The same principle was laid down by the Judicial Committee in the case of *Venkatasubba v. Subba Rama* (12), the judgment of the Bombay High Court in which case is reported in *Subba Rama v. Venkatasubba* (13) their Lordships repeating what they had said in the case of *Kalyanasundaram Pillai v. Karuppa Mooppanar* (10). In *Kalyanasundaram Pillai's* case (10) their Lordships said:

"They are unable to see how the provisions of S. 123, T. P. Act, can be reconciled with S. 47, Registration Act, except upon the view that while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest, within the prescribed period. Neither death nor the express revocation by the donor, is a ground for refusing registration if the other conditions are complied with."

Applying these observations, if they are applicable, to the case of a mortgage it may well be said that while registration is a necessary solemnity in order to the enforcement of a mortgage of immovable property, it does not suspend the mortgage until registration actually takes place. It has been contended, however that what was laid down by their Lordships of the Judicial Committee in the case aforesaid has no bearing upon the question now before us. This has been said firstly, because by reason of

3. (1874) 22 W R 319.
4. (1889) 11 All 319=(1889) A W N 101 (F B).
5. (1913) 20 I C 385.
6. (1879) 1 All 465=4 I A 166 (P C).
7. (1893) 16 Mad 464.
8. (1898) 2 C W N 207.
9. A I R 1921 Pat 150=59 I C 290=5 Pat L J 71F.
10. A I R 1927 P C 42=100 I C 105=54 I A 89=50 Mad 193 (P C).

11. A I R 1921 Mad 90=62 I C 280.
12. A I R 1925 P C 86=108 I C 367=52 Bom 313 (P C).
13. A I R 1924 Bom 434=80 I C 477=48 Bom 435.

Ss. 2 and 129, T. P. Act, 1882, the Hindu law which requires delivery of possession to complete a gift applied, whereas it is too late now to contend that under the Hindu law possession is necessary to complete the title of the transferee in any other case of transfer [*Kali Das v. Kanhya Lal* (14)]; and secondly because what was really considered by the Judicial Committee was a very different question, namely, whether a donor having done all that he had to do to make a valid gift, and when all that was necessary to make it effective was done and the document was incomplete merely on account of non-registration, could himself turn round and revoke the gift.

As regards the first of these grounds it is difficult to see how the distinction pointed out enures to the benefit of the appellants. The Hindu law or S. 122, T. P. Act, 1882, only imposes an additional condition for the gift to be effective the provision for registration remaining the same in the case of gifts as well as in the case of mortgages. So far as the second ground is concerned it is true that the present question was not the question before the Judicial Committee. But their Lordships' decision, carefully read, does not seem to us to proceed upon a disqualification attaching to the donor personally by reason of the fact that he had executed the deed of gift and handed it over to the donee; it proceeds upon a consideration of the legal position created by the fact that the gift was complete except for the registration. Their Lordships quoted a passage from the judgment of the learned Chief Justice of the Madras High Court in the case under appeal and did not express their dissent from it. On the other hand their Lordships affirmed the judgment and the decrees appealed from. The passage runs thus:

"The effect of these sections (i.e. Ss. 47 and 49, Registration Act), in my judgment, is that if a title is complete except for registration no subsequent alienation or dealing with the property by the vendor or donor as the case may be can defeat the title which on registration became an absolute title dating from the execution of the document."

It will be seen that the observations just quoted include not merely gifts but also sales. Their Lordships observed that they were in complete agreement with the Full Bench decision of the

Bombay High Court in the case of *Atma-ram Sakharam v. Vaman Janardhan* (15) and also approved of the Full Bench decision of the Madras High Court in the case of *Venkati Ram Reddi v. Pil-lati Rama Reddi* (16) subject to a qualification as to acceptance of the gift arising by reason of S. 122, T. P. Act. These Full Bench decisions, as well as the two dissenting judgments in the former of the two cases, dealt very fully with the question whether an executant of a deed compulsorily registrable has any locus penitentie to resile by reason of the fact that the title under it is incomplete for want of registration. These decisions are clear authorities for the proposition, which has thus obtained the approval of the Judicial Committee, that incompleteness due to want of registration is not a thing of which the executant can take any advantage, and that if the instrument is otherwise complete the executant is to be regarded as having done everything that was in his power to complete the transfer and to make it effective.

To consider the effect of S. 64, Civil P. C., the true nature of an order of attachment has to be realized. Form No. 21 of App. F to the Code, is the form of a prohibitory order for attachment of immovable property. It shows that by such an order the judgment-debtor is prohibited and restrained from transferring or charging the property by sale, gift or otherwise, and all persons are prohibited from receiving the same by purchase, gift or otherwise. At the stage at which the attachment in the present case was effected the transferor had done all that lay in his power to complete the transfer and to make it effective and the transferee had already taken the charge which had been so created in his favour, and all that remained was the solemnity to be gone through which was necessary to make it enforceable. We are accordingly of opinion that the attachment, such as it was in the present case, did not effect the mortgage. The result is that, in our judgment, the purchase by defendant 26 cannot prevail over the plaintiff's mortgage lien. In the view we have taken of the aforesaid matter no other question

15. A I R 1925 Bom 210=87 I C 490=49 Bom 388 (F B).

16. (1917) 40 Mad 204=88 I C 707 (F B).

14. (1885) 11 Cal 121=11 I A 218 (P O).

calls for our decision. But as two other questions have been argued before us on behalf of the appellants we think it right to record our views thereon.

One of these contentions was that the Subordinate Judge was in error in holding that defendant 29 in the matter of the purchase that he made from defendant 26 was merely a benamidar for defendant 1. We have examined the materials, bearing upon this question, in the light of the arguments addressed to us and we must say we are unable to come to any different conclusion. A careful perusal of the deposition of defendant 29 himself, apart from the other materials to which the learned Judge has referred, confirms us in the view that we take of this transaction. The scheme involved in this benami is a matter of some nicety and complication. The Subordinate Judge has gone into it in detail and with care and we are of opinion that his appreciation of it is correct. It will serve no useful purpose to repeat it here. The other contention is that the equities arising in favour of the appellants, on the footing that they were bona fide purchasers for valuable consideration from defendant 29 and without notice of defendant 1's title, have not been considered by the Court below. The Subordinate Judge appears to have disposed of this question with the remark that S. 11 (or S. 432), T. P. Act, is not applicable to the case. This remark of his, no doubt, does not adequately dispose of the question, but we do not know in what form the question was presented before him. Be that as it may, we have tried to come to a conclusion of our own on this question and we are met with the difficulty at the outset that the materials before us are, in our view, utterly insufficient to establish the fact or show such conduct on their part as would lead to the inference that they were bona fide purchasers. The only materials on the record to which they may point for a finding in their favour, so far as this matter is concerned, is the evidence of defendant 8, Ramdayal which in some material respects is in conflict with what defendant 29 has deposed, and the evidence of the witness Jahbar Ali. We have perused this evidence with care, but we are unable to hold in favour of the appellants. Apart from everything else the evidence makes it

clear that no inquiry was made by the purchasers to satisfy themselves as regards their vendor's title.

The result is that these appeals should in our opinion be dismissed with costs to the plaintiffs-respondents and we order accordingly. One set of hearing-fee will be assessed in the two appeals. The appellants, will be allowed time for three months more from today for redemption on payment of the amounts mentioned in the decree of the Court below.

S.N./R.K.

Appeals dismissed.

A. I. R 1933 Calcutta 215

MITTER, J.

Manmatha Nath—Appellant.

v.

Rakhal Chandra Mandal and another—Respondents.

Appeal No. 75 of 1930, Decided on 28th January 1932, against appellate decree of Addl. Dist. Judge, 24-Pargannas, D/- 20th August 1929.

(a) *Practice—Pleadings—Pleadings in mofussil should be liberally construed.*

The *lordships* in India have to be construed somewhat notwithstanding the fact that lawyers in general in the mofussil now are more fully equipped than the average mofussil lawyers of half a century or more ago.

[P 216 C 2]

(b) *Easements Act (1882), S. 15—Immemorial user or lost grant must be pleaded to obtain relief—Plea of long user—Inference of lost grant may be drawn—Civil P. C. (1908), O. 6, R. 4.*

The question of immemorial user or lost grant must be pleaded in every case before a person can be given relief on that head. Whether the action be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at Common law, or under the Act.

[P 217 C 2]

Where the plaintiffs did allege circumstances, namely, the user by themselves and by their ancestors of the land as pathway for 40 or 50 years, the plaint may on a liberal construction be taken to have relied upon long user leading to an inference of lost grant : 6 Cal 394 (P C), *Ref.*

[P 217 C 1]

Amarendra Nath Bose and Himanta Kumar Bose—for Appellant.

Dwipendra Mohan Ghose—for Respondents.

Judgment.—This is an appeal by the defendant and arises out of a suit for declaration of the plaintiffs' right of way

over a piece of land described in the plaint and for removal of the obstruction placed at one end of it by the defendant. There is also a prayer for perpetual injunction for restraining the defendant from obstructing the said pathway. The defence of the defendant to the suit was that there was no such pathway as alleged in the plaint, nor has the right been exercised for a sufficiently long time in order to entitle the plaintiffs to acquire right either by prescription or under the other heads of claim to which I shall presently refer. The Munsif decreed the plaintiffs' suit declaring the plaintiffs' right of easement as claimed in the plaint and directing that the obstruction be removed in execution of the decree. The Munsif decreed in full the plaintiffs' claim. On appeal the Additional District Judge has modified the decree by restricting the right to use the pathway as a footpath. He has disallowed the claim of the plaintiffs to use the pathway as a cart track.

Against this decision of the learned Additional District Judge of the 21-Pargannas modifying the judgment of the Munsif the present appeal has been brought, and three grounds have been taken by Mr. Amarendra Nath Bose who appears for the appellant. The first ground which he takes is that the appellant has been considerably prejudiced by the Courts proceeding on the footing that the plaintiffs claimed a right to this way on the basis of immemorial user. His contention is that if it had been so pleaded he might have made suitable defences to the claim. It becomes therefore necessary to examine the relevant paragraph of the plaint to see if the claim was based on user from which it might be inferred that the user was much in excess of the period of 20 years prescribed by the limitation Act, or in other words, whether there were allegations in the plaint which would lead to the suggestion that the plaintiffs were basing their claim apart from prescription also on immemorial user. Para. 5 is the paragraph which gives the statement of facts on which the cause of action in the present suit is based. In the first part of that paragraph it is stated that the plaintiffs and their ancestors have been using the disputed land as a pathway as of right without interruption for 40 or 50 years, and having thus used it they have

acquired a right of way over the disputed land.

It is stated in the second part that they have acquired also a right to this land as an easement of necessity; and thirdly it is stated that they having used the land at any rate for much in excess of 20 years without interruption and in their own right they have acquired easement of way over the disputed land. It is contended for the appellant that although the claim is rested on three heads the first and the third heads merely allege facts which suggest that the claim is founded on prescription and not on immemorial user. It is true and I think the comment is a fair one that the plaint is ill drafted and does not in terms suggest that the right was founded on immemorial user. But to my mind it seems difficult to understand the three heads of claim unless one reads the first head as referring to facts which would lead to the inference of immemorial user from which a grant may be presumed. There is no point in stating that the land had been used by the plaintiffs and their ancestors for a period of 10 or 50 years unless it was intended to convey the impression that apart from the right which is acquired by user of 20 years they have acquired a right by very long user. The learned Judge while dealing with this question says this with reference to the argument that no case of grant was made in the plaint:

"but the case of long user was certainly made though the words 'time immemorial' as the learned Munsif remarks were not used, and the existence of an ancient right derived from grant or otherwise is a presumption."

The pleadings in India have to be construed somewhat liberally notwithstanding the fact that lawyers in general in the mofussil now are more fully equipped than the average mofussili lawyers of half a century or more ago. Their Lordships of the Judicial Committee have made observations to the effect that pleadings of this country are not to be construed with the same strictness as pleadings in English Courts. It seems to me that although this plaint was drafted by a junior pleader it was revised as appears from the corrections made in the plaint by a pleader of considerable standing. It seems somewhat singular that the words "immemorial user" were not used although facts were alleged to convey the impression that the plaint

was founded on the case of immemorial user. It is difficult in the face of the case of *Maharani Rajroop Koer v. Abdul Hossain* (1) to say that the defendant should be given a further opportunity of meeting the case of immemorial user seeing that the plaintiffs did allege circumstances, namely, the user by themselves and by their ancestors of the land as pathway leading to Rai Bahadur's Rowd for 40 or 50 years. The Judicial Committee in the case to which I have just now referred made observations which are pertinent to the present controversy. Their Lordships stated:

"The object of the statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of 20 years, in covered under the conditions prescribed by the Act, to give, without more, a title to easements. But the statute is remedial, and is neither prohibitory nor exhaustive."

A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that in this case there is abundant evidence upon the facts found by the Court for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Munsif and of the Subordinate Judge, are thus stated in the judgment of the High Court:

"The evidence shows, and the Courts appear to have found, that the pyne was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years certainly more than twenty years for the purpose of irrigation; and it is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the pyne."

This being an artificial pyne, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since or at least down to the time of the obstructions complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought to refer such a long enjoyment to a legal origin, and under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's *mohal* and the defendants'

land by which the right was created. That being so, the plaintiff does not require the aid of the statute; and his right therefore is not in any degree interfered with by the provision in S. 27, upon which the Munsif decided. This question which has been raised by Mr. Bose assumes an important aspect as the defendant raised the plea of limitation under the statute and on the facts found it appears that the obstruction was much beyond two years of suit. The plaintiffs rested their case not only on prescription as I have said but on a liberal reading of the plaint on long user which might lead to the inference of lost grant. It is true that the effect of this somewhat ill-drafted plaint has been that the defendant had to pursue his remedies in the lower appellate Court as well as before this Court and there was some ground for his appealing both before the lower appellate Court and this Court. That really is a question of costs which I shall consider hereafter.

Mr. Bose has referred to a number of decisions where it has been held that the question of immemorial user or lost grant must be pleaded in every case before a person can be given relief on that head; and that no doubt seems to be so, as will appear from certain observations of the learned author in *Gale on Easements* 9th, Edn. 521. The learned author says:

"As the right can be established by the dominant tenement the pleading will state the possession of the tenement by the party, and that by reason thereof he was entitled to the right in question. That whether the action be brought against the servient owner or a stranger, a party cannot safely allege a right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at Common law, or under the Prescription Act; and in many cases it is advisable to plead alternatively a title by all three methods."

The learned author further points out that according to modern practice a lost grant if relied on should be pleaded. In this connexion Mr. Bose also referred to *Smith v. Baxter* (2). If I was of opinion that the plaint could not be construed as containing the allegation of very long user much beyond the period of prescription as prescribed by the Limitation Act I would have remanded

1. (1881) 6 Cal 394 = 7 I A 240 = 4 Sar 199 P C).

(2) (1900) 2 Ch 138 = 69 L J Ch 437 = 82 L T 650 = 48 W R 458.

the case. It seems to me that it is really due to legal advice that the plaint has been so drafted. The facts are there and it would not be right to allow the defendant further opportunity for he has to meet the case of long user made in the evidence and indicated in the plaint. The user was ever since 1866 when this pathway was shown in a particular document to which the present defendant was a party and the finding is that the user has continued ever since. Of course the Munsif was not very happy in his expression when he says that the oral evidence adduced by both the parties furthers the view that there was such a path and it never came into disuse. I asked Mr. Bose whether there is evidence to show on behalf of the plaintiffs that the pathway was being used for this length of time, and he answered in the affirmative.

It is not necessary in this view to consider the second question raised in this appeal as to whether the plaintiffs can succeed on the ground of easement of necessity as according to the findings of both Courts there is not another though inconvenient way.

The third ground taken is that there is no determination of the question of the width of the pathway. I think there is evidence to show that the width of the pathway was 6 feet and the evidence points to this: that this has been the width ever since 1866. The learned Judge has restricted the pathway to its use as a footpath and to that extent the decision of the Judge is in favour of the defendant.

The appeal must be dismissed. Having regard to the observations which I have made that the plaint is not absolutely clear on the question of immemorial user it is just that the plaintiffs will not have costs either of this Court or of the lower appellate Court. Subject to this slight alteration as to costs the appeal is dismissed.

M.N.

Appeal dismissed.

A. I. R 1933 Calcutta 218

JACK AND M. C. GHOSE, JJ.

A. Malcolm and another — Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 176 of 1932, Decided on 18th August 1932.

(a) Arms Act (1873), S. 19 (a)—Mere negotiation for sale to unlicensed person is no offence.

Where the sale of an arm was not completed, no offence was committed, as negotiations for sale to a person who has no licence is not in itself an offence. An offence under S. 19 (a) of the Act is only committed if the weapon is actually delivered to a person who has not got a licence.

[P 219 C 1]

(b) Arms Act (1873), S. 14—"Extent."

The word "extent" in S. 14 is not limited to territorial extent.

[P 219 C 2]

(c) Arms Act (1873), S. 19 — Weapon handed over to unlicensed person for negotiating sale—Such possession is no offence.

Where a weapon is made over to an unlicensed person merely for the purpose of negotiating a sale, such possession is not possession of the weapon with the intention of using it as a weapon. Such temporary possession is not possession as contemplated by the Act.

[P 219 C 2]

(d) Arms Act (1873), S. 19 (f) — Possession of arms after expiry of license even for a month is offence.

Possession of arms of which license has not been renewed is punishable under S. 19 (f) even though such possession is discovered within 30 days of the expiry of license.

[P 219 C 2]

J. Cammel, Probodh Chandra Chatterji, Bireswar Chatterji, Phanendra Nath Mukerji and Amiruddin Ahmed—for Appellants.

Khundkar and Anil Ch. Roy Chowdhury—for the Crown.

Judgment.—The appellants have been convicted under S. 19 (f) read with S. 14, Arms Act, and sentenced to periods of imprisonment and fines. The prosecution case is that an officer of the Customs Preventive Service received certain information on 4th January. The information was conveyed to the Superintendent of the Preventive Service who deputed an Indian Officer, Mr. Burman, to act as a bogus purchaser of an automatic pistol.

On the morning of 5th January they proceeded to Prinsep Memorial about 10-45 a. m. and after about an hour they saw the accused Malcolm come up to the memorial. The informer introduced Malcolm to Burman as the vendor and he said that the wished to sell the pistol which he produced. Negotiations then took place. The vendor wanted Rs. 440 for this revolver and another revolver which Malcolm said he had for sale. The bogus purchaser told him that he was willing to give him Rs. 300 for the pair. At this point by an agreed signal two other men from the Customs Department came up and arrested Malcolm. They found the pistol in his pocket. On his being seized he shouted

out for the other accused Betteley and they were both brought under arrest and later on produced at the thana where a license which had expired on 31st December was found with Betteley. The suggestion of the prosecution is that the whole of the transaction was illegal inasmuch as the accused intended to make a surreptitious sale to a person who was not entitled to possess the weapon, and that the license had been obtained by Betteley merely for the purpose of enabling him to effect this transaction. Mr. Greenfield, Superintendent, Customs Preventive Service, says that Mr. Mann, another witness, had informed him of the intended sale of the pistol as far back as October 1931, and it was then that he instructed him (Mr. Mann) to get into touch with Mr. Burnan who posed himself as the intending purchaser. It appears that the license for this pistol was not renewed in January. It appears from the statement made by Mr. Burnan in cross-examination that there was no intention of the immediate delivery of the pistol by the accused to him. He says that :

"Malcolm told him that he would deliver both the weapons together and I would pay him them."

As only one weapon was with him, it is clear that the delivery was intended to take place at a subsequent date. In any case as the sale was not completed no offence was committed, as negotiations for sale to a person who has no license is not in itself an offence. An offence under S. 19 (a) of the Act is only committed if the weapon is actually delivered to a person who has not got a license. But there has been an offence committed under S. 19 (f) inasmuch as the accused Betteley had in his possession or under his control an automatic pistol in contravention of the provisions of S. 14, Arms Act, inasmuch as his license had already expired on 31st December. It is true that such delay in the renewal of the license is not ordinarily prosecuted. There is a Rule (No. 82) in the Bengal Government Arms Act Manual to the effect that ordinarily applications received for renewal of license within 30 days after the date of expiry should be granted. But that does not affect the provisions of S. 19 which states that a person who has in his possession arms in contravention of the provisions of S. 14 commits

an offence. It has been argued that the word "extent" in S. 14 only refers to territorial extent, and in support of that reference has been made to form 16 and the conditions thereunder (which are found in Sch. 8, Arms Act Rules) in which "extent" in Col. 10 refers to territorial extent only, and condition three there also refers to territorial extent only.

But that does not limit the meaning of the word "extent" in S. 1 Arms Act. It is true that anyone who fails to deposit arms of which license has expired or who is in unlawful possession is also liable under Cl. (i), S. 19, Arms Act. But no authority has been shown to us limiting the meaning of the word "extent" in S. 14 to territorial extent. So that we think that the possession of arms of which the license has not been renewed is also punishable under S. 19 (f), Arms Act, read with S. 14.

As regards the possession of Malcolm we think where a weapon is made over merely for the purpose of negotiating a sale such possession is not unlawful inasmuch as it is not possession of the weapon with the intention of using it as a weapon. Such temporary possession is not possession as contemplated by the Act. We therefore think that Malcolm has not committed an offence under S. 19, Arms Act. In any case, as I have said, negotiations for a sale where no delivery took place would not be an offence. As regards the possession by Betteley we think that he has committed an offence under S. 19, Arms Act, inasmuch as he was admittedly in possession of this weapon after the expiry of the period of his license. Ordinarily under executive instructions no prosecution would result within 30 days. In the present case we agree with the finding of the learned Magistrate that both of the accused were trying to negotiate a sale surreptitiously. Such sales at the present time are highly reprehensible and we think that in the circumstances we would not be justified in not enforcing the provisions of the law as regards the illegal possession of this weapon beyond the period of license. In assessing the punishment for this offence we cannot take into account the intention of the accused to negotiate this illicit sale as part of the offence of retaining unlicensed arms in his possession, and we think for that offence a

sentence of a fine of Rs. 50 will be sufficient punishment.

We therefore set aside the sentences which have been passed on both of the accused. We acquit Malcolm but convict Betteley under S. 19 (f), Arms Act, and sentence him to pay a fine of Rs. 50 in default to undergo rigorous imprisonment for three months. Malcolm is discharged from his bail bond and Betteley will be discharged from his bail bond on payment of the fine. The appeal is disposed of accordingly.

K.S. *Order accordingly.*

A. I. R. 1933 Calcutta 220

RANKIN, C. J. AND C. C. GHOSE, J.
Gouri Kinkar Bhakat—Appellant.

v.

Messrs. Radhat Kissen Cotton Mills—
Respondents.

Appeal No. 108 of 1931, Decided on 4th August 1932, against original order of Commr. Workmen's Compensation, Bengal, D - 24th November 1930.

(a) **Workmen's Compensation Act (1923).**
S. 19—Finding as to employment of workman and how accident occurred should be given.

In writing an order it is for the commissioner to state his findings as to what the applicant's employment or duties were—what he was engaged to do; and then to go on to state his findings as to how the accident in fact happened to decide whether the accident arose out of the employment. [P 221 C 1]

(b) **Workmen's Compensation Act (1923).**
S. 30—Question of law—Whole case is open.

In cases under the Act if a substantial question of law arises the High Court is entitled to consider the case as a whole on points of fact as well as on points of law. [P 221 C 2]

(c) **Workmen's Compensation Act (1923).**
S. 3—Injury by added peril disentitles workman from compensation.

If the injury was occasioned by an added peril which the workman brought about by interfering unnecessarily with a fenced off part of the machine while it was working he is not entitled to compensation. [P 222 C 1]

Rabindra Nath Chaudhuri—for Appellant.

Jatindra Mohan Ghose—for Respondents.

Rankin, C. J.—This is a workman's appeal against a decision of the Commissioner under the Workmen's Compensation Act rejecting a claim to compensation made on the ground that the applicant sustained an injury on 19th March 1930 while working in the spinning department of a cotton mill. The applicant's case is that he was a piecer, that his duty was to tie broken ends of cotton

threads, that while he was standing by the machine and putting a bobbin on a spindle the bottom of his dhoti got caught between two rollers which were underneath the table of the machine and he says that the bottom of his dhoti having been caught between the two rollers was pulled in, that he put out his hand to try to pull it out and that in that way his hand got crushed. It seems that as a result of the injury his arm had to be amputated an inch or two below the shoulder. The employers make the case that it was quite impossible for a person standing by the machine and either putting a bobbin on a spindle or doing his proper work as a piecer to get his dhoti caught between the two rollers in the manner alleged. It is further said that at the time of the accident the applicant said both to the doctor and to the manager that he had got his arm crushed in a different way altogether, namely that he was trying to remove a torn spindle banding from the tin rollers while they were in motion. It was no part of the applicant's duty to interfere with the tin rollers. It is not contended that it was any part of his duty to take out any torn spindle banding from the tin rollers. The tin rollers were underneath the table altogether and the underneath part of the table was fenced off in the manner which has been described so that it would be necessary, to get one's hand into the tin roller to stoop down and reach out underneath the table.

The learned Commissioner had several witnesses called before him for the applicant. There is the applicant's own evidence as to his dhoti being caught by a roller. There were fellow workers with him who came and said that they saw his dhoti caught in the roller. But some of the corroborative witnesses appear to have been of a very poor quality and some of them also do not profess to have seen the actual commencement of the accident. Against that there was the evidence of the doctor and the evidence of the manager, and the learned Commissioner on two occasions examined the machine very carefully for himself. He has come to the conclusion—and from his description of the machine it is evidently very clear—that the story that the dhoti got caught between the rollers when he was standing by the machine attending to his duties is entirely impossible and

must be disbelieved altogether, it not being possible for the dhoti to have got caught in that way. That is a finding of fact based upon his own examination of the machine, but it can be seen by this Court to be very well based indeed by reason of the description of the machine given by the Commissioner. That being so the Commissioner says:

"I do not believe that the accident happened through the applicant's dhoti being drawn into the machine. His case that it arose out of his employment is based upon this and I see no other way in which it could have arisen out of his employment, though it might very easily have happened as stated by the opposite party."

Now, one way to deal with a case of this character would be for the learned Commissioner to state his findings as to what the applicant's employment or duties were—what he was engaged to do; and then to go on to state his finding as to how the accident, in fact, happened. The learned Commissioner's judgment has given a good deal of trouble by reason that it does not follow this course. It does not state properly what the duties of the applicant were. It is not expressly stated whether the Commissioner was satisfied that rules were made or orders given that these pieces were not to meddle with the machinery while in motion. As, however, that is admitted by the applicant in his evidence, it does not very much matter. It is much to be wished however that the Commissioner had come to some more specific findings of fact as to how the accident happened. If the story as to the dhoti being caught is disbelieved, the applicant is found to be basing his case upon a false story. In that case one asks oneself why should not the evidence of the doctor and the manager be believed? It does not appear to me that the statement "though it might very easily have happened as stated by the opposite party" is a sufficient statement in the circumstances. The difficulty in dealing with the question whether the accident arose out of his employment without finding how the accident arose and going carefully into the limitations that had been put on the duties of the applicant is very considerable. In one case, for example, *Mrs. Margaret Thom*, or *Simpson v. Sinclair* (1), (though it was not a case quite of the

present character) it was said by Lord Shaw of Dunfermline:

"I think that the statute is not satisfied by asking the question as to whether the nature of the employment of the injured person had any causal relation to the accident, because it is clear that in very many instances the accident arose out of the employment as such, apart from the particular nature of the service which the injured workman had to render";

and in another passage the same learned Lord says:

"My view of the statute is that the expression 'arising out of the employment' is not confined to 'the mere nature of the employment.' The expression, in my opinion, applies to the employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply. If the peril which he encountered was not an added peril produced by the workman himself, as in the cases of *Plumb v. Cobden Flour Mills Co.* (2) and *Barnes v. Nunnery Colliery Co.* (3) in this House then a case for compensation under the statute appears to arise."

I cannot say therefore that I am at all satisfied with the observation "I see no other way in which it could have arisen out of his employment"; and if the question before us was a question to be decided merely by criticism of the learned Commissioner's judgment there would be a great deal to be said for the applicant. We have however to consider this case as a whole. If a substantial question of law arises we are entitled to do so on points of fact as well as on points of law. From this standpoint it appears to me plain enough that this is one of those cases where it is shown that the injuries arose to the applicant by reason of what has been described in the language I have just quoted as "an added peril produced by the workman himself." Similar cases may be found in the books. The case to which reference was made in the case cited is the case of *Plumb v. Cobden Flour Mills Co.* (2); and the principle that has often been laid down may be stated in the language of Lord Dunedin (quoting and adopting Lord Loreburn) thus:

"Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a

1. (1917) A C 127=86 L J P C 102=(1917) W O & I Rep 164=116 L T 609=61 S J 350=38 T L R 247.

2. (1914) A C 62=83 L J K B 107=30 T L R 174=58 S J 184=109 L T 763=(1914) W O & I Rep 48.

3. (1912) A C 44=81 L J K B 213=(1912) W O & I Rep 90=28 T L R 135=56 S J 159.

genuine prohibition, then I should say that the accidental injury did not arise out of his employment."

Without entering into any question whether this boy was guilty of such wilful conduct as is mentioned in S. 3, sub-S. 1 (b), Workmen's Compensation Act of 1923, I am satisfied that the duties of a piecer do not include anything which requires his getting down underneath the table and interfering with the tin rollers while they are in motion. According to the applicant's own statement of his duties they do not include anything of the kind. His own version of his duty is that he has to join ends of threads when the machine is in motion; and the underneath part of the table is fenced to keep him out. Therefore his story as to the dhoti being caught while he was merely standing by the machine being found to be impossible, the applicant is, in the particular circumstances of this case, under the very strongest suspicion of having been doing something underneath the table which he desires to conceal because it was altogether outside his function. I see no reason at all why the evidence of the doctor or the manager as to what the lad was doing should not be accepted. I do not know why the learned Commissioner has not said that he would accept it or does not give some reason for not accepting it. In my judgment it is proved on the facts of this case that the injury was occasioned by an added peril which the lad brought about by interfering unnecessarily with a fenced-off part of the machine while it was working. In these circumstances the appeal fails and must be dismissed with costs. Hearing-fee two gold mohurs.

C. C. Ghose, J.—I agree.

M.N. *Appeal dismissed.*

A. I. R. 1933 Calcutta 222

MITTER AND S. K. GHOSE, JJ.

Nanda Lal Roy and others—Appellants:

v.

Pramatha Nath Roy and others—Respondents.

Appeals Nos. 332 and 370 of 1928, Decided on 14th March 1932, from original decrees of Sub-Judge, 5th Court, Dacca, D/- 28th February 1928.

(a) **Fishery**—Title to tidal and navigable river can be proved by express or presumed grant from Crown.

Burden of proof of title to an exclusive fishery in a tidal, navigable river can be discharged by

proving an express grant or by giving evidence that a grant though not capable of being produced will be presumed: *A I R 1914 P C 48* and *11 Cal 434, Ref.* [P 227 C 1, 2]

(b) **Evidence Act (1872), Ss. 42 and 13**—Judgment declaring person to be auction-purchaser though not inter partes is admissible.

A previous judgment in which one of the parties successfully asserted that he was the owner of certain properties as purchaser at revenue sale although not inter partes is admissible in evidence as evidence of a transaction and assertion of title under S. 13: *22 Cal 533 (P C), Rel on.* [P 228 C 2]

(c) **Fishery—Conduct of proprietor must be considered in determining possession.**

The course of conduct which the proprietor might be expected to follow with regard to his own interest must be taken into account in determining the sufficiency of a possession of the fishery. [P 229 C 1]

(d) **Deed—Recitals—Evidentiary value of.**

Repeated assertions of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute a prima facie title: *Briston v. Cormican*, (1878) 3 A C 641, *Ref.* [P 229 C 2]

(e) **Civil P. C. (1908), S. 11**—Previous decision—Pleadings and circumstances should be considered.

It is necessary to examine the decision and the pleadings and the circumstances which led to the decision if it is to operate as res judicata. [P 230 C 1]

(f) **Civil P. C. (1908), S. 11**—Applicability depends on identity of issues and not subject-matter.

The rule of res judicata, does not depend upon the identity of the subject-matter, but it depends on the identity of the issues. [P 230 C 2]

(g) **Civil P. C. (1908), S. 11**—Substantial effect of previous decision must be considered.

In order to consider whether a previous decision is res judicata or not the substantial effect of what has been decided in the case has to be considered. [P 230 C 2]

(h) **Evidence Act (1872), S 87.—Rennel's map.**

Rennel's map indicates correctly the course of rivers, but it cannot be regarded as giving correctly the direction of villages. [P 231 C 1]

(i) **Decree—Value of—Decree for rent not executed—Probative value to prove possession is small.**

A decree for rent is certainly evidence of possession of the decree-holder, but its probative value is very small if the decree is not proved to have been executed and the rent realized: *Neil v. Duke of Devonshire*, (1882) 8 A C 135, *Ref.* [P 232 C 1]

(j) **Adverse Possession—Mere participation of rent is not sufficient for ouster.**

Mere participation of the rent and profits of jalkar without more by the co-sharers even for a long period of time is not sufficient to constitute ouster: *Corsa v. Appuhamy*, (1912) A C 230 and *A I R 1918 P C 1, Ref.* [P 232 C 2]

Jogesh Chandra Roy, Rupendra Coomar Mitter, Bankim Chandra Banerjee and Nirmal Chandra Chakravarti—for Appellants.

D. N. Chakravarty, Sarat Chandra Basak, Gunada Charan Sen, Prakash Chandra Mazumdar and Ashita Ranjan Ghose—for Respondents.

Mitter, J.—Four main questions fall for determination in this appeal by the plaintiffs: (1) whether the plaintiffs have established their title to the fishery known as the Bikrampur Jalkar in the tidal and navigable river Padma; (2) what is the boundary between their jalkar and the respondents' (defendants 1 to 5) fishery known as the Mukundia Jalkar; (3) whether the plaintiffs have lost their title by adverse possession of the defendants to the portion of the fishery now in dispute and (4) what is the legal effect of the proceedings of 1816, 1843 and of the award of the arbitrator in certain suits instituted in 1909. The principal contestants to the appeal are Raja Janaki Nath Roy, a gentleman possessed of considerable wealth and his nephews.

In this action plaintiffs claimed a decree for recovery of joint possession with their co-sharers to the extent of their three annas two gundas one kara one kranti one danti shares in that portion of the fishery which is described in Sch. 2 to the plaint after declaration of their title as proprietors to the fishery described in Sch. 1 to the plaint of which the property in Sch. 2 is claimed as forming a part. The plaintiffs also rested their claim to the disputed portion of the fishery on the ground of adverse possession for more than the statutory period of 12 years. In the alternative they claimed that if the right to the disputed fishery (jalkar) be not established on the ground of their title as proprietors or on the ground of adverse possession they may be given a declaration that they have acquired

"a right of easement and prescriptive right on the ground that they have been holding possession of the said right in succession to their predecessors for upwards of 60 years openly, peaceably, uninterruptedly and as of right."

They also claimed a decree for the sum of Rs. 536-10-3 as their share of the profits of the disputed jalkar during the pendency of the proceedings under S. 145, Criminal P. C., which had been withdrawn by the defendants and also claimed tentatively the sum of

Rs. 1,600 as mesne profits. The plaintiffs failed before the Subordinate Judge of Dacca. Hence this appeal to this Court.

The case as stated in the plaint is that there is a jalkar mehal described in Sch. 1 to the plaint known by the names of Nadi Padmabati, Balabanta Narhi Korha and others, that this jalkar mehal was in very ancient times an independent jalkar, that it was subsequently incorporated in zamindari 1 of the touzi of the Collectorate of Dacca and the Sadar jama of the said zamindari was fixed at Rs. 1,222-8-4 that the boundaries of the jalkar portion now in dispute is given in Sch. 2 of the plaint; that one-third of the jalkar formed the howla of Shamdas Pal within the said zamindari and the remaining two-thirds of the jalkar remained in the khas possession of the maliks; that the zamindari stood in the name of Raj Krishna Roy; that it was sold for arrears of Government revenue on 24th August 1832 (Bhadra 1239 B. S.) and was purchased in the name of Prem Chand Roy, father of Raja Sreenath Roy, defendant 1, who died pending this action and Raja Janaki Nath Roy (defendant 2) and grandfather of defendants 3 and 4, Jadu Nath Roy and Priya Nath Roy and Iswar Chand Desmukhya in equal shares; that the eight annas purchased by Prem Chand was for the benefit of himself and his three uterine brothers Guru Prosad Roy, Hari Prosad Roy and Chaitanya Das Roy, that Iswar Chandra sold his eight annas share of the zamindari to Trilochan Chatterjee who in turn sold the eight annas to the Pal Choudhuries of Lohajung; that the Pal Choudhuries and others dispossessed the Roy Choudhuries from a portion of the jalkar described in Sch. 1 and a suit was instituted by Prem Chand Roy for recovery of joint possession of the disputed portion of the jalkar and was fought up to the Sadar Dewany Adawlut and was decreed with mesne profits; that the plaintiffs as well as defendants 1 to 5 are descendants of the Roy Chowdhuries and plaintiffs have got certain shares in the jalkar which are detailed in paras. 13, 14 and 15 of the plaint.

The plaint proceeds to refer to several proceedings in support of their title and possession, viz., Suit No. 22 of 1851, in the Court of the Principal Sudder Amin of Dacca, the resumption proceedings of

1861, Suit No. 374 of 1864 in the Court of the Munsif of Narayangunge against the Government and the ijaradars of the Government, and rely on the principle of equitable estoppel against defendants 1 to 5 on the basis of what transpired in the course of these suits and proceedings. It is not necessary to refer to the history of these suits and proceedings now, as they will have to be referred to in detail hereafter. In para. 7 of the plaint the plaintiffs refer to certain demarcation proceedings under Act 5 of 1875 and refer to important admissions alleged to have been made by the principal defendants or their predecessors in the petition of objection as to the description of the upstream limit of the plaintiffs' jalkar now in dispute. The plaintiffs then proceed to state that with regard to a portion of the jalkar described in Sch. 1, to the plaint which is marked as A, B, C, D in the sketch map attached to the plaint and which lay within the district of Faridpur proceedings under S. 145, Criminal P. C., were started and the first party to the said proceedings were the principal defendants 1 and 2 and Roy Sitanath Roy father of defendants 3 and 4 and the principal defendant 6 and some other persons and plaintiff 7 and the predecessor of some of the plaintiffs and some cosharer pro forma defendants were the second party to the said proceedings and the jalkar was attached under S. 145, Criminal P. C.

The plaint further states that in those proceedings the first party described the portion marked A, B, C, D in the annexed map as included in mehal char Mukundia bearing Touzi No. 4,000 of the Faridpore Collectorate and the second party described the said portion of the jalkar as included in Sch. 1, and appertaining to Zamindary No. 1, Raj Krishna Roy; that aggrieved by the order of attachment three title suits were instituted, one by some of the principal defendants (which includes some of their predecessors), the second by some of the present plaintiffs (which term includes their predecessors as well) and the third by the Pal defendants in different Courts in Faridpur and all these were referred to the arbitration of Mr. Sarada Charan Mitra, formerly a Judge of the High Court of Calcutta, who after taking evidence given an award, that by the said award he decided that the ujan (ups-

tream) simana (limit) of the jalkar described in Sch. 1, of this plaint was the ujan simana and was represented by the line E F as in the map annexed to the plaint and held that the plaintiffs and the cosharer defendants were entitled to the portion of the jalkar marked A, B, C, D in the annexed map and the Court ordered a decree to be made on the said award and the appeal against the said award was dismissed, that the principal defendants are bound by the decision in the title suits and are estopped from questioning the findings in the said suit by reason of the rule of res judicata. The plaint next alleges that in the year 1917 another proceeding was started under S. 145, Criminal P. C., in respect of the jalkar now in dispute in which the plaintiffs pro forma defendants 15 to 24 were the first party and the principal defendants were the second party and the Magistrate decided that the second party were entitled to the possession of the same by his order dated 31st October 1918, that during the pendency of the 145 case the disputed jalkar was attached and Rs. 2750 was collected from the said Mehal by making settlement by auction and this sum was deposited in the Dacca criminal Court and was unjustly withdrawn by the defendants.

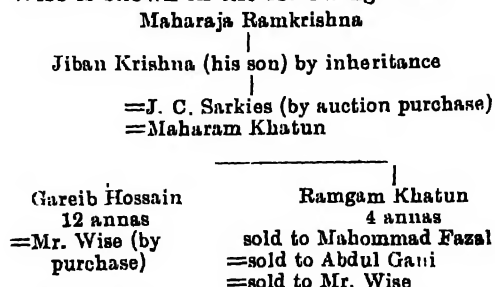
The order of the criminal Court has given rise to the cause of action for the suit which was brought on 30th September 1921 within three years from the date of the order under S. 145 of the Code. In para 10 of the plaint the plaintiffs say that they and their predecessors in interest have been in adverse possession of the jalkar for upwards of 70 years and have also acquired a right by adverse possession. In para 11 of the plaint the plaintiffs alleged that plaintiffs and their predecessors have continued to hold possession of the jalkar as of right, peacefully, unobstructedly without any interruption for 70 years on receiving rents, kabuliats and fish from the dealers in fish, by granting ijara settlements for a term fixed to them, and by holding the same in khas possession and they have acquired a prescriptive right and right by easement therein. On these allegations plaintiffs ask for the reliefs mentioned in the beginning of the judgment. Nothing further need be said about plaintiffs' claim based on "prescriptive right and

right by easement" as the claim on this basis has been abandoned in this Court. Several of the defendants filed their written defences but as they generally follow the same lines it is sufficient to set forth the defence raised in the written statement of the principal defendants 1 to 4.

These defendants contend (1) that the suit is barred by limitation; (2) they admit that the plaintiffs, defendants 1 to 5, the defendant 15 and defendants 16 to 35 have got Zamindari right in Zamindari 1, Raj Krishna Roy and defendants 16 to 94 have got howla right in one-third share of the Howla Shamdas Pal but they deny that the jalkar (fishery) described as lying within the boundaries mentioned in Sch. 1, in its entirety and the jalkar described in Sch. 2 are included in the said Zamindari 1 on the Howla Shyamdas Pal; (3) they deny all knowledge of the revenue sale of the Zamindari 1, Raj Krishna Roy in the month of Bhadra 1239 B.S. They deny the possession of Prem Chand and Desmukhya in the disputed jalkar, on the other hand they say that the Zamindar of Char Mukundia had been in possession of the disputed jalkar even from before the permanent settlement and the maliks of Zamindari 1 had not been in possession; (4) they contend that they are not bound by the decision in Suit No. 22 of 1851, by the resumption proceedings of 1831 as the proprietors of Char Mukundia (their predecessors) were no party to the said two decisions; (5) they contend that they are not bound by the decision in the suit brought by their ancestor Prem Chand Roy against Pal Babus and Gopi Mohan Sen inasmuch as the owner of char Mukundia, the predecessor-in-interest of the defendants were no parties to the suit and this decision is no evidence against them; (6) they contend that neither the decision in Suit No. 22 of 1851 nor the statements of the plaintiffs in the said suit can be used as evidence against them as the owner of Char Mukundia was not party to the said suit; (7) they contend that the statements of plaintiffs predecessors cannot be used in their favour; (8) they say that in the demarcation proceedings of 1903 neither defendants 1 and 2 nor the father of defendants 3 and 4 made any statements or sign any papers and that the state-

ments were made by the ijmal officers who acted under the direction of the plaintiffs; (9) they do not admit the accuracy of the map filed with the plaint; (10) they say that the arbitrator did not decide the question of the boundary between the two jalkars and allege that the subject matter of the dispute in respect of which the award was given became dry chur immediately after the decision of the proceedings under S. 145 which gave rise to the three title suits which culminated in the award; they contend that the award cannot operate as res judicata on the question of boundary.

(11) They contend further that neither the maliks of zamindari No. 1 nor those of Howla Shamdas Pal ever acquired any indefeasible right by adverse possession to the disputed jalkar. They next raise the defence that the plaintiffs the pro-forma defendants and the principal defendants 1 to 5 jointly own and possess the jalkar as lying within the boundaries of Sch. 1 excluding therefrom the boundaries of the Sch. 2 and the jalkar lying to the south thereof. These defendants then proceed to set forth their own title to the jalkar of Char Mukundia. There was a zamindari Char Mukundia and others Sarkar Fyzabad and others and there was a several fishery called Nadi Balabanta Bil Baor in the public tidal navigable river Padma, Padmabati or Ganges. These two separate mehals carried separate jamas; afterwards they were incorporated into one Touzi, viz., 110 at the time of the permanent settlement which has become touzi 4000 of the Faridpur Collectorate. It carries a Sadar jama of Rs. 3,142-10-3. The devolution of the zamindari from Maharaja Ram Krishna Roy to Mr. J. P. Wise is shown in the following chart.



Mr. Wise on whom the zamindari devolved eventually granted a Patni settlement in respect of the jalkar mahal to Girish Chandra Guha in 1279 B.S.—

1872 A. D. Girish Chandra had 10 annas 8 pies share in the patni. Bepin had the remaining 5 annas 4 pies in the same. Girish mortgaged his 10 annas 8 pies share of the patni to Raja Sreenath Roy, Raja Janaki Nath Roy and Rai Sita Nath Roy Bahadur, father of defendants 3 and 4, and in execution of the mortgage decree the mortgagees purchased the 10 annas 8 pies share of Girish in the patni in the year 1882 and took possession of the same in the same year and the remaining 5 annas 4 pies share are in ownership and possession of defendants 5 to 9. Mr. Wise sold the zamindari interest and the jalkar right to one Mr. David and defendants 1 and 2 and father of defendants 3 and 4 purchased the same from the Administrator General when David's estate had been in his hands in the year 1301 B. S.=1894 A. D.

Defendants 1 and 4 give in a schedule attached to the written statement the boundaries of their jalkar which is known as Nadi Balawanta a local name for river Padma. They contend that the allegation that upstream of the jalkar claimed by the plaintiffs was Bangabaria and Narikelberia is false. They refer to a case under Regn. 49 of 1793 between plaintiffs' and defendants' predecessor by which it was decided that the downstream limit of their jalkar extended upto the south of Char Sahabdi, they contend that decree of 1816 inter partes operates as res judicata on the question of boundaries between the two jalkars. The upstream limit of the Bikrampur Jalkar they say has never been on the upstream side of the southern boundary of the said Char Sahabdi. They contend that they are not bound by the proceedings in the suit between Prem Chand Roy, their ancestor, as owner of the Bikrampur Jalkar and his co-sharer the Pal Babus and Gopi Mohan Sen. They insist that the plaintiffs have no right to the jalkar claimed by them on the upstream side of the mouth of river Satar. They contend that they have been in adverse possession of the jalkar described in Sch. 2 to the plaint for more than hundred years and have acquired a title by adverse possession. They say that the father of the defendants 1 and 2 or the grandfather of defendants 3 and 4 had no right to the Mukundia Jalkar before their purchase of the patni right and whatever right they had to the jalkar men-

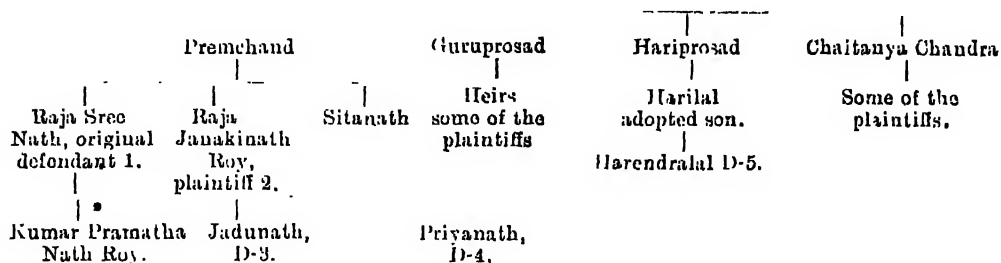
tioned in Sch. 2 of the plaint as co-sharers of the plaintiffs in the Bikrampur Jalkar have been extinguished by adverse possession for 100 years and knowing this these defendants purchased on 17th Aswin 1289 B. S. (1882 A.D.) 10 annas and 8 pies share of the patni right of Girish Gula under the owner of Char Mukundia and subsequently purchased the entire maliki right in 1301=1894 and have been in adverse possession in both the said patni and zamindari rights for upwards of 12 years against the owners of the Bikrampur Jalkar. Defendants 6 to 9 take the same line of defence except that they deny the title of the plaintiffs to the Bikrampur Jalkar. On these pleadings several issues were framed.

They are to be found at p. 161, B K A. It will not be necessary to refer in detail to all the issues as the controversy has been considerably narrowed down before the Court. I will deal first with the question of the title of the plaintiffs to the Bikrampur Jalkar. The first part of issue 20 is as follows: Have the plaintiffs any independent or several fishery in the Padma? On this issue the Subordinate Judge decided against the plaintiffs and he seems to be of opinion that the plaintiffs must fail as they have not produced a grant from the Crown or have proved a lost grant. The burden is undoubtedly on the plaintiffs to show that the Bikrampur fishery has come to them under a valid and effectual grant from the Crown which has been sustained by the continuous use and employment of themselves, and their co-sharers and their predecessors. It is now well settled that title to an exclusive fishery in a tidal, navigable river can be established by proving an express grant or by giving evidence that a grant though not capable of being produced will be presumed. Bearing this in mind we proceed to discuss whether plaintiffs have established the title to the fishery which they describe in their plaint. They say, as has been stated already, that their jalkar was an independent jalkar and was included in zamindari of touzi No. 1 of the Collectorate of the district of Dacca and the Sudder jama of the said zamindari No. 1 along with the said jalkar was fixed at Rs. 1,222-8-4. A one-third share of the jalkar formed the Hqwla Shamdus Pal for which a fixed jama was

payable to the maliks of the said zamindari and the remaining two-thirds share was held in khas possession by the maliks who used to enjoy the same by granting leases to fishermen. This is not now disputed by the defendants-respondents.

This zamindari, the plaintiffs allege, was sold at auction for arrears of Government revenue in Bhadra 1239 B. S. 1832, when it was purchased in the names of Prem Chand Roy Choudhury and Iswar Chandra Das Mukhya in equal

shares. The purchase is not disputed, but what is disputed is that the purchase was not at a revenue sale, a matter to which we shall return hereafter. The purchase by Premchand in respect of the eight annas share is not disputed. It is not disputed that the purchase was for the benefit of Premchand and his three brothers, the predecessor of the plaintiffs and defendant 5. The following genealogical tree shows the relationship between plaintiffs and defendants 1 to 5.



It appears that plaintiffs and defendants 1 to 5 jointly owned the 8 annas share of the jalkar which was settled with touzi No. 1. There is no dispute as to shares of the plaintiffs in the jalkar whatever the limits of the jalkar are determined to be and therefore we have not thought it necessary to detail the shares of the plaintiffs and defendants respectively in the said jalkar. In this case it is true that no grants from the Government in the shape of pattas have been produced. But that fact will not affect plaintiffs' title if circumstances exist from which such a grant can be inferred. In dealing with this question it is important to remember what has been said by their Lordships of the Judicial Committee of the Privy Council in the case of *Sreenath Roy v. Dinabandhu Sen* (1), where the title of the defendants in the Mukundia Jalkar was challenged by the Sens. At p. 227 (of 41 I. A.) their Lordships said this: "Although, on the other hand, when Government has created a separate estate of jalkar at the period in question it is usual to find some entry of it in the decennial settlement papers, no evidence was forthcoming to show that jalkar grants made prior to the decennial settlement or that settlements with zamindars made at the time of it must necessarily have taken the form of pattas or some other muniments

which should now be in the zamindar's possession, or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user: (Garth, C. J., in *Haridas Mal v. Mahommed Jaki* (2)."

In the case before us such secondary evidence exists and it is of such a character that we have no hesitation in saying that such a grant should be inferred. Indeed such a grant was recognized by the Government. In a proceeding between the Government and the proprietors of the Bikrampore Jalkar Government recognized that the Bikrampore Jalkar whose upstream limit was Dookhali belonged to the predecessors of the present plaintiffs and had been in existence from before 1195 B. S., prior to the date of the permanent settlement of 1793. It appears that in the year 1861 the Government assessed rent in respect of that portion of the Bikrampore jalkar from Bagra to Khaliya Bagra, a portion downstream of the portion of the jalkar now in dispute and Premchand Roy, predecessor of defendants 1 to 4 and Harilal Roy predecessor of defendant 5, as well as the plaintiffs' predecessors objected to the assessment and claimed that their jalkar whose upstream limit

was the peepul tree or aswatha tree in the house of Kaimuddi Chakladar of Jonojat on the northern bank of the river and the house of Sadananda Guha of Deokhali on the southern bank and the downstream limit was Dadpur and Matibhanga, etc., was their jalkar from before the date of the permanent settlement and should be released from assessment and their objection was allowed. The Deputy Collector was satisfied from the papers which consisted of decrees of Courts and a certain kobala of the year 1195 B. S., that Nadi Padmabati of defendants 1 to 9 which included Premchand Roy was not excluded in the decennial settlement from the Bikrampore zamindari No. 1 Raj Krishna Roy which admittedly belong to the plaintiffs and defendants 1 to 5: see B. K. B/188 Rubakari Ex. 17 (c). This decision was affirmed by the Commissioner on 24th April 1862.

Apart from this there was dispute between the proprietors of Bikrampore Jalkar and the Mukundia Jalkar regarding the boundaries between the two jalkars so far back as the year 1197 B. S., as will appear from the Rubakari of civil Court of District Jalalpur, Ex. H B K B, p. 51 and this is undoubted evidence that the right of the proprietors of the Bikrampore zamindari was recognized by the proprietors of Char Mukundia zamindari and the dispute was as to the boundaries: see B L B, p. 55 1 to 10. Indeed it is admitted before us by Mr. Dwarkanath Chakravarty who appears for the Raja defendants that the Bikrampore zamindars had a jalkar downstream of the Mukundia Jalkar and the same admission is made before us by Mr. Gunada Charan Sen who appears for defendants 5 to 9. Plaintiff's predecessor as well as the brothers of Premchand the predecessor of defendants 1 to 4 purchased the Bikrampore fishery at a revenue sale in the year 1832=1239 B. S. The defendants while admitting the purchase of the Bikrampore Jalkar by Premchand for himself and his brothers deny that the purchase was made at a sale for arrears of Government Revenue. Indeed it is too late now to raise the contention for it appears from a decision of the year 1852 of the Principal Sudder Amin of Dacca in which Premchand Roy was the plaintiff and the Collector of Dacca on behalf of the Government was the defen-

dant it was asserted by Premchand Roy that he had along with Desmukhya defendant purchased the Bikrampore zamindari at a revenue sale in the month of Bhadra 1239 B. S., corresponding to 1832: see Ex. 16 dated 15th June 1852 Book B-87 (bottom) and that position was accepted by the Court and the plaintiff obtained a decree against the Government. It is certain that this is good evidence of the assertion by Premchand of his purchase at a revenue sale. If Premchand was not a revenue sale purchaser the fact would at once have been challenged by the Government. Indeed the denial of defendants 1 to 4 in this behalf is very evasive for they say in para. 4 of the written statement that they are not aware of the revenue purchase. It is difficult indeed for defendants 1 to 4 to say that their ancestor Premchand was making an untrue assertion in this respect in 1852, and the written statement is therefore put in that evasive form. The Subordinate Judge says that the decree Ex. 16 of 1852 where there is recital about the revenue purchase by Premchand Roy is not admissible in evidence against the owners of Mukundia Jalkar as they were no parties to the said suit. That decree Ex. 16 although not inter partes is admissible in evidence as evidence of a transaction within the meaning of S. 13, Evidence Act. It is too late now to contend after the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Ramranjan Chakravarty v. Ram Narain Singh* (3) that the decree is not admissible in evidence against the defendants. We are unable to follow the reasoning of the Subordinate Judge:

"that the recital is in first part of the decree and the defendants rightly question its binding effect: see B. K. A., p. 520, 115."

In the absence of any evidence to the contrary and having regard to the fact that the recital is to be found in a very ancient document (1852) by the ancestor of defendants 1 to 4 and having regard to the evasive nature of the written statements of defendants 1 to 4, we are of opinion that plaintiffs have proved the purchase of the Bikrampore Jalkar by Premchand at the revenue sale.

Mr. Jogesh Chandra Roy appearing for the plaintiffs-appellants have admitted

the title of defendants 1 to 4 in the Char Mukundia Jalkar and have admitted that the said jalkar appertains to Touzi No. 4,000 of the Collectorate of the District of Faridpur.

The question of boundaries is the more difficult. This dispute regarding boundaries between the two jalkars commenced in very ancient times. The proceedings of those times are fortunately on the record of this case. We are of opinion that the decision of the years 1816 and 1843, Ex. H (B/54) and Ex. C B B K B-68 should form the basis of our decision on the question of boundaries. (His Lordship then considered the evidence and proceeded.) It is very difficult to say at this distance of time that possession of the fishery was exercised up to that limit and it seems less consistent with probabilities that after the defeat of the plaintiff's predecessor in the suit of 1843 the Mukundia Zamindars would allow the Bikrampur Zamindars to exercise possession on that portion of the fishery from which they have been dispossessed by the decree of 1816 and the delivery of possession by the Munsif Kashi Nath. As pointed out by Lord O'Hagan in the Scotch case of *Lord Advocate v. Lord Lovat* (4) the course of conduct which the proprietor might be expected to follow with regard to his own interests must be taken into account in determining the sufficiency of a possession of the fishery. (His Lordship then considered the leases granted by the proprietors and proceeded.) Repeated assertions of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute a *prima facie* title: see *Bristow v. Li. Cormican* (5).

For the purpose of establishing title to the upstream of the Deokhali-Sahebdi line up to which plaintiffs' title has been established it becomes incumbent on the plaintiffs to establish by clear and convincing evidence that actual possession was in accordance with their assertion. We are of opinion that such evidence is lacking in the present case. We do not see any reason to doubt the authenticity of these leases and kabulyats or counter parts of leases. The plaintiffs were certainly en-

titled to grant leases up to the Deokhali Sahebdi line up to which their upstream limit had been determined and they actually granted these leases but in doing so they made assertions of a larger boundary of their Jalkar than they were entitled to.

In dealing with these ancient leases and kabulyats we are not unmindful of what was said by the House of Lords in the case just cited, *Bristow v. Cormican* (5), Lord Chancellor Cairns in delivering his speech said that these old leases have always been considered to be admissible as being evidence of acts of ownership. I understand this to rest on the principle that when at a distant period, as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself as lessor for title to it, and another person willing to agree to give rent for the property and to enter into a solemn engagement as a tenant of it, admitting his landlord's title to it these circumstances are themselves admissible as evidence of title. They are real transactions between man and man, not intelligible except on the footing of title or at least an honest belief in title. The payment of rent under such a lease is a further and additional fact also admissible as evidence on the same principle: p. 652-3 (Appeal cases). But the matter in controversy before us is whether plaintiffs had made out such a possessory title to the fishing in that part of the fishery which lies upstream of the Deokhali-Sahebdi limit as to entitle them to sue the defendants for trespass to that part of the Jalkar. (His Lordship then again considered the evidence of leases and holding that it was insufficient proceeded.) It is next argued for the plaintiffs that the defendants are precluded from contending that the upstream limit of their Jalkar was not on the northern bank, the peepul tree standing at the Bari of Keamuddi Chakladar of Janajat, and the same having been diluviated the Khal of Debinagore in the same line with the above, on the southern bank of the river, the peepul tree on the south of the Bari of Sada Nanda Guha of Deokhali by reason of the award of Mr. Sarada Charan Mitra C. 267 which was given in Suits Nos. 37 of 1909 and 51 of 1909 and No. 8 of 1909 which were inter partes on the principle

4. (1880) 5 A C 273.

5. (1878) 3 A C 641.

of res judicata. The award was made part of the decrees in those suits. It becomes necessary therefore to examine the decision and the pleadings in those cases and the circumstances which led to the reference to arbitration which resulted in the award. A proceeding under S. 145, Criminal P. C., was started on 15th July 1905 in respect of the portion of the Jalkar which lay within the boundaries A B C D as shown in the sketch map attached to the plaint: see Vol. B, Map 1. The boundaries of A B C D are North. The line drawn from Bari of Arjan Khan Munshi of Nanda Dalapur and Char Amirabad on the west bank of the river towards the East up to the main current. South, the line drawn from the Bari of Habib Ulla Ukil on the western bank of the river towards the East up to main current in the same line. East, main current. West, from the Bari of Arjan Khan Munshi of Char Amirabad Nandalpur up to the Bari Habibulla. See plaint of Raja in Suit No. 8 (C 181). The plaintiffs and the defendants and their ijaradars were parties to these proceedings. The Magistrate was unable to find out which of the parties were in actual possession and attached the portion of the Jalkar within those boundaries till a competent civil Court decided between the rights of the parties. The Raja defendants instituted Suit No. 8 of 20th February 1908 in the Court of Subordinate Judge of Faridpur alleging the downstream limit of their Jalkar to be the Koshabhanga and Satar line see plaint (C-174 181) whereas the plaintiffs brought Suit No. 37 alleging their upstream limit the Janajat (which after diluviation had become the site of Debinagar Khal) and Deokhali line: see (C. 279 290) and Chandra Benode Pal and others instituted Suit No. 51. The issues in Title Suit No. 8 of 1909 in which the Raja defendants were plaintiffs were nine in number. Issue 8 ran as follows: "Whether the disputed Jalkar is within the limits of plaintiffs (Rajas) Mahal Char Mukundia. If not can the plaintiffs get any relief?"

All the matters in dispute were referred with the consent of all parties to the arbitration of Mr. Sarada Charan Mitra a former Judge of the High Court after he had resigned office and he gave an award declaring that the

"Jalkar in dispute in the three cases was part and parcel of the zamindari known as Bikram-

pur belonging to all the landlord parties as claimed in Suit No. 37 of 1909 (present plaintiff's suit) and not a part of the Zamindari Char Mukundia as claimed by the plaintiffs in Suit No. 8 of 1909. No objection was taken in time by the Raja defendants to this award and the award was confirmed and decrees followed on this award: see B K C p. 269. The Raja defendants preferred appeals to the Court of the District Judge of Faridpur and the learned District Judge (the late Mr. Garlick) in dismissing the appeal used rather hard expressions and said that the appeal was "an immoral appeal" and that the making of the appeal was a dishonest breach of a binding agreement."

The result was that the decrees on the award became final. It is contended for the plaintiffs that these decrees operate as res judicata and bar the defence that the down-stream limit of the Mukundia Jalkar was the Koshabhanga Satar line or as has been put by the plaintiffs' learned advocate they discredit the Koshabhanga line. The portion of the fishery, the subject-matter of the suits is not included in the portion now in dispute. The rule of res judicata as embodied in S. 11, Civil P. C., 1908, does not depend upon the identity of the subject-matter but it depends on the identity of the issues. The difficulty in arriving at a conclusion on this part of the case is that the learned arbitrator has not recorded his finding on the issue as to what was the downstream limit of the defendant's Jalkar. If he had done so, the matter undoubtedly would have been res judicata. It is contended for the plaintiffs that no decision would have been given for the plaintiffs unless the learned Judge was of opinion that the Koshabhanga line was not the downstream limit of the defendant's Jalkar or which comes to the same thing, the upstream limit of the plaintiffs' Jalkar. In order to consider whether a previous decision is res judicata or not the substantial effect of what has been decided in the case has to be considered. It seems to me that the decrees are conclusive to this extent that the downstream limit of the defendant's Jalkar must be above the line where the line D C in the sketch map cuts the river, but it is not res judicata on the question that any portion above that line is the upstream limit of the plaintiff's Jalkar. (His Lordship then considered the evidence and holding that the plaintiff had failed to prove adverse possession beyond Deokhali-Sahebdi line proceeded to consider the commissioner's map.) It is argued

for defendants 6 to 9 that the location of Sabdy char by the commissioner is obviously incorrect on the face of Renel's map G-13 for it comes between Bowhapur and Nasseygur but it is shown by the commissioner on the north of Nasipur.

Not a single question was put to the commissioner in cross-examination in this behalf and it is easy to propound riddles before the Court of appeal. Renel's map indicated correctly the course of rivers but it cannot be regarded as giving correctly the direction of villages for the method adopted for ascertaining village was by gun and sound, an extremely unscientific method, which makes reliance upon it difficult for the purpose of ascertaining true direction of villages. It is next argued that the river in 1819 at the time of delivery of possession by Kashi Nath was flowing north to south and Sahebdi char was to the east of Deokhali and in a line with Deokhali, Chaudharasi and Harina as appears from the statement of the plaintiffs in the suit which led to the rubakari of 1843, and then it is said that we know the positions of the three villages there can be no escape from the position that Sabdy char must be to the east of Deokhali and not towards its north-east. For what was once in the east of a particular village must always remain towards the east however the course of the river may change. But we are not troubled with this consideration seeing that between 1819 and 1840, when the suit was filed by plaintiff's predecessor, the river was flowing east to west and we have the relative positions of Deokhali and Sahebdi with the changed course of the river, one to the south of the other. We have got the relative position of the villages with reference to the changed course of the river from the statements made by the Mukundia Zamindars at a time much nearer their ken, and it transpires from their statement that Sahebdi char was on the northern bank of the river in 1843, while Deokhali was on the southern bank. There is no substance in the argument that Sahebdi was on the eastern bank at the time of the delivery of possession by Kashi Nath in 1819=1226 B. S. Whatever the relative position was in 1819 we have got this: that in 1843 when the river was flowing east to west Sahebdi char was on the north

of Deokhali and that is the present position as shown in the Commissioner's map. If therefore we join point No 160 of the Commissioner's map which is the site of Asawtha tree to a point slightly to the north of the northernmost Sabdy char shown in burnt-sienna colour in the Commissioner's map and produce it towards the river we find the line cuts a point between stations 7 and 8 on the southern bank and station No. 28 on the northern bank of the present flowing river Padma and we think that the upstream limit of the plaintiff's jalkar is the line which joins a point between stations 7 and 8 to station No. 28 on the opposite bank of the river. Plaintiffs will be entitled to get a decree for recovery of joint possession provided their right has not been lost by adverse possession of the defendants for more than the statutory period of 12 years, or by ouster by the defendants for more than the statutory period.

We therefore proceed to discuss the question of ouster or adverse possession. In considering this question of adverse possession it is important to bear in mind the distinction between the elements necessary to constitute adverse possession when Mukundia Zamindari had not passed into the hands of defendants 1 to 4 who are cosharers in the Bikrampur Jalkar and the period after 1882 when it passed into their hands. It is conceded on behalf of the appellants that if there had been good evidence of adverse possession of the jalkar up to the Koshabhanga Satar line between 1867 and 1882 plaintiffs' title must be held to be extinguished. On 26th April 1867 Mr. Wise accepted a kabuliyat from one Kali Kumar De where the assertion was made that the downstream limit was Koshabhanga to Satar line: see Ex. B, p. 202. On 20th November 1872 Mr. Wise grants a patni patta (Ex. 5) to Girish Chandra Guha in which the same downstream limit of the Mukundia Jalkar is asserted, B 226 and on 17th January 1873 the corresponding patni kabuliyat is executed by Girish Chandra Guha. But after the execution of this patta and kabuliyat we have got no evidence of possession of the jalkar within the Koshabhanga Satar line for nearly eight years when an ex parte decree for rent obtained by Girish Chandra on 24th November 1882 for some portion of the

fishery near the mouth of the Satar river. This decree which was obtained by Guha is certainly evidence of Guha's possession, but its probative value is very small. The weight to be attached to it must be very small seeing that it is not shown that the decree was executed and rent realized: see *Neil v. Duke of Devonshire* (6).

It is an important circumstance that there is no assertion by the Mukundia Zamindar of his right to the jalkar up to the Koshabhanga Satar line after the decree of 1816 and 1843 which defeated his claim up to that limit up to the year 1867 when for the first time Mr. Wise accepted the kabuliyat from Kali Kumar Do alleging the upstream limit to be Koshabhanga and Satar line. In order to establish title by adverse possession more convincing evidence beyond solitary *ex parte* decree for rent should have been forthcoming. Girish Chandra mortgaged his two-thirds share in the patni to the Raja brothers and two-thirds share of the patni in the Mukundia Jalkar was purchased by the Raja and his brothers on 20th March 1882 [see Ex. G-B.245] and the peon's report of delivery of possession is dated 11th July 1882. This evidence is in our opinion not sufficient to establish actual adverse possession of the stretch of water extending up to Koshabhanga-Satar line. It is not likely that the plaintiffs' predecessors-in-title would allow possession to be wrested from them beyond the Deokhali and Sadaikhali limit when they were able to keep Prithipati Ram Krishna Roy the earlier Mukundia Zamindar out of possession even after the decree of 1816. The Guhas have not produced a single kabuliyat or patta from fishermen showing their possession of the jalkar up to the Koshabhanga-Satar line between 1872 to 1880 although Purna Chandra Guha deposes in (B K 478 A 20 to 30) that he saw registered kabuliyats in his grandfather's time; and on this evidence they cannot certainly found their title by adverse possession.

After 1882 when the Raja defendants 1 to 4 became the owners of the Mukundia Jalkar they were also cosharers of the Bikrampur Jalkar possessing the portion of the fishery downstream of the Mukundia Jalkar. When granting leases to fishermen up to Koshabhanga limit

they might be exercising the right both as owners of Mukundia Jalkar and owners of the Bikrampur Jalkar. The question to be determined with reference to this part of the case is when did they give notice to the plaintiffs, their cosharers, in the Bikrampur Jalkar that they were granting the leases up to Koshabhanga-Satar line in their capacity as owners and patnidars of the Mukundia Jalkar and not as the cosharers of the Bikrampur Jalkar. The numerous pattas and kabuliyats (S series) which are undoubtedly genuine documents were executed in favour of or by fishermen for large sums of rent, on the assertion that the fishery up to Koshabhanga-Satar line belong to them in their right as Mukundia Zamindars; but it does not appear that plaintiffs had any notice of the assertion of this hostile title till within 12 years of suit. Mere participation of the rent and profits of a jalkar without more by the Raja cosharers even for a long period of time is not sufficient to constitute ouster: see *Corea v. Appuhamy* (7) and *Hardit Singh v. Gurmukh Singh* (8). (After further considering evidence re: adverse possession by the defendants the judgment proceeded). It is to be served that these leases after the institution of the suit of 1909 are of very little use after they as they were given after the dispute had arisen. It is to be observed that between 1906-18 both parties were trying to enlarge their respective rights in the jalkar and it cannot be said that the defendants were in uninterrupted and exclusive adverse possession of the portion of the fishery to which plaintiffs have established their title.

Reference has been made to the case of *Raja Sree Nath v. Dina Bandu Sen* (1) and it is said that the defendants openly asserted in that suit that their downstream boundary was the Koshabhanga-Satar line. The present plaintiffs were no parties to the said suit and the portion in dispute in that case was admittedly above the portion of the fishery now in dispute. Great stress was laid by the learned advocate for defendants 1 to 4 on the following passage in the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Sreenath v. Dinabandhu* (J).

7. (1912) A C 280—81 L J P O 151.

8. A I R 1918 P O 1—64 P R 1918 (P O).

6. (1882) 8 A C 185—81 W R 622.

"and by means of such proceedings in 1797, 1816, 1843 by means of similar proceedings in litigation with some of the present defendants and by a long succession of ijara pattas and kabulyats which they put in evidence, they prove de facto possession, as under their jalkar rights of the whole fishery in both streams between their upper and their lower limits."

But as the present plaintiffs were no parties to the suit this finding is not strictly evidence against them. The question of adverse possession by the defendants loses much force as it appears that there were disputes prior to 1917 regarding the collection of rent from the disputed portion of the jalkar between plaintiffs' and defendants' lessees which led to proceedings under S. 144, Criminal P. C., and the matter was compromised, [see Ex. 15 C, Vol. 1 p. 1] and the order under S. 144 was rescinded. Indeed it is very frankly admitted by the learned advocate for defendants 6 to 9 that the decision of the case should depend on the decision on the question of title and not on the assertions and counter-assertions regarding the upstream limit of the plaintiffs and downstream limit of the defendant's jalkar in the numerous leases and kabulyats. We are on the whole of opinion that the real dispute with regard to the portion of the fishery now in dispute arose with the action of Sadar Ali Bepari, one of the fishermen lessees of the Raja defendants whose looting of the fish from the disputed portion resulted in the 145 proceedings which terminated on 31st October 1918 in favour of the defendants. The present suit has been brought within three years from that date and is well within time. We are of opinion that plaintiff's title to the portion to which he has established their title has not been lost by adverse possession of the defendants. (The remaining portion of the judgment is not necessary for reporting—Ed.).

S. K. Ghose, J.—I agree.

R.K.

Suit decreed.

A. I. R. 1933 Calcutta 233

GUHA AND M. C. GHOSE, JJ.

Bhola Nath Sirkar—Petitioner.

v.

Hara Duari Agarwalla—Opp. Party.

Civil Ref. No. 3 of 1932, D/- 7-7-1932.

Civil P. C. (1908), O. 21, Rr. 58 and 100—Remedy of unsuccessful claimant under R. 58 is by suit only—Scope under Rr. 58 and 100 being same he cannot again apply under R. 100.

Because after the dismissal of a claim case

under O. 21, R. 58, the only remedy open to the claimant being in the institution of a regular suit as provided in O. 21, R. 63 of the Code and the scope of inquiry under O. 21, R. 100 being the same as the inquiry under O. 21, R. 58, an unsuccessful applicant in a case under O. 21, R. 58 is not competent to apply under O. 21, R. 100: 15 I C 683, Ref. [P 234 C 1]

A. N. Bagchi—for Petitioner.

S. C. Janak—for Opposite Party.

Order of Reference.—In course of execution proceedings, the present applicant brought a Claim Case No. 31 of 1930, under O. 21, R. 58, Civil P. C. That case was dismissed for default on 13th December 1930: vide Order No. 10 of the Order-sheet. Thereafter the attached property was sold in auction purchased by the decree-holder on 19th February 1931. The sale was confirmed on 6th October 1931. Then on 17th November 1931 on decree-holder's prayer process for delivery of possession was issued and possession was duly delivered. Thereupon the present applicant who was the claimant in the Claim Case No. 31 of 1930 has presented an application under O. 21, R. 100 complaining about dispossession regarding his eight annas share in the disputed land. The opposite party decree-holder has resisted this application on a preliminary point, viz., the Claim Case of the applicant having been dismissed for default, he is precluded from raising any objection under O. 21, R. 100 on the principles of res judicata. The learned pleader for the decree-holder has urged that on the dismissal of a Claim case the only remedy open to the claimant is in the institution of a Regular Suit as provided in O. 21, R. 63, Civil P. C., and that the scope of inquiry under O. 21, R. 100 is same as one under O. 21, R. 58. It has been further contended that if the applicant (Claimant) is permitted to apply under O. 21, R. 100, Civil P. C., having once failed in his application under O. 21, R. 58, Civil P. C., and to obtain a favourable order, he would thereby gain his end which he could not otherwise than by institution of a suit contemplated in O. 21, R. 63 C.P.C. These contentions appear to me to have force in them. On the other hand I find nothing in the Civil Procedure Code which precludes an application under O. 21, R. 100 by an unsuccessful applicant in a case under O. 21, R. 58. In my opinion, having regard to the provisions of O. 21, R. 63, Civil P. C., which give a

conditional finality to an order in a Claim Case, the applicant is precluded from agitating the identical question in an application under O. 21, R. 100, Civil P. C. But the Civil Procedure Code being silent on the point at issue and the parties to the proceeding having failed to refer to any reported ruling on the point, I have not been able to come to a definite conclusion on the point. In the circumstances I would refer under O. 46, R. 1, Civil P. C., the following question for decision by the Hon'ble High Court. Is an unsuccessful applicant in a case under O. 21, R. 58, Civil P. C., competent to apply under O. 21, R. 100, Civil P. C.?

Judgment.—This is a Reference under O. 46, R. 1, Civil P. C., made by the Munsif of Meherpur in connexion with an application under O. 21, R. 100 of the Code, in Miscellaneous Case No. 519 of 1931, pending in his Court. The facts giving rise to the Reference have been fully set out in the letter of reference addressed to this Court and it is not necessary for us to refer to them again here. In view of the principle underlying the decision of this Court in the case of *Jugal Kishore v. Bejoy Krishna* (1) the contention of the decree-holder that after the dismissal of a claim case under O. 21, R. 58, the only remedy open to the claimant was in the institution of a regular suit as provided in O. 21, R. 63 of the Code and the further contention of the decree-holder, that the scope of inquiry under O. 21, R. 100 was the same as the inquiry under O. 21, R. 58 appears to us to be correct. In our opinion, the question referred to this Court for consideration, viz., whether an unsuccessful applicant in a case under O. 21, R. 58, Civil P. C., is competent to apply under O. 21, R. 100, must be answered in the negative. The Reference is disposed of in the manner above indicated. There will be no order as to costs in this Reference.

M.N./R.K. *Answered in negative.*

1. (1912) 15 I C 688.

A. I. R. 1933 Calcutta 234

MUKERJI AND GUHA, JJ.

Gopal Lal Chandra—Appellant.

v.

Amulyakumar Sur—Respondent.

Appeal No. 400 of 1928, Decided on 26th August 1931.

(a) Will—Executed after 1870—Calcutta view stated—Hindu Wills Act (1870).

The view adopted by the Calcutta High Court in respect of wills after 1870 is that, on the executors obtaining probate, they immediately become vested by force of statute with the whole of the estate, which belong to the testator at the time of his death: 22 Cal 788 (P C); 25 Cal 103 and 33 Cal 116 (P C), *Ref.*; A. I. R. 1926 Mad 494, *not foll.* [P 236 C 1]

(b) Succession Act (1925), S. 187—Probate obtained subsequent to suit is sufficient.

If any executor institutes a suit in anticipation of probate and subsequently obtains probate, the requirements of S. 187, Succession Act, are satisfied for the purposes of a decree to be obtained: 38 Cal 327, *Ref.* [P 236 C 1]

(c) Will—Legal heir of testator is entitled to sue until claimant under will establishes right.

The legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will: 1915 Cal. 207, *Ref.* [P 236 C 1]

(d) Bengal Tenancy Act (1885), S. 174—Sale under—Inadequacy of price or irregularities will not affect legal consequence of sale.

Inadequacy of price, or irregularity in that the proper forms of proclamation not being used or error in stating whether the sale will be free from encumbrance or not, cannot affect the statutory consequences of the sale held under the Act. [P 236 C 2]

(e) Bengal Tenancy Act (1885), S. 167—Collector refusing to issue notice at first is not debarred from ordering such issue subsequently.

Where a Collector refuses to issue notice under the section he can change his mind and order issue of notice when another application supported by affidavit is put in 28 Cal. 180, *Expl.* [P 237 C 1]

(f) Bengal Tenancy Act (1885), S. 167—"Notice" and not knowledge of encumbrance is necessary under S. 167.

Section 167 speaks of "notice" and not "knowledge" and so requires some intimation of a definite character as regards the nature and the particulars of the encumbrance to serve as a basis, on which the starting point of the period contemplated by the section may rest. But knowledge or intimation may sometimes be sufficient to impute notice, if the circumstances are such as may reasonably require the person, who has such knowledge or intimation to enquire about the particulars: 15 I C 430, *Ref.* [P 237 C 2]

Brajulal Chakraborti, Manmathanath Ray, Krishnalal Banerji—for Applt.
Rupendrakumar Mitra and Kapilendrakrishna Deb—for Respondent.

Judgment.—The plaintiff instituted this suit for enforcement of a mortgage bond in his favour, of which the consideration was made up of his dues upon seven promissory notes and a cash amount of Rs. 8,000 odd, and upon four subsequent mortgages in his favour

on deposit of title deeds. The moneys were taken and the bonds were executed by one Taraknath Banerji, defendant 1 in the suit, who held the mortgaged properties under defendants 3 to 6 under a *dar mourasi mokarrari* lease. The latter purchased the properties in execution of a decree for arrears of rent against defendant 1. The plaintiff's case was that the said purchase was made with knowledge and notice of the encumbrances in plaintiff's favour and that in law and equity the purchasers were bound to pay up the plaintiff's dues. He prayed for a preliminary decree for sale with liberty reserved to apply for a personal decree for the balance.

Defendant 2 disclaimed all interest in the mortgaged properties. He, as well as the other defendants, namely, Nos. 3 to 6, alleged that they had no knowledge or notice of the encumbrances prior to the sale, that the sale was held in execution of a decree for rent in accordance with the provisions of the Bengal Tenancy Act with power to the purchasers to avoid all encumbrances, that they got notice of the encumbrances, when they received the notices through Court in connexion with the present suit and they, thereupon annulled the encumbrances by proceeding under S. 167 of the Act. The Subordinate Judge has made a decree for money in plaintiff's favour against defendant 1 and has dismissed the suit against defendants 2 to 6. The plaintiff has appealed.

The first contention of the appellant is that the decree, in execution of which defendants 3 to 6 made the purchase, was not a decree for rent contemplated by the Bengal Tenancy Act and the sale in execution also had not the effect of a rent sale thereunder. This contention is pressed on several grounds, which will be noticed presently. But before doing so it will be convenient to state a few facts.

The suit for rent was instituted by five persons, namely: (1) Praphullakumar, (2) Amulyakumar, a minor son of one Shashibhooshan represented by his mother Manmohini, (3) Anathnath, (4) Sarojekumar and (5) Prasannakumar. It was stated in the plaint that the share of Nos. 1 and 2 was 10 as., of No. 3—2 as, 13 gds. 1 k. 1 kr., of No. 4—13 gds. 1 k 1 l. 1 kr., and of No. 5—2as

13 gds. 1 kr. The prayer was for recovery of rents and cesses for the years 1324 to 1327 B. S. with damages and interest. It was instituted on 14th April 1921. Shashibhooshan had left a will, dated 10th October, 1918, which was pending probate at the date of the suit. By the will, Praphullakumar, Manmohini and Shashibhooshan's son-in-law, Satish, were appointed executors: the first two being also appointed guardians of the person of the minor, Amulyakumar. Several bequests were made in favour of different persons, the properties, with which this suit is concerned, being bequeathed to Amulyakumar and it being provided that the executors should deliver them to him on his completing the age of 21 years. Probate was issued in favour of the two executors, Praphullakumar and Manmohini on 28th April 1921. On 7th September, 1921, the decree was passed in the suit for rent. The plaintiffs in the suit named above, as decree-holders, applied for execution. The sale was held on 19th November, 1923, they themselves being purchasers. They obtained a sale-certificate in their own names on 21st December 1923, and they obtained delivery of possession of the purchased properties on 10th January 1924.

It has been argued that, as the properties had vested in the executors under the will, there was no representation in respect of the 10 annas share of Shashibhooshan in the properties, since not the executors but the plaintiffs 1 and 2, that is to say, Praphulla in his personal capacity and Amulyakumar as represented by his guardian Manmohini, and not Manmohini as executrix, had sued so far as that share is concerned. This contention is pressed on the strength of the decisions of the Judicial Committee in the case of *Meyappa Chetty v. Supramanian Chetty* (1). In that case their Lordships observed:

"It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of the probate is the only way in

1. A I R 1916 P C 202=35 I C 323=43 I A 113 (P O).

which, by the rules of the Court, he is allowed to prove his title."

Their Lordships were there relying on the English law on the point and referred to the cases of *Thompson v. Reynolds* (2) and *Woolley v. Clark* (3). The view adopted by this Court in respect of wills after 1870 is that, on the executors obtaining probate, they immediately become vested by force of statute with the whole of the estate, which belonged to the testator at the time of his death: or in other words, that the vesting takes place on the taking of probate, but relates back to the time of the testator's death and to the estate which then belonged to him: see *Administrator-General of Bengal v. Premlal Mullick* (4), *Sarat Chandra Banerjee v. Bhupendra Nath* (5) and *Kurrutulain Bahadur v. Nuzbat-ud-dowla Abbas Hossein Khan* (6). It has been pointed out to us that a different view has been taken in other Courts [e. g., in the case in *K. Ramiah v. K. Venkatasubamma* (7)], but we should be content to adopt the view which this Court has taken. It is true that, if an executor institutes a suit in anticipation of probate and subsequently obtains probate, the requirements of S. 187, Succession Act, are satisfied for the purposes of a decree to be obtained [*Chandra Kishore Roy v. Prasanna Kumari Dasi* (8)]. But at the same time, it is well settled that the legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will: see the cases referred to in *Basanta Kumar v. Gopal Chunder* (9). The contention of the appellant therefore cannot be upheld.

It has next been contended that, even if the suit was properly constituted at the date it was laid, by the grant of the probate, which Praphulla and Manmoffini obtained, Shashibhooshan's ten annas share vested in them as executors, and neither at the date of the decree nor

at the date of the application for execution the decree-holders had any rights as landlords, and so, on the authority of *Forbes v. Maharaj Bahadur Singh* (10), the execution was not one in which the tenure could pass. We have carefully perused this decision and we have come to the conclusion that it is not possible to regard the decree-holders as having parted with or assigned over their interests as landlords in any way, so as to be ex-landlords and not existing landlords within the meaning of the decision. Amoor Ali, J., in the case of *Chhatrapat Singh v. Gopi Chand Bothra* (11) observed thus:

"From one point of view the trustee is an assignee, inasmuch as the property is conveyed to him as has been done in this case. But to my mind the legislature never intended to include in the word 'assignee' used in Cl. (h) (meaning that clause of S. 148 of the Act) persons in whom a legal estate was vested by an act of the owner but had no independent interest in the property."

We entirely agree in this view. This contention also must be overruled. It has been argued that the sale was held subject to encumbrances and this should be inferred from the fact that the price which the properties fetched was only Rs. 5,000, whereas after purchase it was let out by the purchasers in 1926 for a selami of Rs. 3,000 and at an annual rent of Rs. 3,000. The price, for which the properties were purchased, seems to have been very low. But inadequacy of the price is hardly a consideration, which comes in when the question is what is the legal consequence that should have followed from the sale. In one copy of the proclamation (Ex. H) filed on behalf of the defendants the words "sale will be free from incumbrance" appears, while in another copy (Ex. 14), which is said to be the original, the words "sale will be subject to the encumbrance" appears, and the forms of these proclamations, that were used, were inapposite, inasmuch as, instead of forms under S. 162, Cl. (a), those under Cl. (b) were used. These irregularities and errors cannot, in our opinion, affect the statutory consequences of the sale that was held. Both in Ex. 14 and in Ex. H it was distinctly stated at more places than one that the sale was to be held with power to annul encumbrances.

2. (1827) 8 C & P 123.

3. (1822) 5 B & Ald 744=1 D & R 409=24 R R 546.

4. (1895) 22 Cal 788=22 I A 107 (P C).

5. (1898) 25 Cal 103.

6. (1905) 33 Cal 116=32 I A 244 (P C).

7. A I R 1926 Mad 484=94 I C 83=49 Mad 261 (F B).

8. (1911) 38 Cal 327=38 I A 7=9 I C 122 (P O).

9. A I R 1915 Cal 207=26 I C 21.

10. A I R 1914 P O 111=23 I C 632=41 I A 91=41 Cal 926 (P O).

11. (1899) 26 Cal 750=4 C W N 446.

The next question raised is whether the Collector had jurisdiction to issue the notices under S. 167, Ben. Ten. Act. The sale, as already stated, took place on 19th November 1923. The application for serving the notices under S. 167 of the Act was made on 11th June 1926. This application was dismissed by the Collector on 15th June 1926, on the ground that it had been made beyond one year from the date of the sale. There was then an application for revival of the case on allegation, supported by an affidavit of the oath of defendants 2 to 6 that they had notice of the encumbrance only on 11th May 1926. On this application the case was revived and notices were ordered to issue. It has been argued that the Collector's order of revival was without jurisdiction, because what he had to do in this connexion was nothing judicial, and reliance for this proposition has been placed on the decision in the case of *Nritya Gopal Hazra v. Golam Rasool* (12). The decision only lays down that the Collector's function in this matter is that of a ministerial officer. There is nothing in the decision suggesting that the Collector may not change his mind or that he may not subsequently do what he had declined to do before. The word "revival" may not have been a happy word to use in this connexion. Our attention has been drawn to the allegation in the petition and the affidavit aforesaid that defendants 2 to 6 received notice of the encumbrance on 11th May 1926 and that the correct date should be 29th April 1926. The error is unfortunate, but we cannot regard it as intentionally made.

Then it has been argued that defendants 2 to 6 had notice of the encumbrance far beyond one year from the date of the application made for issuing the notices under S. 167 of the Act. Their case was that it was on 11th May 1926 (or rather 29th April 1926 to be correct), that they got notice of the encumbrance when they received the registered postcards issued by the Court informing them of the present suit. The plaintiff's case on the other hand was that on at least four previous occasions they had such notice or knowledge of the encumbrance. The plaintiff has adduced some oral evidence and has also relied upon some circumstances to establish

this position. We have examined this evidence with care and we are quite unable to believe it : we are decidedly of opinion that it was untrue in every material respect, and it is in conflict with what some documentary evidence, that there is on the record, unmistakably proves. The circumstances on which the appellant relies are at best dubious and lead to no definite conclusion. It is possible that the wholesale ignorance pleaded on behalf of the defendants is not true, but the possibility is more or less a mere supposition and is not based on any tangible proof. In the circumstances we think it is reasonable to hold that the defendants are entitled to rely on the notices that they received through the Court in respect of the suit as giving them first notice of the encumbrance. An argument has been addressed to us based on the supposition that two of the defendants had much earlier notice of the encumbrance. It was based upon a passage in the judgment of the Court below, which is worded thus :

"It is also very likely that, during the years 1920 to 1924, the plaintiff would tell two out of the five landlords about his mortgage lien, but this will not help the plaintiff's cause in the present case, when it is admitted that no other landlord, except Saroje Sur and Praphulla Sur, was apprised of the mortgage lien. The Bengal Tenancy Act does not encourage this vague talk about a mortgage lien and it has been provided that, in case of registered and notified encumbrances, a copy of the instrument must be served on the entire body of landlords. A purchaser in a rent sale has got the right of annulling all encumbrances excepting the notified and registered encumbrances and the plaintiff cannot claim any benefit for himself unless he brings himself within the class of registered and notified encumbrances."

It has been argued that if Saroje and Praphulla had notice of the encumbrance, the other decree-holders defendants, who were members of the same joint family as they and to whom they or one of them stood in the position of karta, were affected by that notice. The answer to this contention is that the fact that Saroje and Praphulla had knowledge is only a possibility, as we have already stated, and is not a fact proved in the case. Nextly, the answer is that S. 167 speaks of "notice" and not "knowledge", and so requires some intimation of a definite character as regards the nature and the particulars of the encumbrance to serve as a basis on which the starting point of the period contemplated by the

section may rest. It is true that there is no form of notice prescribed by the statute. It is also true that it has been held that knowledge or intimation may sometimes be sufficient to impute notice if the circumstances are such as may reasonably require the person, who has such knowledge or intimation to inquire about the particulars: *Yusuf Gazi v. Asmat Mollah* (13). But we can find nothing on which it may be held that there was such a duty cast on Praphulla or Saroje in the present case. Nor do we see how knowledge, if any, on their part may be regarded as knowledge of the others on the footing of their being members of one family. There are no materials on which we can hold that Praphulla and Saroje or either of them acted as kartas, while on the other hand the plaintiff's own evidence is that on one occasion, when he and the mortgagor saw Praphulla and Saroje make entreaties of them for returning the properties to the mortgagor on taking some money, Praphulla and Saroje replied that: "they would consult their cosharers if it was possible to give back the properties after taking some money."

On the findings we have arrived at no other question need be considered. The appeal, in our opinion, ought not to succeed. It is accordingly dismissed with costs to the appearing respondents.

K.S. *Appeal dismissed.*

13. (1913) 15 I C 430

* A. I. R. 1933 Calcutta 238

GUHA AND M. C. GHOSH, JJ.

Surendra Chandra Roy and others—
Defendants—Petitioners.

v.

Showdamini Roy—Plaintiff—Opposite Party.

Civil Rule No. 294 of 1932, Decided on 17th June 1932, against order of 2nd Sub-Judge, Sylhet, D/- 23rd January 1932.

* Civil P. C. (1908), O. 33, R. 1—Court can allow plaintiff to continue suit as pauper—Suit on insufficient stamp—Application for pauperism when deficit payment ordered—Pauperism proved—Plaint cannot be rejected under Civil P. C. (1908), O. 7, R. 11.

The power to allow a case not instituted as a pauper suit to be continued as a pauper suit is included in the power given to the Court to allow a suit in forma pauperis to be instituted.

[P 239 C 1]

The plaintiff instituted suit for partition on payment of court-fees which were found to be insufficient on objection by defendant. Plaintiff

was given time to pay deficit court-fees. On the last day the plaintiff prayed to be allowed to continue suit as pauper and amend plaint according to the previous findings. Court allowed the continuation of suit as pauper and deferred decision on point of amendment.

Held: that the order was quite proper and the rejection of plaint under O. 7, R. 11 would have been illegal and without jurisdiction: 2 Cal 130 and 20 Cal 319, *Rel. on*; A I R 1932 Cal 685, *Dist.* [P 239 C 1]

Chandra Sekhar Sen and Nikunja Behary Roy—for Petitioners.

Priyanath Dutt—for Opposite Party.

Guha, J.—The plaintiff-opposite party in this rule instituted a suit for partition on 3rd September 1930, in the Second Court of the Subordinate Judge, Sylhet. The court-fee paid on the plaint in the suit was Rs. 10 only. On the objection of the defendants, the petitioners in this Court, on the question of court-fee payable on the plaint as filed in Court, based on the fact that the plaintiff was out of possession of the properties sought to be partitioned, it was held that the plaintiff was to pay ad valorem court-fees on her plaint. Time was granted to the plaintiff for putting in deficit court-fees; and on the last date fixed for payment of court-fees, the 27th July 1931, an application was made by the plaintiff to allow her to proceed with the suit as a pauper. In the application made on 27th July 1930, the plaintiff prayed for the amendment of the plaint as presented in Court, in view of the Subordinate Judge's decision that she was not in possession of the share of the property claimed by her in the suit for partition. The application, to continue the suit as a pauper was eventually granted on 23rd January 1932, by the Subordinate Judge after the necessary inquiries into the pauperism of the plaintiff had been made, as required by law. The concluding portion of the order passed by the Subordinate Judge on that date was this:

"The petitioner is, accordingly, declared a pauper, for the purpose of the suit, and she is permitted to continue her Suit No. 127 of 1930 as such. Her prayer for amendment, along with the petition for pauperism was really premature, and it shall be considered in its due course, as the suit proceeds."

The defendants in the suit applied to this Court for setting aside the aforesaid order, made in Pauper Case No. 2 of 1931. The grounds for setting aside the order as mentioned in the application to this Court, on which this rule was granted, were directed against the Subordi-

nate Judge's entertaining the plaintiff's application for continuing the suit as a pauper, and against the merits of the case, so far as the decision of the Subordinate Judge, on the fact of the plaintiff's pauperism was concerned. So far as the Court's power to allow a case to be continued as a pauper suit, after coming to a decision that the plaintiff was actually a pauper, is concerned, it appears to be amply supported by authority of decisions, so far as this Court is concerned: see the cases of *Nirmal Chandra v. Doyal Nath* (1) and *Thompson v. Calcutta Tramways Co.* (2). We can find no reason to differ from the view taken by this Court, based upon the principle that the power to allow a case to be continued as a pauper suit is included in the power given to the Court to allow a suit in forma pauperis to be instituted.

The order of the learned Subordinate Judge, as it stands, cannot, in our judgment, be successfully challenged, as one made without jurisdiction, or as one not passed in accordance with law. It has however been contended before us on the authority of the decision of this Court in the case of *Mrs. Selima Sheehan v. Hafer Mohammad Fateh Nashub* (3), that where the plaintiff had under-valued the suit, had not paid proper court-fees, after taking adjournments for the purpose of putting in deficit court-fees, but had applied on the last date for payment of such fees, for leave to continue the suit in forma pauperis, the only course left open to the Court was to reject the plaint, under O. 7, R. 11, Civil P. C. The contention thus advanced altogether overlooks the order against which this rule is directed. The order relates to pauperism of the plaintiff, and does not even relate to the question of amendment of the plaint as prayed for by the plaintiff in the suit. The plaint as presented could not be rejected on any of the grounds mentioned in O. 7, R. 11 and it was only after the plaint had been amended with a view to a prayer for recovery of possession by the plaintiff, that payment of deficit court-fees as directed by the Court, could arise. No question of rejection of the plaint as filed by the plaintiff could

arise on 23rd January 1932. The order passed on that date specifically mentioned that the prayer for amendment made in the petition for pauperism was premature, and was to be considered in due course during the progress of the suit. The decision of this Court in *Mrs. Selima Sheehan's* case (3), to which reference has been made above, and upon which great reliance has been placed on behalf of the petitioners cannot be of assistance to them, on the facts and circumstances of the case before us. There was no occasion for rejection of the plaint in this case at any stage of the proceedings before the Court below; and the learned Subordinate Judge would on the facts of this case, have acted illegally and entirely without jurisdiction if he had on 23rd January 1932, rejected the plaint as presented in the Court by the plaintiff, on the ground of non-payment of deficit court-fees. The order made by the learned Subordinate Judge on 23rd January 1932, appears to us to be a valid order under the law, and the ends of justice in the case would, in our judgment, be frustrated and justice denied to the plaintiff, if that order was to be set aside and the Court below directed to reject the plaint on the ground of non-payment of deficit court-fees. In the result the rule is discharged with costs. We assess the hearing-fee in this rule at two gold mohurs.

M. C. Ghose, J.—I agree.

M.N./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 239

JACK, J.

Nalini Kanta Roy—Petitioner.

v.

Kamaraddi and others—Opposite Parties.

Civil Rules Nos. 423 and 424 of 1932. Decided on 7th July 1932, against order of Munsif, First Court, Chandpur, D/- 23rd February 1932.

Civil P. C. (1908), S. 48—Through mistake of Court decree dated wrongly—Application barred from correct date but within time from mistaken date—Execution held to be in time—Maxim, Act of Court shall prejudice no man—Limitation Act (1908), Art. 182.

A decree was by mistake dated 16th February 1929, whereas the date of the decision was actually 11th February 1929. The decree-holder took certified copy of that portion of the summons book which contained the formal decree

1. (1876) 2 Cal 180.

2. (1898) 20 Cal 819.

3. A I R 1932 Cal 685=199 I C 520.

and was therefore led to believe that the suit was decreed on 16th February 1929. His application for execution was filed on 15th February 1932.

Held: that although the Court had no power to extend the time of limitation, yet in the interest of justice, the decree ought to be regarded as having been passed on 16th February 1929, on the principle *actus curiae neminem gravabit* (act of Court shall prejudice no man). [P 240 C 1]

Jatindra Mohan Sanyal — for Petitioner.

Judgment.—This Rule No. 424 has been issued upon the opposite party to show cause why an order dismissing an application for execution as barred by limitation should not be set aside on the ground that the petitioner having been misled by mistake of the Court the application for execution is not barred by limitation.

It appears that a decree was by mistake dated 16th February 1929, whereas the date of the decision was actually 11th February 1929. The decree-holder took certified copy of that portion of the summons book which contains the formal decree and was therefore led to believe that the suit was decreed on 16th February 1929. His application for execution was filed on 15th February 1932, and was therefore within time if the decree was passed on 16th February 1929, but out of time from the date of actual decision 11th February 1929. It is true that the Court has no power to extend the time of limitation. But in the circumstances of the case in the interest of justice, I think, the decree ought to be regarded as having been passed on 16th February 1929 on the principle "*actus curiae neminem gravabit*" which has been followed in a number of cases of this nature, one of which is referred to by the learned advocate for the petitioner, Civil Revision No. 1077 of 1929, of this Court. This rule is made absolute. The order complained of is set aside and the application for execution will be registered. Same order will apply to the other Rule No. 424 of 1932.

R.K.

Rule made absolute.

* A. I. R. 1933 Calcutta 240

PANCKRIDGE AND PATTERSON, JJ.

H. G. Bolton—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 613, 614 and 615 of 1932, Decided on 19th December 1932.

* (a) Criminal P. C. (1898), S. 528-B—**Revision in High Court from order of Judge of Andamans for reduction of sentence is not subsequent stage of case.**

A revision filed in High Court for reduction of sentence from the order passed by a Sessions Judge of the Andamans is not a subsequent stage of the case within the meaning of the section.

Hence an accused who has not claimed to be dealt with as a European British subject before the trial Magistrate can claim to be so dealt with in the High Court in the revision proceedings: *A I R 1920 All 351, Foll.*; *12 Bom. 561* and *A I R 1924 Mad 373, not Foll.* [P 241 C 1]

(b) Criminal P. C. (1898), S. 528-B—**Construction favourable to accused should be adopted.**

If the language of S. 528-B is ambiguous, a construction favourable to accused and convicted persons should be adopted, as the section purports to curtail privileges conferred by other provisions in the Code. [P 241 C 2]

Santosh Kumar Basu, Santosh Kumar Pal and Parimal Mukherjee—for Petitioner.

D. N. Bhattacharjee—for the Crown.

Panckridge, J.—A preliminary point of jurisdiction is raised by the Crown in showing cause against the rule. The petitioner states that he is a European British subject. His statement is verified by an affidavit sworn by his brother, and Mr. Bhattacharjee agrees that in the absence of any evidence to contradict it, it must be taken to be correct. He was convicted at Port Blair on 2nd May 1932 by a First Class Magistrate of offences punishable under Ss. 408 and 468, I. P. C., and sentenced to undergo rigorous imprisonment for a term of eight months. On 6th May 1932 the learned Sessions Judge of the Andaman and Nicobar Islands allowed the petitioner's appeal against his conviction under S. 468 and acquitted him on that charge, but dismissed his appeal against his conviction under S. 408 and maintained the sentence. On 12th July 1932 the petitioner obtained this rule calling upon the Chief Commissioner of the Andaman and Nicobar Islands to show cause why the order of the Sessions Court should not be set aside or modified, on the ground that the sentence is too severe. Learned counsel for the Crown argues that we have no jurisdiction to entertain the petitioner's application.

By S. 13, Cl. (d) of the Andaman and Nicobar Islands Regulation, 1876, (Regulation 3 of 1876) it was ordered that the functions of the High Court under Ch. 32, Criminal P. C., of reference and

revision should be discharged in respect of proceedings of the Court of Session by the Governor-General in Council, and in respect of Courts subordinate to the Court of Session by the Court of Session, but this clause does not apply to proceedings against European British subjects or persons jointly charged with European British subjects. By a notification made in 1878 under S. 3, Indian High Courts Act, 1865 (28 and 29 Vic. C. 15) it was ordered that this Court should exercise original and appellate jurisdiction and discharge the functions of a High Court in criminal proceedings in the Islands against European British subjects. *Prima facie* we have clearly the power to deal with the petitioner's case by way of revision. Mr. Bhattacharjee however maintains that, inasmuch as the petitioner did not claim to be dealt with as a European British subject by the Magistrate before whom he was tried, he must by reason of the provisions of S. 528-B, Criminal P. C., be held to have relinquished that right, and cannot assert it before us exercising revisional jurisdiction, which is "a subsequent stage of the case" within the meaning of the section.

Mr. Basu argues that what the section means is that, unless the claim has been made, a European British subject cannot at a subsequent stage challenge the legality of a previous stage at which the claim might have been made on the ground that he was not at such previous stage dealt with as a European British subject. There is nothing, it is contended, to prevent a European British subject making the claim at any stage of the case and being dealt with as such from that stage.

We are not prepared to go to this length since the argument appears to us to leave out of account the words—"shall be held to have relinquished his right." We are more impressed with the submission that when this Court calls for the record under S. 435 and thereafter proceeds to exercise its powers of revision under S. 439, the proceedings cannot properly be said to be a subsequent stage of the case. On this point the decisions are conflicting. In *Empress v. Grant* (1) the Bombay High Court held that when the accused had not claimed to be dealt with as a European British subject

before the Sadar Court in Sind the Bombay High Court had no power by virtue of S. 4 (1) of the Code to enhance in revision the sentence passed on him.

On the other hand in *Harris v. Peal* (2) Walsh, J., held that an application in revision was not a subsequent stage of the same case within the meaning of S. 454 of the Code of 1898. In *Jeremiah v. Johnson* (3) Krishnan, J., preferred to follow the Bombay decision. We have come to the conclusion that the better opinion is that of Walsh, J. S. 439 confers no rights on a person convicted either by a trial Court or a lower appellate Court to invoke the revisional jurisdiction of the High Court. The exercise of that jurisdiction is, subject to the limitations imposed by the section, purely discretionary. The High Court can and often does exercise the jurisdiction of its own motion without an application having been made to it. In these circumstances the hearing in revision cannot, we think, be properly described as a subsequent stage of the case. We think that, if the language of S. 528-B is ambiguous, a construction favourable to accused and convicted persons should be adopted, as the section purports to curtail privileges conferred by other provisions in the Code. For these reasons we hold that we have jurisdiction to revise the orders made by the Magistrate and the Sessions Judge.

With regard to the merits the petitioner was a ship's clerk employed in S. S. "Sajahan." In the course of his employment he was entrusted with various sums of money. In the case with which we are at present concerned he was charged with having misappropriated Rs. 100-1-0 which had come into his possession on account of mowing charges paid by passengers. In another case he was charged with misappropriation of Rs. 215 which had come into his possession as passage money collected from passengers on board. In the third case he was charged with misappropriation of Rs. 501 which had come into his possession as the price of wine supplied to passengers. He was convicted in all the three cases and a sentence of eight months' rigorous imprisonment was im-

2. A I R 1920 All 351=21 Cr L J 767=58
I C 351.

3. A I R 1924 Mad 373=25 Cr L J 231=76
I C 635.

posed on him in each case, the sentences to run consecutively, making a total term of two years' rigorous imprisonment. His offence was undoubtedly a serious one and it was aggravated by the fact that he suppressed correspondence from the owners of the ship and made false entries in the books of account which it was his duty to keep. At the same time this was his first offence and this much should be said to his credit that he made a more or less clean breast of the matter and did not, as people in the same situation often do, endeavour to throw the blame on a fellow servant.

In the circumstances we think that the ends of justice will be met if we reduce his sentence in this case to one of six months' rigorous imprisonment and make a similar order in the other two cases. This will have the effect of reducing the total term of his imprisonment from two years' to "18 months." In Revision Case No. 614 of 1932 we reduce the sentence of imprisonment from eight months rigorous imprisonment to six months' rigorous imprisonment for the reasons set out in our judgment in Revision Case No. 613 of 1932. In Revision Case No. 615 of 1932 we reduce the sentence of imprisonment from eight months' rigorous imprisonment to six months' rigorous imprisonment for the reasons set out in our judgment in Revision Case No. 613 of 1932.

K.S. *Sentences reduced.*

A. I. R. 1933 Calcutta 242

RANKIN, C. J. AND BARTLEY, J.
Saheb Ali and others—Appellants.
 v.

Emperor—Opposite Party.

Criminal Appeal No. 291 of 1932, Decided on 10th August 1932.

(a) Criminal P. C. (1898), S. 297—**Enforcing claim to property is not admitting other party's possession—Contrary statement in charge vitiates it.**

It is not a correct proposition of law to lay down that a person who attempts to enforce a claim to property which he cannot substantiate thereby creates the position that possession is with another, and if the language of a charge is open to that construction it is bad for misdirection. [P 243 C 1]

(b) Criminal P. C. (1898), S. 297—**Charge in case under S. 304 stating that person in possession of property about which fight took place is not guilty of any offence is incorrect—Penal Code (1860), S. 304.**

A direction in a charge in a case under S. 304, Penal Code, to the effect that if the party of the

accused was held to be in possession, none of them was guilty of any offence even though there was a free fight between the two parties resulting in death of some of the complainant's party from injuries received, is not correct or comprehensive law. [P 243 C 2]

Heramba K. Biswas—for Appellants.

Khundkar, Dy. Legal Remembrancer
and Nirmal Ch. Chakravarti—for the Crown.

Bartley, J.—The three appellants have been convicted by the learned Additional Sessions Judge of Mymensingh sitting with a jury, who returned a majority verdict of guilty under S. 117 and 149/304, I. P. C., against all of the appellants and under S. 304, I. P. C., against Sahabali alone. The material facts alleged by the prosecution were that Sataulla and Manu owned a plot of land on which they grew paddy. On 20th November 1930 these appellants and a mob of other people entered the land and began to cut the crop. Sataulla, Manu and another man came up and protested. Appellants Sahabali and Manir speared Manu and Sabel struck him with a lathi. They then assaulted Sataulla with lathis. Both Manu and Sataulla died subsequently from the injuries. The substantive defence set up was that the land belonged to Sabel, who sowed *aus* and *aman* paddy in it. He cut the *aus*, but there was a golmal at the time of cutting the *aman*. The other appellants simply pleaded not guilty, and no alternative version of the actual fracas was alleged or sought to be proved, although it would appear that at least one man among the alleged aggressors died of injuries. The learned Judge, early in his charge, laid down that the first question for the jury was who was in possession of the land on the date of occurrence; in other words, who grew the paddy. After discussing the evidence on this point in detail, he told the jury that if they found possession with the prosecution side the accused had no right of private defence. If they found that Sabel was in possession, the next question was if he and his party had exceeded the right of private defence. If the jury could not, on the evidence, decide who was in possession, they

"may consider whether it was a case of disputed possession, and then the question will arise which party was the aggressor."

He referred to these propositions as three alternatives, and proceeded to

direct the jury as follows: If Sataulla and Manu were in possession, the appellants, provided the jury held "they were all there" are guilty under S. 147. They might under conditions stated by the learned Judge be guilty under Ss. 149 and 304 of the Code. If the jury held that Sabel was in possession, none of the appellants were guilty of any offence. Finally, if it was a case of disputed possession and both parties went to the land prepared to fight, neither party could claim any exemption from liability for the consequence of their acts, and even then the appellants would be guilty of those offences of which they would have been guilty had Manulla and Sataulla been in possession. On these directions the jury returned a verdict that it was a case of disputed possession, and that the appellants were guilty as recapitulated above. (The judgment after overruling the contentions regarding prejudice to accused by non-summoning some of their witnesses and misdirections on the question of fact of possession proceeded.) It remains to consider in the light of the somewhat unusual verdict of the jury, the validity of the directions regarding what the learned Judge terms "disputed possession."

His first direction was that if the jury found disputed possession the question would arise which party was the aggressor. Later he said that if it was a case of disputed possession and both parties went to the land prepared to fight . . . the appellants would be guilty of those offences of which they would have been guilty had Manulla and Sataulla been in possession. It is not a correct proposition of law to lay down that a person who attempts to enforce a claim to property which he cannot substantiate, thereby creates the position that possession is with another, and the language used by the learned Judge is open to that construction. Moreover the case before the jury was, not that two parties went to the field prepared to fight. One side alleged that a mob cut their paddy and attacked them when they protested. The other side admitted an affray over the paddy cutting, gave no details of that affray, and merely claimed that the paddy belonged to them. The suggestion that both parties went prepared to fight is not based on evidence in the record. The direction as to the

aggressive party is also confusing. If the jury found, as they did apparently find, that the land was the property of neither party, the legal position was that neither party had any right to use force in defence of the crop. The direction should have been that if the prosecution story as to the actual use of violence was correct, and if the appellants were not in possession, the appellants were not entitled to plead any right of defence of property in reply to the charges brought against them. Contra, if the jury found that the complainant's party attacked the others, the whole prosecution case failed, irrespective of who was in actual possession.

Lastly, if the jury held that the appellants were the owners of the crop, no right of private defence arose until its possession was endangered. If and when that right arose, it was a right limited by the provisions of the Penal Code, and the direction in the charge to the effect that if Sabel was held to be in possession, none of the appellants were guilty of any offence, is not a correct or comprehensive statement of law. We are, therefore of opinion that the charge delivered by the learned Judge is bad on the ground that it contains misdirections of fact and law, and that the convictions should not be sustained. In the result this appeal is allowed. The convictions and sentences are set aside and the case remanded for retrial to the Court of Session. The appellants will continue on the same bail.

Rankin, C. J.—I agree.

M.N.

Case remanded.

A. I. R. 1933 Calcutta 243

MITTER, J.

S. R. Varma—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 674 of 1932, Decided on 20th December 1932.

(a) *Calcutta Municipal Act (1923), Ss. 391 and 175*—Sections are quite different and one has nothing to do with the other.

Section 175 deals with a very different class of license from that contemplated by S. 391. The object of the two sections and the nature of the licenses required by them are different. S. 175 occurs in Ch. 12 which deals with tax on profession, whereas S. 391 occurs in Ch. 26 dealing with regulation and inspection of places of public resort. Hence S. 175 has nothing to do with S. 391: 34 Cal 913 and *A I R 1920 Cal 535, Ref.* [P 215 C 1]

(b) **Calcutta Municipal Act (1923), S. 391—Corporation has discretion to refuse license.**

It is open to the Corporation to refuse a license if in their discretion they think it necessary to do so in the interest of public order and morality; but this discretion must be exercised in a judicial spirit and in a reasonable manner: *Reg. v. London County Council*, (1915) 2 K B 466, *Ref.* [P 246 C 1]

(c) **Interpretation of Statutes—Bye-laws or regulations framed under statute should be supported unless manifestly unfair or unreasonable.**

Where there is competent authority to which a statute entrusts the power of making regulations or bye-laws, it is for the authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported unless they are manifestly unreasonable or unfair: *London County Council v. Dermondsey Bioscope Co.*, (1911) 60 L J K B 141, *Rel. on.* [P 245 C 2]

(d) **Calcutta Municipal Act (1923), S. 391—Authority of Corporation to refuse license can be questioned by way of defence in criminal Court—Criminal Trial.**

It is open to a person to raise by way of defence in a trial before a Magistrate under S. 391 that the Corporation has no authority to refuse license though it may be more appropriate to do so by a civil declaratory action or by a writ of mandamus. [P 246 C 2]

D. N. Bhattacharyya and Parimal Mukherji—for Appellant.

N. K. Basu and Pasupati Ghose—for the Crown.

Judgment.—The question raised by this appeal is one of considerable importance and relates to the power of the Corporation of Calcutta to refuse a license to keep open a Carnival when in the public interest it thinks it necessary to do so. The case for the prosecution is that the appellant S. R. Varma was the proprietor of a Carnival in respect of which license had been obtained from the Corporation and that that license remained in force up to 1st March 1932; that there had been complaints against the holding of Carnivals of late both in the newspapers as well as by some public bodies like the Marwari Trades Association of Calcutta and the appellant was informed that no further license would be granted after the expiry of the period; that the appellant thereafter changed the site and name of the show and obtained a police licence for the show under the name of Hollywood Park Carnival on plots Nos. 21 to 29 of the Calcutta Improvement Trust Scheme and intimated to the Corporation that he was going to open the projected Carnival from 1st April and was prepared to

pay the taxes, that the Carnival was opened from 1st April; but no license from the Municipality having been obtained the appellant had offended against the provisions of S. 391, Calcutta Municipal Act. The Corporation of Calcutta started the prosecution under S. 391, Calcutta Municipal Act.

It is admitted by the accused that the Carnival was started without obtaining the license and in such circumstances one would have thought that the provisions of S. 391 had been contravened; but it is contended by the defence that the Corporation cannot refuse a license altogether although it can impose conditions for the taking out of the license. The Magistrate thought that it was not necessary to go into the question whether the Corporation had the right of refusing license altogether and that it was sufficient for the purposes of the conviction in this case that the Carnival had been started and continued without a license. In this view the Municipal Magistrate convicted the appellant under S. 391, Calcutta Municipal Act, and has sentenced him to pay a fine of Rs. 500. The conviction and sentence have been challenged on appeal on several grounds: (1) the Corporation had no power under the statute to refuse a license altogether and, refusing to grant license "the Corporation ceased to function" and the conviction under S. 391 cannot be maintained; (2) the Act contemplates two licenses, one license for the place and another for the calling; and so far as the license for calling is concerned license could be taken after 1st July as S. 391 must be read with S. 175 and the prosecution was bad as it was started before 1st July; (3) that the sentence is too severe.

It will be easy to dispose of the second ground first. Mr. N. K. Basu who appears for the Corporation of Calcutta replies to the argument founded on this ground by pointing out that S. 175 or Sch. 6 has got nothing to do with S. 391. He argues that the breach under S. 175 is punishable under S. 492 whereas the breach under S. 391 is punishable under S. 488. He points out that S. 175 occurs in Ch. 12 which concerns "tax on profession," whereas S. 391 occurs in Ch. 26 which deals with "regulation and inspection of places of public resort." Mr. Basu further

cites two cases in support of this view, *Bevin Behari Ghose v. Corporation of Calcutta* (1) and *S. N. Banerjee v. W. Lewis & Co.* (2). Both these cases which were under the old Calcutta Municipal Act (3 of 1899) B. C., support the argument of Mr. Basu and I am of opinion that S. 175 deals with a very different class of license from that contemplated by S. 391. The object of the two sections and the nature of the licenses required by them are different. S. 175 occurs in Ch. 12 which deals with tax on profession whereas S. 391 occurs in Ch. 26 dealing with regulation and inspection of places of public resort. These observations are sufficient to dispose of ground 2 taken. Ground 1 taken seems to be one of some difficulty. S. 391 of the Act of 1923 runs as follows :

"No person shall, without or otherwise than in conformity with the terms of a license granted by the Corporation in this behalf, keep open any theatre, circus or other similar place of public resort, recreation or amusement : Provided that this section shall not apply to private performances in any such place."

It is argued that when a Municipal authority is given the power under the law to regulate the opening of certain places of amusement that implies the continued existence of that which is to be regulated and governed and on this authority it is argued that the Corporation has got no power to withhold a license. It is said it can impose conditions but it cannot refuse altogether the granting of licenses. In support of this contention reliance has been placed on a decision of their Lordships of the Judicial Committee in the case of *Municipal Corporation, Toronto v. Virgo* (3). In that case the question arose as to whether a statutory power conferred upon a Municipal Council to make bye-laws for regulating and governing a trade does or does not in the absence of an express power of prohibition authorize the making it unlawful to carry on a lawful trade in a lawful manner. It was held that it did not so authorize the Municipal Council. In that case a Municipal bye-law was passed prohibiting hawkers from plying their trade in an important part of the Municipality. And Lord Davey said that through all the cases a general principle

may be traced that Municipal power of regulation or of making bye-laws for good government without express words of prohibition does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

In that case before their Lordships what was being dealt with was a bye-law power to make which is given by the statute and not the statute itself as in the present case, and it was held that the bye-law was really ultra vires of the statute in the absence of express prohibition. But there is also a well recognized principle that where there is competent authority to which an Act of Parliament entrusts the power of making regulations it is for the authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported unless they are manifestly unreasonable or unfair; see the observations of Lord Alverstone, C. J., in *London County Council v. Bermondsey Bioscope Co.* (4). It is familiar knowledge that public performances have a strong influence on public mind and public opinion and for that reason the Corporation have been given the discretion to grant or refuse licenses regarding theatre, circus or other similar places of public resort, recreation or amusement. The terms of S. 391 would impliedly suggest such a discretion. As has been pointed out by Buckley, J. J., in *Reg. v. London County Council* (5), which was the case of cinematograph license: "The only question we have to determine is whether the body with whom exclusively the determination of that matter lies has acted fairly and according to law."

In the case in which these observations were made license was refused to the cinematograph company whose share holders were in a large proportion alien enemies, and it was held that the London County Council could refuse license in the exercise of their discretion.

Further in the case of *Toronto Corporation* there was no question of apprehended nuisance for, as Lord Davey pointed out:

"there was no evidence and it is scarcely conceivable that the trade could not be carried out without occasioning a nuisance."

1. (1907) 34 Cal. 913=11 C W N 885=6 C L J 183=6 Cr L J 148.

2. A I R 1920 Cal 535=58 I C 924=21 Cr L J 844=47 Cal 809.

3. (1896) A C 88=65 L J P C 4=73 L T 449.

4. (1911) 80 L J K B 141=(1911) 1 K B 45=103 L T 760=75 J P 53=9 L G R 79=27 T L R 141.

5. (1915) 2 K B 466=84 L J K B 1787=113 L T 118=79 J P 417=13 L G R 847=31 T L R 829=59 S J 382.

If such nuisance could be apprehended the licensing authority would have been within their rights to refuse license. S. 391 says that certain places of amusement cannot be kept open without or otherwise than in conformity with a license granted by the Corporation of Calcutta. Can it be said that where a question of public order is involved or where a question is involved that betting and gambling which are illegal might go on in this Carnival the Corporation has no power to refuse a license? In the present case there was the representation by a public body as to the harmful effect of these Carnivals and there is evidence of the Theatre Inspector that betting and gambling were going on in the Great Eastern Carnival of which the appellant was the proprietor. It was open to the Corporation to anticipate, having regard to the way this Carnival was being carried on, that the applicant would not be a fit and proper person to hold the license for another Carnival. I am of opinion it was within the competence of the Corporation to refuse a license where in the interest of public order and morality it was necessary to do so. This act on the part of the Corporation does not in my opinion infringe on the liberty of the subject to carry on lawful trade in a lawful manner. The element of public order comes in and I should think that S. 391 impliedly gives the Corporation power to refuse licenses if in the interest of public order it thinks it should do so. The representation by the public bodies and in the newspapers led to a resolution to be passed by the E. G. P. Committee to the effect that no licenses should issue for carnivals except with the permission of the District Committee. This seems to be a salutary resolution, and if in pursuance of the resolution the Corporation refused to grant licenses it was quite within its power to do so. It cannot be said that the discretion was exercised arbitrarily or in an unreasonable manner.

A point had been raised by Mr. Basu on the second day of hearing of the case that authorities show that one cannot raise the contention that the refusal to issue license is in excess of the authority of the Corporation in a criminal Court, but must be determined before a civil Court wherefrom the accused must

obtain a declaration that the action of the Corporation is ultra vires. I am of opinion that it may be raised by way of defence in the trial before the Magistrate although it may be more appropriate to do so by a civil declaratory action or by a writ of mandamus. My conclusions may be summarized as follows: Under the implications of S. 391 of the Act it is open to the Corporation to refuse a license if in their discretion they think it necessary to do so, but this discretion must be exercised in a judicial spirit and in a reasonable manner. In the present case it cannot be said that the discretion has not been exercised in an impartial and judicial spirit seeing that on the representation of a public body the question was debated before the E. G. P. Committee and the said committee came to the conclusion that license of Carnivals should ordinarily be refused and may be granted with the permission of the District Committee and seeing further that there is evidence in that case that the previous Carnivals of which the appellant is the proprietor allowed gambling and betting to go on. The conviction must therefore be maintained.

With regard to the ground of severity of sentence, after considering all the circumstances and giving due weight to the argument of Mr. Basu that the accused was liable in addition to a daily fine, I am of opinion that the ends of justice would be met by reducing the fine to Rs. 250 only (rupees two hundred and fifty). The appeal is to this extent allowed. The conviction is affirmed, but the sentence is reduced. The portion of the fine remitted must be refunded to appellant.

K.S.

Sentence reduced.

A. I. R. 1933 Calcutta 246

RANKIN, C. J. AND COSTELLO, J.

Kiron Soshi Dasi—Defendant—Appellant.

v

Official Assignee of Calcutta—Plaintiff—Respondent.

Appeal No. 101 of 1931, Decided on 22nd April 1932, from original decree of Buckland, J., D/- 11th August 1931.

(a) Civil P. C. (1908), S. 11, Expl. 4—B executing deed of gift in favour of two persons who mortgaging that with K—Mortgagee K purchasing property in execution of decree against mortgagors—B suing for de-

claration that deed of gift was not binding on her—On B's death A was substituted for B and suit dismissed—A remaining in possession all the time—K becoming insolvent—Official Assignee suing A for possession and admitting A's possession since 1896—A pleading adverse possession—A could plead adverse possession.

In 1896 B executed a deed of gift of the property in suit in favour of two persons who granted a simple mortgage of the property in favour of K. In 1914 K instituted a suit against the mortgagors which resulted in a final decree being passed in 1916. The mortgaged property was sold in execution and purchased by K. Immediately after this B sued for a declaration that the deed of gift was not binding on her and for other reliefs against the mortgagee. She died soon afterwards and A was substituted in her place as plaintiff. The suit was eventually dismissed in 1923. But as A continued in possession of the property in suit and as K could not obtain possession of it from A the Official Assignee in 1930 sued A for possession of the property (K having been adjudicated insolvent in 1929.) At the hearing of the suit, B's and after B, A's adverse possession was admitted since 1896. A pleaded title by adverse possession for over 12 years even if the deed of gift was held to be binding and effective. Plaintiff pleaded that as A did not take the plea of adverse possession in the previous suit, A could not raise it in the present suit under Expt. 4, S. 11 :

Held : that though by reason of the former decision A was precluded from raising the plea that the title of the plaintiff had been extinguished in 1918 by A's adverse possession for over 12 years, it was quite open to A to urge that plaintiff's title had been extinguished by A's adverse possession for over 12 years prior to the date of the present suit. [P 249 C 1]

(b) Civil P. C. (1908), O. 21, Rr. 97 and 103—Executing Court not giving delivery—R. 97 does not apply—Limitation Act (1908), Art. 11-A.

Rule 97 has no application in the absence of an attempt on the part of the Court in execution to give delivery to the decree-holder or the auction purchaser. [P 250 C 1]

An application by a decree-holder or auction purchaser for being put in possession of the property on the allegation that in spite of repeated demands the person in possession was unwilling to give him possession is not an application within the meaning of R. 97, the order made on it is not an order under R. 99; and the suit filed thereafter for possession of such property is not a suit under R. 103 so as to make Art. 11-A, Lim. Act, applicable thereto, there having been no execution proceeding or no order made by the Court at any time directing that the decree-holder or auction purchaser should be put into possession of the property on the strength of his decree or sale certificate as the case may be : A I R 1924 All 495 (F B), not foll. [P 243 C 1]

Advocate-General, S. C. Mitter and S. P. Sinha—for Appellant.

W. W. K. Page and Laha—for Respondent.

Rankin, C. J.—In this case the defendant, a lady of the name of Kiron

Soshi Dasi, appeals from a decision of my learned brother Buckland, J., in a suit brought against her by the Official Assignee of Calcutta for possession of premises No. 10, Sonagachi Lane, in the town of Calcutta together with mesne profits. On 25th February 1896, it appears that a woman of the name of Bhuban Mohini Dasi executed a deed of gift of the property in suit in favour of two persons, Gora Chand Dhur and Gour Mohan Dhur, sons of one Kunja Behari Dhur and these persons on 14th March 1912 granted a mortgage of that property in favour of one Maharaj Kishore Khanna. In July 1914, Khanna instituted a mortgage suit against Gora Chand and Gour Mohan which resulted in a final decree being passed in 1916 and a sale of the property in execution of the decree took place on 10th August 1918. On the day of this sale, Bhuban Mohini not only protested to the Registrar that the property still remained in her and that the deed of gift under which the mortgagors claimed was null and void but she commenced a suit for declaration of her title, for a declaration that the deed of gift was not binding on her and for other reliefs against the mortgagee. She died afterwards and the present defendant Kiron Soshi Dasi was substituted in that suit in Bhuban Mohini's place and stead. While that suit was proceeding, the mortgagee Khanna in his own mortgage suit obtained a sale certificate on 12th March 1919. On 13th March 1923, the suit of Bhuban Mohini which had become the suit of the present appellant Kiron Soshi was dismissed by Page, J. Thereupon, on 25th April 1923, Khanna the mortgagee, in his own suit applied for an order against the present appellant or any other person to vacate and make over vacant possession of the mortgaged premises No. 10, Sonagachi Lane, on the allegation that a certificate of sale had been granted to him but that the premises were in the occupation of the said Kiron Soshi Dasi who refused to give up possession in spite of repeated demands.

In that application, Kiron Soshi Dasi produced evidence of various tenants of the property who deposed to the fact that she and Bhuban Mohini had been in possession for many many years. She did not dispute that she was in possession of the property or contend

for a single moment that she was minded to give it up. That application was in the end dismissed by an order made by Greaves, J. Thereafter it is not necessary to detail the events except to say that the present suit was brought by the Official Assignee because Khanna the mortgagee was adjudicated an insolvent on 25th September 1929.

The plaint in the suit which is before us was filed on 9th August 1930. At the hearing of the suit, it was not disputed that Bhuban Mohini and the defendant after her had been in adverse possession of this property even since the date of the deed of gift which Bhuban Mohini had executed to Khanna's mortgagors. At the settlement of the issues, a plea of limitation was taken and a plea of adverse possession and Mr. S. M. Bose on behalf of the plaintiff gave an express admission that the possession had been adverse possession from 1896 onwards. In these circumstances, the defendant who was concluded by the judgment of Page, J., from denying that title was in the Official Assignee on the footing that the deed of gift was valid and that the mortgage to Khanna was a good mortgage contended, first, that the suit was barred by limitation because it was not brought within one year of the order made by Greaves, J., in 1923 dismissing the application for possession. She also contended that her title by adverse possession was a complete defence to the suit. On this point the plaintiff said that Page, J.'s judgment made it impossible for her in this suit to set up Art. 142 or Art. 144, Limitation Act, as a defence.

Now, the first question is a question on the merits, that is to say, whether or not this adverse possession admitted since 1896 leaves the defendant without any answer to the Official Assignee. In my opinion, it affords a complete defence. The contention on behalf of the plaintiff which the learned Judge has acceded to is as follows: The suit before Page, J., had been brought in August 1918. The lady had in her plaint set up that the deed of gift was obtained by undue influence and had never been acted on or given effect to and that Khanna, the mortgagee had notice of all these facts. Page, J., was not convinced that there was anything defective in the deed of gift. He thought it valid and

operative. Thereupon learned counsel for the plaintiff in that case ordered Page, J., to allow him to amend the plaint and plead an alternative case to the effect that, even if the deed of gift was valid and effective, the grantor, contrary to the deed of gift, had been in possession ever since, that that was adverse possession for more than 12 years and that the title of the grantee under the deed of gift had thus become extinguished under S. 28, Limitation Act. The learned Judge finding that this case had not been pleaded for one reason or another refused to allow the amendment. He therefore dismissed the suit for declaration as to the deed of gift and for an injunction restraining the mortgagee from proceeding against the mortgaged subject. The learned Judge in the present case has discussed the question whether, although adverse possession was not a subject-matter of decision before Page, J., the question of the lady's adverse possession for 12 years prior to August 1918 is a matter within the explanation to S. 11 of the Code—a matter which might and ought to have been raised in the same suit and he has come to the conclusion that it is such a matter. I am not in the least disposed to disagree with that opinion. I think it was for the lady to put forward a case in her plaint not only on title, but any case which she had to enable her in August 1918 to get relief against the mortgagee on the footing of adverse possession. If that question had been raised it would only have been relevant to see whether or not she had made out that for 12 years prior to 10th August 1918 she had been in adverse possession. It must be taken therefore that before 10th August 1918 she had not been for 12 years in adverse possession, that is to say, she is not now able to say that the title of the Official Assignee was gone on 10th August 1918 by reason of 12 years adverse possession.

It has been pointed out by the learned Advocate-General that the judgment of Page, J., cannot be taken to mean that her possession thereafter ceased to be adverse. Her possession thereafter became all the more acutely adverse by reason of Page, J.'s judgment. Then the question is: Does Page, J.'s judgment necessarily mean more than this: that she cannot be taken to have had in August

1918 adverse possession for 12 years. I am of opinion that it means no more than that. Had she been in adverse possession for two years before that judgment, she would have had no case whatever and, if she had raised the case and the case had been negatived, it would not in the least have been necessary to infer that the Court had come to the conclusion that for those two years she had not been in adverse possession. In my judgment, notwithstanding the judgment of Pago, J., it is quite open to the lady, in the circumstances of the present case, to say that for years before the date of the present plaint she was in adverse possession of the property. That is a complete answer to the suit and, on that ground alone, it seems to me that the suit should have been dismissed with costs.

The question of limitation which the learned Advocate-General raised in this appeal was to the effect that the plaintiff's suit was bad under Art. 11-A, because it was not brought within one year of the order made by Greaves, J., on 25th April 1923, dismissing the mortgagee's application for possession under his sale certificate. The learned Judge has held and I think rightly that those proceedings cannot be said to be proceeding upon an application under R. 97, O. 31 of the Code and the order cannot be held to be an order under R. 99.

The case of *Sobha Ram v. Tursi Ram* (1), has been pressed in argument before us. In my judgment, the position of the matter under the Code is as follows: If a person has in a suit succeeded in getting a decree for possession of certain property, he is entitled to get an order from the Court for delivering that property to him by way of execution against any person who is bound by the decree. In like manner, if a person is an auction-purchaser of a property in a suit constituted in a certain way, he is entitled to get possession of that property at the hands of the Court by way of execution against persons who are bound by the sale. When in either of such cases the decree-holder or the auction-purchaser desires the assistance of the Court to put him into possession he need not invoke the Court's assistance if he can get possession peaceably without it he has to

make up his mind as to the kind of possession he is entitled to claim and whether he is entitled by way of mere execution to get possession against the other party at all; for example, to take the case which is the present case before us—the case of a person who has purchased a property under a mortgage decree, if he cannot for one reason or another get possession, he has to make up his mind whether he will on the strength of his title bring a suit against whoever is in possession or whether he will get a mere summary and equally successful remedy by execution. If he wants execution, he has to make up his mind whether, having regard to the persons whom he desires to remove and having regard to the persons who are likely to object to his getting possession, the case is one within R. 95 or R. 96.

If it is not, that is to say, if some one is in possession who is under no duty to obey the decree in the particular suit, that is a fact which he has to take into account before making up his mind to apply for execution at all. That is a fact which points to this that he is unlikely to get an effective remedy merely by executing his decree or the sale certificate. In these circumstances, it may very well be that the proper course is not to attempt to recover in execution without bringing an independent suit. It is only if he is prepared to say that the case is one within R. 95 or R. 96 that the certificate-holder or decree-holder has any business to approach the Court in that suit for execution and when he does apply, it appears to me that the order he ought to get is an order of the character in form No. 39 in App.E of the Code, not an order directed against any particular person but a general order directing the officer of the Court to put him into possession with a general direction to remove any person who refuses to vacate; else it will be purely a general order of the character specified in R. 96. Having in that way invoked the assistance of the Court to put him into possession of two things one or the other will happen; either he will get or he will fail to get possession because of the resistance or obstruction of somebody and when that happens it appears to me that it is open to him to apply under R. 97. In that case, the Court will investigate the question of

the character of the possession or the claim of right of the party objecting to the execution and will make an order under R. 98 or R. 99 the consequence of which will be that the order will be final subject always to the bringing of a suit such as is contemplated by R. 103, O. 21.

In the Allahabad case already cited, it appears to have been assumed that without any order for execution under R. 95, or R. 96 the decree-holder or the certificate-holder who goes on the law by himself and demands possession and does not get it can come straightaway to the Court under R. 97, O. 21 and that has given rise to the further question whether knowing that the person in possession is not minded to give it up it is necessary for him to go physically and be really obstructed or resisted or whether it is enough in such a case merely to show that the person was objecting to his possession. I am not prepared to accept the authority in the Allahabad case in so far as it appears to hold that R. 97 has any application in the absence of an attempt on the part of the Court in execution to give delivery to the decree-holder or the auction-purchaser. The words which appear as the rubric of the particular rules of which R. 97 is the first one "resistance to delivery of possession to decree-holder or purchaser" and the form provided in App. E is plain to the effect that resistance is resistance to the carrying out of the execution by the office of the Court. Form No. 40 is headed "summons to appear and answer charge of obstructing execution of decree" and it proceeds:

"Whereas the decree-holder in the above suit has complained to this Court that you have resisted (or obstructed) the officer charged with the execution of the warrant for possession, you are hereby etc."

The language of the rule is:

"Where the holder of a decree for possession of the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property."

That language does not, it seems to me, indicate that because an amicable delivering up of the property to the decree-holder or the certificate holder is refused, the matter is to come summarily before the Court, there being no previous execution directed for the purpose of giving possession [of R. 98]. The great difficulty in my judgment is this:

Both the Court and the parties are apt to suppose that in order to get a warrant under R. 95 the question of the character of the possession of the person likely to be obstructed ought to be raised and decided. I am more particular in saying that that is not the intention of R. 95 because one of the Judges in the Allahabad case already mentioned seems to have taken that view and I see that in 1919 in the present case an order was made by me sitting on the original side purporting to be under R. 95 and purporting to direct Kiron Soshi to vacate. That order was afterwards set aside. But it appears to me that the correct way of working these rules is this: First of all, to find out whether the applicant claims to be within R. 95 or R. 96. If he does not, dismiss his application then and there and leave him to bring a separate suit.

If on any reasonable right he claims to be under R. 95 or R. 96, let him have a general warrant mentioning nothing about any particular person who is likely to give trouble; wait and see what particular person does give trouble when the officer of the Court comes to put the applicant into possession; and according to the claim of the person who there gives trouble, an application may successfully be made under R. 97. In my judgment, it would be unsafe for this Court to follow the exposition given by any of the Judges in the case cited from *I. L. R. 46 Allahabad* (1). The question in this suit is whether an application having been made to Groves, J., on 12th April 1923 by Khanna saying that in spite of repeated demands Kiron Soshi was unwilling to give him possession, the dismissal of that application meant that Khanna had one year only within which to bring his suit. In my judgment, that is not so. Khanna's application was not an application within R. 97; the order was not an order within R. 99 and this suit is not within R. 103 there having been no execution proceeding or no order made by the Court at any time directing that Khanna should be put into possession of the property on the strength of the sale certificate. The application may have been dismissed for this very reason.

One way to test the matter would be to take the case of a decree-holder who falls within O. 21, R. 22. He cannot get execution—Whether under R. 95 or

otherwise without giving notice under R. 22. Can he then go informally and without even a warrant or a copy of the decree to demand possession and on refusal bring an application under R. 97 against anyone he finds in possession? I think not; on this point therefore the appeal fails, but as the appellant succeeds on the first point, the result is that the appeal must be allowed with costs and the suit dismissed with costs.

Costello, J.—I agree.

K.N./R.K.

Appeal allowed.

A. I. R. 1933 Calcutta 251

RANKIN, C. J. AND COSTELLO, J.

Pradyumnakumar Mallik—Appellant.

v.

Gopendra Mallik—Respondent.

Appeal No. 11 of 1932, Decided on 26th April 1932, from judgment of Lord Williams, J., in Suit No. 2350 of 1921.

(a) **Limitation Act (1908), Art. 181—Mortgage—Application for personal decree—Limitation is governed by Art. 181—Civil P. C. (1908), O. 34, R. 6.**

Limitation for an application for personal decree against a mortgagor judgment-debtor for the balance of amount due by him after the sale of the property is governed by Art. 181; and the date from which time begins to run is the date of the order confirming the sale under O. 21, R. 92 whether the decree-holder's costs have been taxed or not: *A I R 1925 Cal 634* and *A I R 1931 Cal 166, Rel on.* [P 252 C 1]

(b) **Mortgage—Costs in mortgage suit are to be regarded as liquidated amount—Costs.**

Costs in a mortgage suit are not like an award of damages, but are to be regarded as liquidated amount capable of ascertainment. [P 252 C 2]

(c) **Civil P. C. (1908), O. 34, R. 6—R. 6 is not limited by form No. 8 in Sch. 1, Appendix D.**

Order 34, R. 6 makes no specific reference to Form No. 8, Sch. 1, Appendix D, and is not limited by this form which is provided merely for use and adaptation according to the circumstances of the case. [P 253 C 1]

(d) **Limitation Act (1908), Art. 181—Interpretation.**

Article 181 is a residuary article adapted to many different classes of application. The words in Col. 3 are only the expression of a broad Common law principle. They have to be interpreted and applied according to the substance of each case. [P 253 C 1]

Pugh and S. B. Sinha—for Appellant.

N. N. Sircar and S. C. Mitter—for Respondent.

Rankin, C. J.—This suit was brought, on 26th July 1921, by two persons of the name of Ray—mortgagees under an English mortgage, dated 13th February 1920 against two sets of defendants—against a first set as mortgagors and against a second set as puisne mortgagees. The

suit was an ordinary suit for the enforcement of the mortgage. On 18th August 1921 a receiver of the mortgaged property was appointed; on 12th April 1922 a preliminary mortgage decree for sale was passed in the usual form. It was a decree under R. 4, O. 34, Civil P. C.

The usual form of mortgage decree on the original side of this Court is not literally and exactly in conformity with Form No. 4, Appendix D, Sch. 1 of the Code, which has reference to Cl. (b), R. 2, O. 34. It is usually necessary to direct the taking of accounts as contemplated by Cl. (a) of that rule. In the present case, apart from directions given for the benefit of the puisne mortgagees, the preliminary decree directed accounts to be taken of what would be due to the plaintiffs for principal and interest on a certain future date, and it further directed that the plaintiffs' costs of the suit should be taxed as between attorney and client. It then provided that, upon the defendants or any one of them, within a certain time, paying what should be reported to be due for principal and interest together with the plaintiffs' taxed costs with interest thereon at 6 per cent per annum from the date of taxation until realization, the defendants should get back the property. But that if such payments were not made by the time appointed, certain further interest and costs should be added as part of the amount payable to the plaintiffs under the decree; that the property be sold and the money to arise by the sale be paid into Court and applied first in payment of the amount payable to the plaintiffs under the decree, and so forth in accordance with R. 4, O. 34. In accordance with the rules of the High Court, a clause was inserted to the effect that, if the money to arise by the sale should not be sufficient, the plaintiffs should be at liberty to apply for a personal decree for the amount of the balance. In Courts other than the High Court, the costs of the suit are not referred to a Taxing Officer for taxation, but are summarily assessed and are inserted in the decree itself in the manner disclosed by Form No. 1, Appendix D.

The Registrar took the accounts under this decree and, on 21st August 1922, made his report stating what would be due for principal and interest on the security on 12th March 1923. The plain-

tiffs' solicitors however had not carried in their bill of costs for taxation at this stage. On 16th April 1923, the final decree for sale was passed which simply recited the preliminary decree and the fact that payment thereunder had not been made. It ordered the premises to be sold and gave leave to the plaintiffs to bid with the usual consequential directions. It may be noticed that the decree provided for the plaintiffs' costs of the suit subsequent to the preliminary decree and for taxation thereof. The present appellant thereafter took an assignment of the rights of the plaintiffs and obtained an order on 25th August 1924, substituting him in their stead as the plaintiff. The mortgaged property was thereafter sold by the Registrar in different lots, the last lot being sold to the present appellant on 27th February 1926. This sale was confirmed by an order of the Court made on 29th March 1926. On 4th December 1931, the appellant, by notice of motion, instituted the proceeding out of which this appeal arises. In this proceeding he asked for a personal decree to be passed against the mortgagor defendants for the sum of Rs. 2,67,513, as being the balance due to him after realization of the mortgaged property. The learned Judge has dismissed this application on the ground that it is barred under Art. 181, Schedule to the Lim. Act of 1908, which requires the application to be made within three years from the time when the right to apply accrues.

That Art. 181 is applicable was decided by this Court in *Pell v. Gregory* (1) and that the date from which time begins to run is the date of the order made under O. 21, R. 92, was decided in *Krishna-bandhu Ghatak v. Panchkari Saha* (2). Prima facie therefore the appellant's right to apply for a personal decree was barred on 29th March 1929. Before the learned Judge and before us the appellant has sought to avoid this conclusion by reason of the fact that he did not carry in his bill of costs for taxation till 1930 and 1931. The two allocaturs, he holds, are dated 9th May 1930, and 8th August 1931. This is the single point submitted for our consideration and it is

the only point dealt with in the judgment of the learned Judge. Other points are taken in the memorandum of appeal, but we have not been asked to consider them. On behalf of the appellant, Mr. Pugh does not contend that there is any need in the High Court to have the costs of suit taxed before applying for a personal decree, which in this Court, in a case like the present, usually recites the amount of the net proceeds of sale, the amount of the plaintiff's claim for principal and interest and the difference between these two sums, and then directs the defendant to pay to the plaintiff this difference with decretal interest at 6 per cent per annum and also his costs of the suit. He contends however that he is not obliged to ask for a decree in this form, and that if we look at Form No. 11 of App. D as it stood in 1929, or Form No. 8 of the appendix as it now stands, we will find that the amount due to the plaintiff in respect of costs is contemplated as having been ascertained. He says accordingly that he is entitled to ask for a decree for a definite sum of money which would include everything including all costs except the cost of this application for a personal decree.

I agree with the learned Judge in thinking that this contention is unsound. The object of the personal decree is to give to the plaintiff a remedy not so far given to him by the preliminary or the final decree for sale; and to give him this remedy only after compelling him to give credit to the defendant for the sale proceeds. The fact that the forms contemplate that the costs have either been assessed at a specific sum by the earlier decrees or can there and then be assessed is explained by the circumstance that Courts in India have ordinarily no taxing master and no procedure for the carrying in of bills of costs for taxation. The High Court, on its original side, like the Courts in England, assesses costs on different principles and by a more elaborate machinery. Where it is clear that, apart from the costs, a heavy balance is due to the plaintiff upon his mortgage, the personal decree, which, for the first time makes the mortgagor liable for the payment of costs, is in no way different from any other decree which awards the costs of a suit. These costs are not like an award of damages, but are to be regarded as a liquidated amount capable of

1. A I R 1925 Cal 834=52 Cal 828 = 89 I C 1 (F B).

2. A I R 1931 Cal 166=59 Cal 741 = 130 I C 815.

ascertainment. R. G. O. 34, speaks of "the amount due to the plaintiff," "the net proceeds of the sale" and "the balance." The rule makes no specific reference to the form and is not limited by the form which is provided merely for use and adaptation according to the circumstances of the case. Art. 181, Lim. Act, is a residuary article adapted to many different classes of application. The words in Col. 3 are only the expression of a broad Common law principle. They have to be interpreted and applied according to the substance of each case. In the present case, as it is not disputed that the plaintiff in the ordinary way could have obtained a personal decree in the ordinary form for the balance, including what was due to him for costs, I agree with the learned Judge in thinking that the argument for the appellant cannot be accepted and this appeal must therefore be dismissed with costs.

Costello, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Calcutta 253

MUKERJI AND GUHA, JJ.

Sm. Swarnamoyee Dasi—Appellant.

Probodh Chandra Sarkar and others—Respondents.

Appeal No. 417 of 1928, Decided on 2nd March 1932, against original decree of Addl. Sub-Judge, Zillah 21-Pargannas, D. 28th July 1928.

(a) Will—Construction—*M* executing will on 11th April 1868—Government promissory notes given to wife *B*, on her death to daughter *D* and on her death to daughter's sons—*D* having two sons *K* and *J*—*K* predeceasing both *B* and *D*—*D* who died after *B* making will of all her properties but not mentioning promissory notes—*J* taking conveyance from *K*'s son regarding all properties in 1901—In 1922 *K*'s son executing in very general terms deed of release in favour of *J*'s wife to whom *J* by his will had given his properties in consideration for certain gift made by his wife—No mention of promissory notes even in this deed—Fact of promissory notes not disclosed to *K*'s son till 1922—In 1926 *K*'s son suing to recover his half-share in them—Will of *M* created gifts in praesenti and hence *K* and *J* took vested interest—*K* who was living after testator's death got absolute estate though enjoyment of it was postponed till death of *B* and *D*—Hence his right was not defeated though he predeceased *B* and *D*—Art. 120 applied to suit—*K*'s son could claim advantage of S. 18, Lim. Act, since *J* who was his co-partner fraudulently concealed from him existence

of promissory notes—Deed of release did not relinquish *K*'s son's rights to promissory notes—*K*'s son was not estopped from claiming his share in promissory notes—Limitation Act (1908), S. 18 and Art. 120—Evidence Act (1872), S. 115.

M, a Hindu testator, executed a will on 11th April 1868, which provided that certain Government promissory notes should devolve upon his wife *B*, on her death upon his daughter *D* and on her death upon the daughter's sons. The relevant provision of the will read as follows: "My wife, and on her death my daughter and on her death my daughter's sons shall, on my death be entitled to get the Government promissory notes exclusively belonging to me . . . neither my brother nor my nephews nor my brother's grandsons shall be competent to make any claim." *D* had two sons, *K* and *J*. *K* predeceased both his mother and grandmother. After the death of *B*, *D* died leaving a will regarding her self-acquired properties as well as those inherited from her father but no mention was made of the promissory notes. *J* took a conveyance from *K*'s son (who is the plaintiff) regarding all his properties in 1901. *J* also made a will by which he gave all his properties to his wife (the defendant). In 1922 plaintiff executed in very general terms a deed of release by which he relinquished all claim against *J*'s estate in consideration of a gift made by defendant. No mention of the promissory notes was made even in this deed. The fact of the existence of the promissory notes was not disclosed to the plaintiff till 1922. In 1926 plaintiff sued defendant for recovery of his half-share in the promissory notes.

Held: that the intention of the testator was to make gifts in praesenti only postponing the enjoyment thereof in the case of the daughter till the death of the widow, and in the case of the grandsons till the lives of the widow and the daughter were over. The will created an absolute estate in favour of the grandsons with the two life estates intervening. Hence, as plaintiff's father was alive when testator died, plaintiff's right to a half-share could not be disputed, though his father predeceased testator's widow and daughter: *Hullifax v. Wilson*, (1809) 16 Ves Jun 168, *Ref.* [P 256 C 2]

Held further: that the suit was governed by Art. 120 and that Arts. 123 and Art. 62 and 49 had no application: *A I R 1932 P C 81 and 21 Cal 151 (P C)*, *Rel on.* [P 257 C 1]

Held further: that *J* and the plaintiff were copartners and therefore it was the duty of *J* to speak; and since he remained silent there was concealed fraud on his part on which the plaintiff could justly rely to get over the bar of limitation. The burden therefore would lie on defendant to show that plaintiff had clear and definite knowledge of the facts which constituted fraud. To discharge this burden it would not be enough to show that the plaintiff had means available to him for coming to know of the fraud. As the suit was well within six years from the time when fraud became known to plaintiff the suit was not barred: *A I R 1929 Cal 250, Rel on.* [P 258 C 1]

Held further: that the deed of release executed by plaintiff in favour of defendant, although expressed in very general terms did not relinquish the claim to the promissory notes as

there was fraudulent concealment with regard to them on the part of J, under whom the defendant claimed: *Jarris v. Duke*, (1681) 1 Vern 20; *Broderick v. Broderick*, (1713) 1 P Wms 237, *Ref.*

Held further: that the deed of release and the deed of gift could not operate as estoppel against the plaintiff as it was not possible to hold that the defendant was misled into thinking that the plaintiff was giving up his right to the promissory notes: 20 Cal 296 (P C), *Rel on.*

[P 259 C 1]

(b) Limitation Act (1908), Art. 49—Art. 49 does not apply where half-share in moveable is sought to be recovered by declaration of title.

Article 49 is inapplicable in a case where a half-share in certain moveable is sought to be recovered on declaration of title, such a suit not being a suit for specific moveable property, which means property of which one can demand the delivery in specie. [P 259 C 2]

(c) Limitation Act (1908), S. 18—What constitutes fraud—Effect of fraud.

Except when the plaintiff's knowledge is an ingredient of his cause of action, the plaintiff's ignorance of his right to sue does not prevent time from running against him. But it is otherwise if such ignorance is brought about by the fraud of the defendant. In order to constitute fraud there must be some abuse of confidential position, some intentional imposition, or some deliberate concealment of facts: a designed fraud,

Brother Radha Mohun. . . Ram Kamal Mondal

died 21st April 1868
=W. Bhagabati Dasi died
6th August 1890

Debrani, died 3rd August 1892

Brojendra K. Sircar
Died 1884-85

Probodh, plaintiff
(Born in 1881, attained
majority in 1899).

by which a party knowing to whom the right belongs conceals the facts, and circumstances giving that right. The right of the party so defrauded is not affected by lapse of time or by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud which has been committed. [P 260 C 1]

Brojo Lal Chakravarty and Karunamoy Ghose—for Appellant.

Sarat Chandra Roy Choudhury, Amarendra Nath Bose, Panchanan Ghose, Durgadas Roy, Probodh Ch. Chatterjee, Bireswar Chatterjee and Hara Krishna Pramanik—for Respondents.

Judgment.—In this suit the plaintiff Probodh Chandra Sircar, asked for a declaration of title to and recovery of possession of an 8-annas share of certain Government promissory notes of the face value of Rs. 100,100, or in the alternative for the value thereof, together with interest thereon, and for other consequential reliefs. The Subordinate Judge having decreed the suit the defendant Swarnamoyi Dasi has preferred this appeal.

The parties are related thus:

Brother Radharaman

Iswar Chandra

Another

Brojendra

Jadunath Sircar.

Died 1st February 1915
=W. Swarnamoyee Dasi, defendant

On 11th April 1868 Ram Kamal Mondal executed a will (Ex. 1) under which he left an 8-annas share of his paternal properties to his brother Radha Mohan and the other 8-annas thereof to Iswar Chandra and Brajendra, the son and grandson respectively of his other brother Radharaman and, providing that Radharaman should pay Rs. 25 a month, and Iswar Chandra and Brojendra Rs. 25 a month, i. e. Rs. 50 in all, to Ram Kamal's widow, daughter and daughter's sons; he provided that Government promissory notes of the value of rupees two lacs odd, which had been dedicated to the worship of the ejmali deity Sridhar Jiu Thakur but stood in his name should, on his death, go to his

brother Radhamohan who would perform the sheba of the deity with the interest thereof; he recited that he had already dedicated some of his self-acquired properties to the deity Sri Raghunath Jiu Thakur installed by him, but they proved insufficient; and he accordingly left some other self-acquired properties to his wife Bhagabati Dasi and on her death to his daughter and daughter's sons, so that the income thereof might be applied for the worship of the said deity and also for the maintenance and other necessary expenses of the daughter and the grandson enjoining them to perform the worship of the said deity in the said manner; and as regards other Government promissory notes which he had, that is to say besides those which had

been dedicated to the Ijmali deity as aforesaid, he provided :

Excepting these, my wife Bhagabati Dasi and on her death my daughter and on her death my daughter's sons shall, on my death, be entitled to get the Government promissory notes exclusively belonging to me whose numbers are mentioned in the aforesaid Court papers, and in respect of those lastmentioned papers neither my brother, nor my nephews nor my brother's grandsons shall be competent to make any claim, and even if they do the same will not be accepted. It is these Government Promissory Notes, or rather an eight annas share thereof which the plaintiff alleges he is entitled to, which forms the subject-matter of the suit. A few more facts require to be stated. Ram Kamal died on 21st April 1868. Probate of his will was taken by the executors of whom his widow Bhagabati Dasi was one. On 6th August 1890 Bhagabati Dasi died. On 12th March 1891 the daughter Debraui filed an application for Letters of Administration (Ex. 10) alleging that Government promissory notes of the value of one lac one hundred which Ram Kamal had bequeathed in the aforesaid manner had been endorsed over to Bhagabati Dasi as she had a life interest therein, and that the said Government promissory notes were in her possession since Bhagabati Dasi's death. She obtained the Letters of Administration and her son Jadu Nath Sircar who held a power of attorney from her dated 3rd August 1878 (Ex. 12) bound himself as surety for her in that matter (Ex. 11). The plaintiff was born in 1881. His father Brojendra, brother of Jadu, died in 1884 or 1885. In 1892 Debraui died leaving a will (vide Ex. 3) in which no specific mention was made of these Government promissory notes, but it was said that she had moveable and immovable properties, as her stridhan, acquired from presents given to her from her father and her mother and that she had on her mother's death obtained certain moveable and immoveable properties under her father's will as his heir, from the income whereof she had also purchased some other properties of her own. She purported to make the will saying that all her properties, with the exception of those that she got under her father's will as his heiress, belonged

to her absolutely. The properties which thus belonged to her absolutely were disposed of by the will. By the will she gave, subject to certain bequests, a moiety thereof to Jadu absolutely, and she provided that the other half, subject to an allowance for maintenance of Probodh's mother, was to be held in trust by Jadu for Probodh until Probodh attained the age of 25 years. The will provided that if Probodh behaved in a certain way he would be taken to have an absolute interest under the will, but in case Probodh died without any issue this moiety would go to Jadu and his heirs. On 3rd May 1893 Jadu obtained probate (Ex. 3) of Debraui's will. Probodh attained majority in 1899. It is common ground that by this time he had acquired vices and had contracted debts and gone astray and that it became impossible to restrain him in the wild career into which he had launched himself. Soon after he attained majority, that is to say, on 24th November 1901, Jadu took from him a conveyance of his entire properties. This conveyance is not before us, but it is said that it was for an adequate consideration. On 1st February 1915 Jadu died leaving him surviving his widow Swarnamoyee, the defendant in this suit, and a will by which he left all his ancestral and self-acquired properties to her in absolute right. Prior to Jadu's death Probodh had married, and he, his wife and his mother evidently were by this time in want, living mainly if not entirely on the bounty of Jadu. It is fairly clear that after Jadu's death, trouble from him was apprehended ; and in consequence of this apprehension Swarnamoyee, before applying for probate of Jadu's will, took a letter from Probodh, his wife and his mother (Ex. C) dated 3rd April 1915, in which it was said :

"The revered Jadu Nath Sircar left by his will all his ancestral and self-acquired properties to you for good in absolute right. We were his dependants and were supported by him. In order that there might be any difficulty in future as regards our maintenance he had made up his mind to settle with us Sm. Nityakali Dasi (the mother) and Sm. Pankajini Dasi (the wife) the properties purchased by him from Probodh Chandra Sircar. But on account of his sudden death he could not give effect to it. Now that we requested you for that purpose, you too out of affection for us have agreed to make a proper settlement and have said so. So we and our Probodh Chandra Sircar all convey our thanks and inform you that none of us have any

objection or claim at all with regard to his estate. You may soon take out probate without any trouble and go on maintaining us. This is our prayer."

On 28th March 1922 two deeds of release were executed, one by Probodh (Ex. A) and the other by Nitya Kali Dasi (Ex. B), and it is said that on the same day Swarnamoyee executed a deed of gift in favour of Nitya Kali Dasi in respect of all the properties which Probodh had conveyed to Jadu in 1901. After the aforesaid documents were executed there appears to have been several litigations between the parties: two suits were brought by Probodh against Swarnamoyee to recover arrears of annuity due upon the term of Ram Kamal's will, and a suit was instituted by Nitya Kali against Swarnamoyee to recover a sum of money which she alleged she had kept with Jadu; but it is not necessary to state what the results of these litigations were. Thereafter on 1st October 1926 the present suit was instituted. The suit was resisted by the defendant upon various grounds amongst which such as have been urged before us in this appeal will now be dealt with. The first contention urged is put in the defendant's written statement in these words:

"This defendant further submits that as there is a provision in the will of Ramkamal Mondal deceased that his wife Bhagabati Dasi, and on her death her daughter, and on her death her daughter's sons, would acquire all his self-acquired Government Promissory Notes and as the said Bhagabati Dasi and Debrani Dasi were alive after the death of the said Ramkamal Mondal and as the plaintiff's father, the late Brojendra Nath Sircar, died during the lifetime of the said Bhagabati Dasi and Debrani Dasi, the said Brojendra Nath Sircar or the plaintiff did not or could not legally acquire any title to the self-acquired Government promissory notes which were left by the late Ramkamal Mondal."

The question is one of construction. It has been argued that the use of the word *Tad avarthamane* (on her death) and the omission of any restrictive words as regards the estates that were conferred on the wife, the daughter and the grandsons, indicate that not successive estates but substitutional estates were intended to be conferred. In other words, it has been contended that the whole object of the will was to keep these Government promissory notes away from the brother and his line and that nothing else was done by the will than to leave them to his widow, and then to his daughter and thereafter to his daughter's sons,

as it would be in the case of intestacy. We are unable to agree in this view. Putting ourselves in the testator's arm-chair for the moment, as we are bound to do, we can conceive of no reason why the testator should think of mentioning the daughter and the daughter's sons if it was his intention to postpone the bequests themselves in their favour in that way; we think it was his intention to make gifts in praesenti in their favour, only postponing the enjoyment thereof in the case of the daughter till on the death of the widow, and in the case of the grandsons till the lives of the widow and the daughter were over. We have been asked to construe the words used in their natural meaning; it is true that it is not expressly stated in the will that the estate to the widow was for her life, or that the estate to the daughter was for her life, and it is also true that so far as the widow and the daughter are concerned the devise apparently is no more restricted in its character than in the case of the grandsons. But taking the whole of the bequest together and giving the words their natural meaning we are driven to the conclusion that what was meant was that it would go to the widow for her life, then to the daughter for her life and thereafter to the grandsons absolutely. In other words the intention was to create an absolute estate in the grandsons with the two life estates intervening, a thing not unknown or repugnant to Hindu law. The will, having regard to its date, is not governed by the Succession Act, but even if the principles of that Act are applied to it the same result is reached because the interests created are not "contingent" but "vested." The expression "on her death" must be taken to indicate merely the time when the gift over is to be reduced to possession and not the time when the right to such possession vests: see *Hallifax v. Wilson* (1). The principle underlying this rule is that no contingency is imported by the fact that the legacy is given after a life-estate in the property bequeathed. As nothing is more certain than that every person who lives must die, the death of a life-tenant is an event not contingent but certain.

But if the bequest had been not merely after the death of the life-tenant
1. (1809) 15 Ves Jun 168.

but to such of her sons as may be surviving on her death, then clearly the condition of surviving or being alive at her death would be a condition precedent to the vesting itself and the bequest would be a contingent one. As the plaintiffs' father was alive at the testator's death the plaintiffs' right to a half-share of the Government promissory notes cannot, in our opinion, be disputed. (Here the judgment considered matter not material for this report, and taking up the question of limitation it proceeded as follows.) Be that as it may, the question of limitation really depends upon the article to be applied. On behalf of the appellant it has been contended that the article applicable is Art. 49 or Art. 62, and on the respondent's behalf it has been said that either Art. 123 or Art. 120 is the article to apply. That Art. 123 will not apply has now been conclusively settled by the Judicial Committee in the case of *Ghulam Mohammad v. Ghulam Hussain* (2). Their Lordships have said in that case :

"This article (meaning Art. 123) only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate."

It cannot be contended that any such capacity or duty can be attributed to Swarnamoyee. In the case of *Mohomed Reasat Ali v. Mt. Hasin Banu* (3), in which a Mahomedan widow had sued to recover the cash and moveables left by her husband on the ground that she was her husband's heiress, their Lordships observed :

"This is not a suit for a distributive share of property (Art. 123), nor a suit for specific moveable property wrongfully taken (Art. 49). This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Art. 120 provides for a period of limitation of six years in a suit for which no period of limitation is provided elsewhere in the schedule."

Article 62, in our opinion, is wholly inappropriate. Art. 49 is, in our judgment, equally so in a case where, as here, a half-share in certain moveable is sought to be recovered on declaration of title, such a suit not being a suit for "specific moveable property, which means property of which one can demand the delivery in specie. In our opinion it must be held that the suit is governed by the residuary Art. 120. The plaintiff

2. A I R 1932 P C 81=59 I A 74=54 All 93
=136 I C 454 (P C).

3. (1893) 21 Cal 157=20 I A 155 (P C).

had six years from the date when the right to sue accrued. That right accrued to him when the half-share of the Government promissory notes became due to him and so the question is whether he can rely, as he does, on S. 18, Lim. Act. As regards the circumstances under which and the extent to which he may do so, the following proposition is well settled : Except when the plaintiff's knowledge is an ingredient of his cause of action the plaintiff's ignorance of his right to sue does not prevent time from running against him. But it is otherwise if such ignorance is brought about by the fraud of the defendant. In order to constitute fraud there must be some abuse of confidential position, some intentional imposition, or some deliberate concealment of facts : a designed fraud, by which a party knowing to whom the right belongs conceals the facts and circumstances giving that right. The right of the party so defrauded is not affected by lapse of time, or by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed. In the case of *Rahimboy Hubibboy v. Turner* (4) their Lordships of the Judicial Committee observed :

"When a man has committed fraud, the onus is on him to show that the injured person had clear and definite knowledge of the facts which constituted fraud, at a time which is too remote to allow him to bring the suit. The burden is not discharged by proof of the fact that some hints and clues had reached plaintiff, which might have led to such knowledge."

It is not the defendant's case that Jadu had informed the plaintiff about his right to the Government promissory notes under the will. Indeed, that cannot be her case, because such a case would be repugnant to her contention that the plaintiff had no such right at all. In such circumstances it may safely be taken that the plaintiff's case that Jadu never disclosed to him his right to the Government promissory notes under the will is true. It is not also difficult to infer that when Jadu took the Government promissory notes endorsed over to himself and dealt with or disposed of them he never disclosed that fact to the plaintiff. Indeed, judging from the position that the plaintiff was occupying in the family and the relations which existed between him and Jadu and considering that Jadu took a conveyance from the

4. (1892) 17 Bom 341=20 I A 1 (P C).

plaintiff in respect of all his other properties evidently with a desire to save them from being wasted, it is inconceivable that Jadu would ever think of doing so. To establish that such non-disclosure constituted fraud three different attributes have been ascribed to Jadu. It has been urged that he was in the first place the karta of the joint family, and next, that he was a trustee appointed under Debrani's will, and thirdly, that he was the plaintiff's cosharer in the matter of the Government promissory notes.

Having regard to the recalcitrant career which the plaintiff had begun to pursue and the transaction in the shape of the purchase of plaintiff's properties which Jadu had made in 1901, it is difficult to attribute to Jadu, by reason of his being the senior male member of the family, the fiduciary character which is attributable to the karta of a Mitakshara joint family, even assuming that, so far as such a character is concerned, a karta of a Dayabhaga joint family does not stand on a different footing. The trust that Jadu was to hold the properties dealt with by Debrani's will on behalf of the plaintiff was clearly not in respect of the Government promissory notes. But a cosharer he certainly was for the will gave him only a half-share in the Government promissory notes, the other half belonging, under the will, to the plaintiff on the termination of Debrani's death. If during the lifetime of Debrani he got possession of the Government promissory notes from her he upon a true construction of the will, was but a sharer therein and could claim no higher rights and privileges than a partner or a cosharer could. A partner is always entitled to rely on the good faith of his co-partner. And a cosharer coming into exclusive possession of property belonging to himself and his cosharer will be presumed to have done so not only for himself but for his cosharer as well until there is ouster: see *Biswanath Chakravarti v. Rabia Khatun* (5). There was therefore a duty on the part of Jadu to speak, and if he remained silent when there was such a duty, there was concealed fraud on his part on which the plaintiff can justly rely to get over the bar of limitation: *Betjammann v. Bet-*

jamann (6). Once this position is reached the burden would lie on the defendant to show that the plaintiff had "clear and definite knowledge of the facts which constituted fraud which is too remote to allow him to bring the suit." To discharge this burden, it is not enough for the defendant to show that the plaintiff had means available to him for coming to know of the fraud. As Rigby, L. J., observed in the case of *Betjammann v. Betjammann* (6):

"What is the duty of a man to inquire? To whom does he owe that duty? Certainly not to the person who has committed the concealed fraud. For a man in that position to come and say: 'you ought to have inquired, and if you had inquired, you would have found me out' is utterly opposed to every principle of equity."

The positive evidence which the defendant has brought to prove that the plaintiff in fact had knowledge of his rights under the will is not believable and what the defendant herself has said in her evidence as to the plaintiff having had every access to the persons and therefore having had every opportunity of knowing how matters really stood falls far short of making out facts on which it might be held that time began to run against the plaintiff. As the suit was instituted well within six years from 1922, when the plaintiff says he acquired knowledge of the facts, the claim, in our judgment is not barred.

Then it has been contended that the deed of release executed by the plaintiff in 1922 (Ex. A) absolves the defendant from her liability. But the deed is entirely silent as regards the Government promissory notes, and it is nobody's case that any claim to or repudiation of a liability in respect of the Government promissory notes, in respect of which the deed could be regarded as constituting a disclaimer, was, at the date of the deed, in the contemplation of the parties. We have read the terms of the deed with care, but notwithstanding the wide words in which they have been expressed we are not able to hold that they can be read as including a dispute which the parties never thought of at the time. The words of the deed run thus:

"Be it further stated that with regard to the management of my properties during my minority by my said father's elder brother, i. e., your husband, the said late Jadu Nath Sircar, as trustee on my behalf as well as any monies due

to me that came into his hands or control in connexion therewith, as also with regard to any act done by him in connexion with my properties after my attainment of majority I did not make any claim or demand against your husband, and of this I informed your husband and yourself repeatedly long ago. But as there was nothing in writing about the same and as you demanded a written disclaimer from me with regard thereto, I accordingly hereby, etc."

Reading the deed as a whole it seems to us that its intention was to effect a release in respect of all claims arising on account of the properties described in the schedule to the deed and which had been taken by Jadu under the conveyance of 1901, and on account of all liabilities consequent on the management thereof and also all demands that could be made against Jadu for his dealings as trustee appointed by Deh-rani's will. But assuming that the words, which are very general and wide, may be read as including all claims of all kinds, the position is that the defendant who has obtained the properties left by Jadu by his will, can have no higher rights and equities in her favour than Jadu himself had. She is not in the position of a bona fide purchaser for value or an innocent third party. To her will apply all such considerations as could, in law and equity, apply to Jadu himself. The proposition is as old as the hills that a release shall be avoided where there is suppressio veri or suggestio falsi: see *Jarris v. Duke* (7) and *Broderick v. Broderick* (8). The proposition is expressed in Story's Equity Jurisprudence, §§. 217 and 219, thus:

"It is upon the same ground that a Court of equity proceeds where an instrument is so general in its terms as to release the rights of the party to property to which he was wholly ignorant that he had any title, and which is not within the contemplation of the bargain at the time when it was made. In such cases the Court restrains the instrument to the purposes of the bargain, and confines the release to the right intended to be released or extinguished.

... Nor is it in every case where even a material fact is mistaken or unknown without any default of the parties that a Court of equity will interfere. The fact may be unknown to both parties, or it may be known to one party and unknown to the other. If it is known to one party and unknown to the other, that will in some cases afford a solid ground for relief, as for instance where it operates as a surprise or a fraud upon the ignorant party. But in all cases the ground of relief is not the mistake or ignorance of the material facts alone, but the unconscientious advantage taken by the party by the concealment of them. For if the parties act

fairly, and it is not a case where one is bound to communicate the facts to the other upon the ground of confidence or otherwise, there the Court will not interfere."

Lastly it has been urged that by reason of the fact that the defendant was induced to execute the deed of gift there is an estoppel against the plaintiff. The estoppel is pleaded thus in the written statement:

"The real fact is that the plaintiff, after he had sold all his properties to the defendant's husband made great efforts to get back the same from the defendant's husband Jadu Nath Sircar during his lifetime, and although the defendant's husband had a mind to make a gift of those properties in his favour he became displeased with the plaintiff on account of his ill-treatment and oppressive behaviour and did not execute such a deed in his favour. Subsequently after the death of this defendant's husband this defendant obtained the entire properties left by him in absolute right according to the provisions of her husband's will; whereupon the plaintiff entreated this defendant a good deal to make a gift of the properties sold by him and told him that he had no claim against her husband for the administration and management of his properties and for any work done by him during the time nor had he any claim for any money in that connexion and that he had no claim whatever in that connexion against the estate owned, held and left by him, and accordingly executed on 28th March 1922, the nadabi or deed of release, etc. (para. 13).

"This defendant relying on the statements of the release executed by the plaintiff, and also on his promise, made a gift of property worth at least two lakhs in the name of his mother for the benefit of him and his family; the plaintiff's claim is barred by waiver, acquiescence and estoppel and the plaintiff is legally debarred from bringing the present suit (para. 15)."

Strictly speaking, the averments set out above are not sufficient for a plea of estoppel. But it is not unreasonable to assume that they mean that the defendant in making the gift acted on the representation of the plaintiff that he would have no further claim if the gift was made; and inasmuch as she did make it the plaintiff cannot be permitted to turn round and run contrary to the representation that he then made. There are however several difficulties in the way of this plea of the defendant being allowed. In the first place the defendant who derives her title through Jadu cannot plead any higher estoppel than Jadu could, and in view of the concealed fraud that Jadu was guilty of, the defendant can hardly plead an estoppel of this character, which, after all, embodies a doctrine of equity. It had been pointed out by the Judicial Committee in the case of *Sarat Chandra Dey v. Go.*

7. (1681) 1 Vern 20.

8. (1719) 1 P W Ms 297.

pal Chunder Lala (9) that the existence of the estoppel does not depend on the motive, or on the knowledge of the matter on the part of the person making it, and in that way it does not matter whether the plaintiff's intention in making the representation was fraudulent or was due to mistake or misapprehension and it is enough that the defendant was misled. So far however as the present case is concerned the defendant can hardly be permitted to take the plea of estoppel, claiming as she does through *Jadu*, through whose concealed fraud the plaintiff was kept in ignorance of his real rights. Then again the essence of the doctrine is that the defendant should have been misled; but when none of the parties had any idea, at the time, of plaintiff's rights to the Government promissory notes and the representation did not expressly include such rights, it is not possible to hold that the defendant was misled into thinking that the plaintiff was giving up such rights.

In our opinion the contentions urged on behalf of the appellants cannot succeed. We accordingly dismiss the appeal with costs to respondent 1 only. The application not being pressed is rejected.

S.N./R.K. *Appeal dismissed.*
9. (1892) 20 Cal 296=13 I A 203 (P C).

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MUKERJI AND BARTLEY, JJ.

Secy. of State—Plaintiff—Appellant.
v.

Madhu Sudan Mukherjee and others—
Defendants—Respondents.

Appeals Nos. 277 of 1928 and 116 to 121 of 1929, Decided on 20th May 1932, against decree of Sub-Judge, Rangpur, D/- 3rd December 1927.

(a) *Transfer of Property Act (1882), S. 116*—Landlord and tenant—Tenant continuing to hold on payment of rent on expiry of term is in position of tenant holding over and 15 days' notice is sufficient—*T. P. Act (1882), S. 106.*

When persons hold under yearly leases but on the expiry of the terms thereof continue to hold on payment of rent to the lessor, their position is of tenants holding over and not of trespassers; and if there are no agreements to the contrary i. e., as regards the terms of holding over, or as to the period of notice for determining the tenancy, the leases should, under S. 116, be regarded as being renewed from month to month, though rent is being paid per year. 15 days' notice ending with a month of the tenancy would

be sufficient: 32 Cal 123; *A I R 1915 Cal 313* and 18 I C 844, *Ref.* [P 261 C 2]

(b) *Transfer of Property Act (1882), S. 106*—Notice—Addressee described as trespasser and more time given than necessary—Notice is valid.

A notice to quit is good notwithstanding that the addressee is described therein as a trespasser and not as a tenant, and more time is given therein than the time prescribed: 7 C 1, *J 107* and *A I R 1918 P C 102, Ref.* [P 262 C 1]

(c) *Transfer of Property Act (1882), S. 116*—“Agreement.”

The word “agreement” in the expression “an agreement to the contrary” means an agreement as to the terms of holding over: 32 Cal 123 and *A I R 1915 Cal 313, Ref.* [P 261 C 2]

S. C. Basak and Nasim Ali—for Appellant.

Sarat Chandra Roy Chowdhury, Kshetra Nath Ghose and Mohendra Kumar Ghose—for Respondents.

Surjya Kumar Aich—for Deputy Registrar.

Judgment.—These appeals arise out of certain suits which were instituted by the Secretary of State for India in Council for ejecting the defendants on service of notices to quit. The suits having been dismissed by the Court below, the plaintiff, the Secretary of State for India in Council, has preferred these appeals. Except as regards one of the suits which has given rise to F. A. No. 277 of 1928 the facts of the cases are very similar. In each of these other suits the facts are the following: The defendants were in possession of their respective plots for a long series of years under annual leases. In 1914 the plaintiff introduced a form of lease designating it as a license to receive which the defendants objected but they were told that the form would make no difference and they would be allowed to hold the plots as they did before under the leases. They held under the licenses the last of which expired on 31st March 1917. On 1st June 1917, the plaintiff gave them notices calling upon them to vacate by 31st July 1917.

In the suit in which the facts are special the original tenant was one Mr. Heather who came into possession under an agreement dated 1893. He transferred his holding to one Mrs. Claudius in 1900, and she, in her turn, sold it to defendant in 1906. Up to 31st March 1914, this defendant held under successive yearly leases. For the next three years he held under the annual licenses. Notices, as in the other cases, were given to him. A further notice was

given to him on 30th September 1918, calling upon him to vacate by the last day of October 1918. The suits, it may be mentioned here, were instituted on 3rd May 1922, and have been dismissed on the ground that the notices given were not sufficient.

The appeals, in our opinion, should be dismissed, though not exactly for the reasons which the Subordinate Judge has given. In 1914 when the new forms of licenses were introduced the defendants objected to accept them. The Subordinate Judge held upon the oral evidence and also a letter (Ex. D) that the defendants were induced to sign the new license forms on the representation of the Agent and the Chief Engineer of the Railway that their position under the old leases would not be disturbed by their signing the new forms of licenses, and that therefore the licenses, obtained as they were under a misrepresentation, were not binding on them. They remained in occupation and continued to pay their rents up to 31st March 1917 after which no rent was accepted from them. On these facts the Subordinate Judge held that the relationship between the parties was as of tenants holding over on the expiry of yearly leases, and so Ss. 106 and 116, T. P. Act, being applicable, the tenancies having originally been created for purposes of residence and for holding shops, the defendants were entitled to 15 days' notice ending with a month of the tenancies. He was of opinion however that the notices that were given were not such as are required by S. 106, T. P. Act.

It has been contended before us in the first place that no notices were necessary because at the end of each year of the licenses and till another license was issued the position of the defendants was that of mere trespassers. Now the important provisions in the lease bearing upon this question are that if the lessee desired to continue in occupation after the expiry of the twelve calendar months for which the lease was granted he would have to give 15 days' notice of such intention before the period of the lease expired (Cl. 9), that if no such notice is given or if such notice is given but the lessor is not willing to grant a fresh lease, the lessee shall vacate and deliver up possession (Cl. 10), and that if within the term the land is required

for railway purposes the lessee will have to vacate on three months' notice (Cl. 11). There is also a clause (Cl. 12) in the nature of a penal clause that if the lessee is guilty of breach of any of the sanitary and conservancy rules, the railway will have the right to resume possession without any previous notice. In the license there is no provision as to notices at all, but it is provided that if on the expiry of the license the licensor is not willing to purchase the structures the licensees would be bound to remove them within two calendar months from the determination of the license (Cl. 8).

Upon the evidence on which the Subordinate Judge has referred we think it is a fair view to take of the situation to hold that the defendants accepted the licenses on the understanding that their position as under the leases would not be affected. Their position therefore was as of persons who held under yearly leases but on the expiry of the terms thereof were holding over on payment of rent to the lessor. It may be observed here that the provision as to giving 15 days' notice of an intention to renew was never enforced in practice. If there was nothing else to be taken into consideration and if the Transfer of Property Act applied to the case, the leases on their expiry would under S. 116 of the Act have to be regarded as being renewed from month to month, though rent was being paid per year, in view of the provisions of S. 106 of the Act. The word "agreement" in the expression "an agreement to the contrary" in S. 116 has been held to mean an agreement as to the terms of the holding over: see *Pratlokya Nath Roy v. Sarat Chandra Banerji* (1) and *Gobinda Chandra Saha v. Dwarka Nath* (2). There having been no provision in the contracts between the parties what, if any, should be the notice in case the defendants were holding over, 15 days' notice ending with a month of the tenancy would be necessary and sufficient. It has been suggested on behalf of the respondents that the true position was that the defendants were holding under yearly leases coupled with an implied agreement that they would hold over from year to year and that therefore they were entitled to

1. (1905) 32 Cal 124.

2. A J R 1916 Cal 313=26 I C 962.

six months' notice. As has been pointed out in the case of *Gobinda Chandra Saha v. Dwarka Nath* (2), this is an ingenious attempt to substitute for a lease from year to year a tenancy for one year coupled with an agreement to renew it from year to year and such a lease would in effect be a lease from year to year, which in view of S. 107 cannot be created except by a registered instrument: see also *Moti Lal v. Darjeeling Municipality* (3).

On the assumption that the Act applied and that there was nothing else to stand in the way, the next question would be as regards the sufficiency of the notices that were issued. The Subordinate Judge was of opinion that the notices such as they were in this case cannot be looked upon as notices for termination of the licenses under S. 106 of the Act and so were invalid. It is not very clear as to why he was of that opinion. On examining the notices carefully we find that the following two objections can conceivably be taken: (1) that the notices proceeded on the footing that the defendants were trespassers and not lessees or licensees whose leases or licenses were to be determined by the notices; and (2) that instead of 15 days they gave two months' time. Neither of these objections can be regarded as well founded. The giver of a notice is not bound to admit the person to whom it is given as a tenant; a notice is good notwithstanding that the addressee is described therein as a trespasser: *Ram Charan v. Hari Charan* (4). Nor can it be reasonably contended that if two months' time is given where only 15 days' time is necessary, that invalidates the notice. After all, the requirements of S. 106 are very few. Their Lordships of the Judicial Committee have observed in the case of *Harihar Banerji v. Ram Shashi Roy* (5):

"Notices to quit though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances, touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and further that they are to be construed not

with a desire to find faults in them, which would render them defective, but to be considered *ut res magis valeat quam pereat*."

But there are two other difficulties in the plaintiff's way. It appears that after the notices were given fresh licenses were issued in favour of the defendants. These licenses on the face of them purport to run from the date of the agreement they embody, e. g., 23rd August 1917, 16th November 1917, 10th January 1918, and so on, all after the dates of the notices and the expiry of the period mentioned therein, and on the face of them they purport to enure for a period of one year. But we have been asked to take it that they were intended to be licenses for the year ending on this 31st March 1917, and that they were issued on the respective dates for the back periods, not having been timely issued for some reason or other. Of this however there is no evidence and the only materials which are pointed out in support of this explanation is that in Cl. 6 of the licenses it is stipulated the licensee would pay the fees, etc., as from the 1st day of April 1916, and in a schedule the date of expiration of the license is given as 31st March 1917. Neither of these materials by themselves would, in our opinion, conclusively establish that the licenses were for the year which had already expired. The respondents, on the other hand, say that the date of expiry mentioned in the schedule means the date on which the previous license expired. What the real facts are it is not easy to determine. But these matters cannot be disposed of on mere suppositions; there must be evidence adduced by the plaintiff to show how and why and for what period these licenses came to be issued or what was the necessity for issuing them after the period itself was over and after notices to quit had already been served. The necessity for explaining these matters becomes all the greater, where, as here, the plaintiff waits for nearly five years after serving the notices to quit and takes no action in the meantime.

The other difficulty in the plaintiff's way is created by the contention which was put forward on his behalf in the Court below and was overruled in that Court, but has been repeated with great force and insistency in this Court. It has been urged that in view of the pro-

3. (1913) 18 I C 844.

4. (1908) 7 C L J 107.

5. A I R 1918 P C 102=48 I C 277=45 I 222=46 Cal 458 (P C).

visions of the Crown Grants Act (15 of 1895) the provisions of the Transfer of Property Act do not apply to Crown Grants. The Subordinate Judge has held that :

"there being no special contract the Crown Grants Act would not apply and the relation between the parties should be governed by the provisions of the Transfer of Property Act."

The question is not free from difficulty, but we do not consider it necessary to decide it, because on the assumption that the plaintiff's contention is well founded the general law would apply. In no view of the case can it be said that the defendants were mere trespassers not entitled to notice. They were at least tenants by sufferance and so entitled to reasonable notice. Having regard to the fact that the defendants had permission under their lease, to build structures on the land, and the leases themselves provided for three months' notice within the term, we should think that three months' notice would be fair and reasonable. In the above view of the matter we think we must hold that the suits were not maintainable for want of reasonable notices to quit. Should the plaintiff desire to eject the defendants notices suggested above must be given.

The Subordinate Judge has dealt with a few other points and has recorded his conclusions thereon. As regards the question whether the notices that were issued were properly served his finding was in favour of the plaintiff. It is not necessary to go into this question, but we must say that as regards the notices meant for one of the defendants there is a considerable doubt. On the question whether the defendants are entitled to the prices of the structures which he has decided in favour of the defendants, his conclusion as regards the structures which have been on the land of the defendant Madhu Sudan Mookerjee since the time of Mr. Heather and Mrs. Claudius has been challenged before us. We are of opinion that the facts proved in the case though they do not lead to an inference of any permanent right on the part of the defendant nor create any estoppel against the plaintiff are sufficient to lead to the inference that the said structures were erected and allowed to continue with the tacit approval of the railway authorities. If this be the finding, as in our judgment it should be,

then he is entitled to compensation under Cl. 4 of Mr. Heather's lease (Ex. A). We accordingly hold that the plaintiff's contention ought not to succeed. The result is that the appeals are dismissed with costs to the respondents, hearing fee being assessed at five gold mohurs in Appeal No. 277 and at two gold mohurs in each of the other appeals, except those in which there has been no appearance on behalf of the respondents or in which the Deputy Registrar's costs have already been paid.

B.R., R.K. *Appeals dismissed.*

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PEARSON AND MALLIK, J.J.

Abdul Majid and others—Defendants
—Appellants.

Abdul Haq and others—Plaintiffs—
Respondents.

Appeal No. 1667 of 1930, Decided on 25th February 1932, against decree of Adml. Dist. Judge, Second Court, Dacca, 28th January 1930.

Provincial Insolvency Act (1920), S. 4 (3) —Order under S. 4 (3)—Subsequent suit to declare title to property declared to be sold is not governed by Limitation Act (1908), Art. 13.

In an insolvency proceeding started by one of the defendants, the petitioner for insolvency had claimed a certain interest in certain tea garden shares. The insolvency Judge passed an order under S. 4 (3) that the interest of the defendant should be sold. More than a year after this order, plaintiff who alleged that the shares were bought with his money filed a suit to have his title to the shares declared :

Held: that plaintiff's suit was not one to set aside the order of the insolvency Judge and as such it was not barred by Art. 13, Limitation Act. [P 261 C 1, 2]

Ramendra Ch. Roy—for Appellants.

Naresh Ch. Sen Gupta and Bama Prasanna Sen Gupta—for Respondents.

Mallik, J.—The suit that has given rise to this second appeal was for declaration of the plaintiff's title to certain tea garden shares. The allegations on which the suit was instituted were that the tea garden shares had been purchased with plaintiff's money and that in an insolvency proceeding started by one of the defendants the petitioner for insolvency had claimed a certain interest in these tea shares, with the result that a cloud had been thrown on the plaintiff's title to those shares. The defence inter alia was that the shares were not the exclusive property of the plain-

tiff, but were the property of a firm of which the plaintiff and the defendants were the partners and that the plaintiff's suit having been instituted more than one year after the order had been passed by the insolvency Court in respect of the shares under S. 4, Provincial Insolvency Act, the plaintiff's suit was barred under Art. 13, Limitation Act. Both these points taken by the defence were found by the Courts below against the defendants with the result that the suit was decreed in plaintiff's favour. The defendants have appealed to this Court.

On behalf of the appellants it was in the first place contended that the lower appellate Court was wrong in not having found that the tea garden shares were the joint property of the plaintiff as well as of the defendants. The question whether the shares were the exclusive property of the plaintiff or the joint property of the plaintiff as well as of the defendants was a question of fact, and the learned Additional District Judge in his judgment clearly found that the plaintiff was the sole owner of the garden shares in suit. The main contention of the learned advocate for the appellants however was on the question of limitation. His point as would appear from what I have stated before was that Art. 13, Limitation Act, operated as a bar to the plaintiff's suit. We do not think that there is much substance in this contention. The plaintiff instituted his suit not to have the order of the insolvency Court, whereby it had simply directed that the shares might be sold, set aside, but to have his title to these shares declared. The order which the insolvency Court passed was no doubt an order passed under S. 4, Insolvency Act. But it was an order passed not under sub S. (2), but under sub-S. (3) of that section. A perusal of the order passed by the insolvency Judge would show that he did not consider it necessary to decide the question of title, which question was left undecided to be decided by a competent civil Court. Having regard to that observation in the order passed by the insolvency Judge and regard being had also to the fact that all that the insolvency Judge ordered at the time was to sell the interest of the defendants in the shares whatever that interest might be the suit

brought by the plaintiff was not, in my opinion, a suit to have the order passed by the insolvency Judge set aside. The order which the insolvency Judge passed under S. 4, sub-S. (3), Insolvency Act, was more for an expeditious disposal of the assets than any other purpose. A perusal of sub-S. (3) would show that before an insolvency Court passed an order to sell an interest, it does not actually hold that the petitioner for insolvency has such saleable interest. If the Court has any reason to believe that the petitioner for insolvency has such saleable interest, it can pass an order under sub-S. (3). Art. 13, Limitation Act, could not therefore, in my opinion, stand as a bar to the plaintiff's suit.

The only substantial contention urged before us on behalf of the appellants therefore fails. The appeal will accordingly stand dismissed with costs.

Pearson, J.—I agree.

K.S.

Appeal dismissed.

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SUHRAWARDY AND GRAHAM, JJ.

Seamuddin Molla and others—Plaintiffs—Appellants.

v.

Mohadeb Mondal and others—Defendants—Respondents.

Appeal No. 421 of 1930, Decided on 30th June 1931, against decree of Addl. Sub-Judge, Khulna, D. 10th July 1929.

(a) *Bengal Tenancy Act (1885), S. 48*—Applicability of section explained.

If the rent is payable in kind and in the alternative in money at the option of the tenant S. 48 is applicable. But where the alternative money rent is recoverable at the option of the landlord S. 48 has no application.

[P 265 C 1, 2]

The relevant portion of a *kabuliyat* was in these words: "If we do not deliver paddy (as aforesaid) then we will pay to you within the said month as value of the said paddy Rs. 400 according to the present market rate. If we do not, then you will be entitled to realize the same amicably or by suit with interest thereon."

Held: that the *kabuliyat* in this case fixed the paddy rent and in default thereof money rent; and either was to be payable by the tenant at his option and hence S. 48 applied: 3 I C 204, *Foll*; A I R 1929 Cal 532 and A I R 1926 Cal 986, *Dist*.

[P 266 C 1]

(b) *Practice*—New point cannot be taken in second appeal—Civil P. C. (1908), S. 200.

A point which was not taken in any of the Courts below cannot be allowed to be raised in second appeal.

[P 266 C 2]

(c) Bengal Tenancy Act (1885), S. 48 — S. 48 applies even where landlord himself is under-raiyat.

Section 48 does not say of raiyat, but says that the landlord of any under-raiyat cannot recover more than a certain percentage mentioned therein. Hence it applies even where the landlord himself is an under-raiyat under a raiyat. [P 266 C 2]

(d) Bengal Tenancy Act (1885), (as amended by Act 4 of 1928), S. 48—S. 48 is not retrospective.

Section 48 is not one relating to procedure only and has no retrospective force. [P 266 C 2]

Saroj Kumar Chatterji — for Appellants.

Nagendra Kumar Dutt — for Respondents.

Suhrawardy, J. — This is an appeal by the landlords and arises out of a suit for rent based upon a kabuliyat. It appears that the defendants hold a jama of 12 bighas bearing a rental of Rs. 15. They let out this jama to the plaintiff at a rental of Rs. 15-4-0 and then took a sub-lease, agreeing to deliver 13 aris of paddy annually as rent, and in the alternative to pay Rs. 400 as the price thereof. The main contention of the defendants in the suit was that the plaintiffs could not recover rent higher than what they were entitled to under S. 18, Ben. Ten. Act, before its amendment in 1928. The section says:

"The landlord of an under-raiyat holding at a money rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than 50 per cent when the rent payable by the under-raiyat is payable under a registered lease."

Here the lease is registered and if the section applies the plaintiffs will be entitled to get annually Rs. 15-4-0 and 50 per cent of it, that is Rs. 22-14-0, as yearly rent from the defendants. The trial Court held that the rent was not payable in money but in kind, and therefore according to the view expressed in some cases by this Court S. 48 (a) had no application. The lower appellate Court on a consideration of the kabuliyat has held that S. 48 of the Act applies and that the plaintiffs are not entitled to recover rent more than Rs. 22-14-0 a year. The case really turns upon the construction of the kabuliyat. The law that seems to be established from various decisions on this point is that if the rent is payable in kind and in the alternative in money at the option of the tenant, S. 48 is applicable. But where the alternative money rent is recoverable at

the option of the landlord, S. 48 has no application. If the interpretation put by the learned Subordinate Judge is right, the case is covered by the decision in *Ananda Chandra Roy v. Makram Ali* (1). The relevant portion of the kabuliyat is in these words:

"If we do not deliver paddy (as aforesaid) then we will pay to you within the said month as value of the said paddy Rs. 400 according to the present market rate. If we do not, then you will be entitled to realize the same amicably or by suit with interest thereon."

In our opinion the Subordinate Judge has placed the correct construction on this kabuliyat. It fixes the rent at 13 aris of paddy yearly, but at the same time gives the option to the tenants to pay Rs. 400 as value of the paddy instead of the paddy. The kabuliyat in *Ananda Chandra Roy's* case (1) referred to above was also to the same effect. There the stipulation was:

"We shall deliver on the 30th Assin every year, a quantity of 27 maunds 30 seers of paddy at the rate of 3 maunds per kani of the chukti per annum (or) in the absence thereof a sum of Rs. 132 on account of the value of the paddy and shall deliver on the 30th Pous every year a quantity of 50 maunds of paddy at the rate of 4 maunds per kani per annum, and in the absence thereof pay a sum of Rs. 118, and we shall pay on account of the value of paddy and jute Rs. 250 and shall take receipts."

Brett, J., sitting singly held that the intention of the plaintiff in taking the kabuliyat was to realize a yearly rent of Rs. 250 whether it was paid in jute and paddy or in cash as stipulated. The contract was that a share of the produce or its value should be paid as rent. On Letters Patent appeal, Jenkins, C. J., agreed that the defendant who was an under-raiyat had the right to pay his rent in the form of money rent and the suit was framed for the purpose of recovering the money rent, and that the rights of the parties in relation to the recovery of that rent must be determined by reference to S. 48 and that the limit imposed by that section must be observed. In *Kamaraddi v. Monmohini Dassya* (2) the contract was to the effect that in default of payment of paddy, the plaintiff (landlord) would be entitled to realize Rs. 20 as the price of the paddy with damages and costs by instituting suits. Mookerji, J., in distinguishing *Ananda Chandra Roy's* case (1) from the case in question observed that in that

1. (1909) 3 I C 204.

2. A I R 1919 Cal 532=41 I C 973.

case the tenant had the option to deliver a certain quantity of the produce or in the alternative money. But in the case before him there was a provision to the effect that if there was any default on the part of the tenant, the landlord would be entitled to realize a certain sum of money as the price of the paddy. This only accentuated the true position, namely, that the rent was payable not in cash, but in kind; and the contract only prescribed the measure of the damages which the landlord could claim in the event of default on the part of the tenant.

That case therefore is no authority in favour of the appellant. There the contract was for delivery of paddy and the landlord was given the option to recover the price of the paddy if any default was made in payment of the rent in paddy. In *Ismail Pramanik v. Khedir Pramanik* (3) the facts were different from those in the present case. There the defendant executed a usufructuary mortgage in favour of the plaintiff and took a sub-lease from him of the land for a period of nine years, stipulating to pay Rs. 20 as rent per year; the rent which the plaintiff was to pay under the lease in favour of the defendant was Rs. 2-12-0, and there was a further stipulation that the plaintiff would pay on behalf of and in the name of the defendant the rent due to the superior landlord. The defendant contended that the plaintiff was not entitled to recover Rs. 20 per year from the defendant under S. 48, Ben. Ten. Act. On a consideration of these facts it was held that the defendant was not an under-raiyat of the plaintiff; but was really a raiyat of the superior landlord and had come to an arrangement with the plaintiff for the payment of the interests due on the mortgage made in his favour by taking a lease of the land from the plaintiff who had the right under the usufructuary mortgage to possess it. It seems to me that the kabuliya in this case fixes the paddy rent and in default thereof money rent; either is to be payable by the tenant at his option. The case therefore comes within the principle enunciated in *Ananda Chandra Roy's* case (1). The view of law taken by the Subordinate Judge is therefore quite correct.

It has next been argued that the plaintiff was really a mortgagee and that therefore the principle in *Ismail Pramanik v. Khedir Pramanik* (3), referred to above, does not apply. The defendant no doubt said in his pleadings that the plaintiff was the mortgagee, that he had deposited the mortgage amount in Court and had paid off the plaintiff's dues. On this point the lower appellate Court has found that there was no evidence worth the name that the lease by the defendant to the plaintiff was in reality a mortgage, and that before the Court there was no dispute that the plaintiff was a raiyat holding at a money rent. The third point urged on behalf of the appellant is that the defendant was not an under-raiyat. But this point was not taken in any of the Courts below and we cannot allow it to be raised here in second appeal. From the judgment of the trial Court it appears that it was assumed and it was the case of both parties that the plaintiff had got raiyati right in the holding. Besides it is not the appellant's case that he had a right higher than that of a raiyat. But he says that he may be an under-raiyat and therefore S. 48 would not apply in this case. S. 48 applies to the case of an under-raiyat without reference to the status of the landlord. "Under-raiyat" has been defined in S. 4 of the Act as a tenant holding whether immediately or mediately under a raiyat, so that even if the landlord happens to be an under-raiyat himself, he must be holding under a raiyat and the tenant holding under him would be holding mediately under a raiyat. S. 48 does not say of a raiyat but says that the landlord of an under-raiyat cannot recover more than a certain percentage mentioned therein. This contention should also be overruled. Lastly it has been suggested that S. 48 of the amended Act should apply in this case as the judgment of the lower appellate Court was delivered after that Act had come into force. It is not necessary to discuss the point, for the judgment of the trial Court was delivered before the amendment, and S. 48 is not one relating to procedure only and has no retrospective force. The result is that the appeal is dismissed with costs.

Graham, J.—The only point raised in the appeal is whether the rent payable by the defendant is limited by S. 48 (a),

Ben. Ten. Act. The trial Court held that it was not so limited and gave a decree for the full amount claimed. On appeal that decision has been modified by the Additional Subordinate Judge, Khulna, who held, differing from the Munsif, that the plaintiff could not recover rent from the defendants at a rate exceeding the limit prescribed by S. 48 (a), that is, 50 per cent of the rent payable by the plaintiff. The rent payable by the plaintiff, according to the plaint, was Rupees 15-4-0 so that the plaintiff could not get more than Rs. 22-14-0 as rent. The appeal was decreed accordingly. The main argument advanced on behalf of the appellant is that the learned Additional Subordinate Judge ought to have held that S. 48 (a), Ben. Ten. Act, has no application in this case, as the kabuliyat on which the suit was instituted did not really create the relationship of landlord and tenant, but was an arrangement come to between a mortgagor and mortgagee. It is further contended that there was in reality no dispute between the parties, that they stood towards each other in the relation of mortgagor and mortgagee, and that the Court of appeal below erred in holding that there was no evidence in support of any such relationship.

In my opinion this contention cannot be allowed to prevail, because it is clear that no such case was made before the trial Court. If that case was relied upon, it certainly ought to have been made before the Munsif, since it was the case of the defendants throughout that S. 48 (a) applied and that the plaintiffs were not entitled to get more than 50 per cent as mentioned in that section. A translation of the kabuliyat has been placed before us and there is nothing in it which appears to support the case of mortgage which is now brought forward on behalf of the appellants. In my judgment the decision of the Court of appeal below is right, and I agree with my learned brother that this appeal must be dismissed.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 267**

MUKERJI AND GUHA, JJ.

Mafizuddin Ahmad—Appellant.

v.

Narayanganj Central Co-operative Sale and Supply Society, Ltd. and another—Respondents.

Appeal No. 154 of 1931, Decided on 31st August 1931, against order of Sub-Judge, Second Court, Dacca, D/- 26th January 1931.

(a) *Co-operative Societies Act (2 of 1922), S. 43, R. 22 (1)*—Objection that one of the judgment-debtors is not member of societies and reference was invalid cannot be taken at appellate stage.

Where an objection was taken not in the trial Court, but only in the appellate Court, to a reference under R. 22 (1) as being ultra vires inasmuch as one of the parties to the reference was not a member of the society:

Held: that the objection not having been specifically taken in the statement of objections filed by the other of the parties, it was not entertainable, because the society had no opportunity of meeting it by adducing evidence, which was absolutely necessary in order to decide on the objection inasmuch as it involved a disputed question of fact. [P 268 C 1]

(b) *Co-operative Societies Act (2 of 1922), S. 43, R. 22 (6)*—R. 22 (6) does not take away jurisdiction of Court to inquire into validity of award.

Rule 22 (6) is not meant to take away the jurisdiction of an executing Court to inquire into the competency of the award on the ground of jurisdiction in the same way as of a decree within the limits of *A I R 1925 Cal 907 (F B)*. [P 268 C 2]

(c) *Co-operative Societies Act (2 of 1922), S. 43, R. 22 (1)*—R. 22 (1) does not confine dispute to membership only.

The terms of sub-R. (1), R. 22, do not confine the dispute to such as may be referable to membership only. Therefore a reference to arbitration under R. 22 (1) by a society on the one hand and its brokers on the other hand is not ultra vires. *A I R 1924 Lah 418* and *A I R 1923 Mad 481, Rel on*. [P 268 C 2]

Phani Bhusan Chakravarty—for Appellant.

Atul Chandra Gupta and Nagendra Nath Bose—for Respondents.

Judgment.—Two persons, Mafizuddin Ahmed and Jowadali Khondar, executed a security bond in favour of the Narayanganj Central Co-operative Sale and Supply Society Ltd. in connexion with their appointment as brokers for supplying jute to the society. They having incurred certain liabilities in connexion with their work as such brokers, the society referred the dispute to the Registrar of Co-operative Societies of the Dacca Division who appointed an arbitrator in accordance with the provisions of R. 22 framed under S. 43, Co-opera-

tive Societies Act (2 of 1922). The arbitrator made an award in the shape of a preliminary decree and thereafter in the form of a final decree for sale of the secured property. The award being put into execution objections were entered by judgment-debtor 1, Mafizuddin Ahmad. These objections were overruled and on that he has appealed. Two grounds have been taken in the appeal.

The first ground is that the reference under R 22, sub-R. (1) was ultra vires inasmuch as judgment-debtor 2, Jowadali, was never a member of the Society. This objection was not specifically mentioned in the statement of objections filed by the appellant in the Court below. It was raised before the Subordinate Judge who rejected it on two grounds: first, that the appellant was precluded from raising it because Jowadali himself had not contested the case; and second, that the objection not having been specifically taken in the statement of objections filed by the appellant was not entertainable, because the society had no opportunity of meeting it by adducing evidence, which was absolutely necessary in order to decide on the objection inasmuch as it involved a disputed question of fact. The first of these grounds is not tenable, but the second is a very reasonable one. We are of opinion that the decision of the Subordinate Judge on this point ought not to be disturbed; the more so, because of certain materials to which our attention has been drawn and on which we are satisfied that the objection has no substance.

The second contention urged is that the reference was ultra vires inasmuch as the dispute was such as it was not between the society on the one hand and the two members on the other *qua* members, but only in their capacity as brokers, in other words, that the dispute, not being of a character referable to their membership but relating to transactions which they had entered into as brokers, was not one coming within the purview of the rule which enables the society to make a reference which may give jurisdiction to the Registrar to found the proceedings. An answer to this contention has been sought to be given by a reference to sub-R. (6), R. 22 which purports to give finality to an award unless called in question by way of an ap-

peal within a given time. This sub-rule, in our opinion is not meant to take away the jurisdiction of an executing Court to inquire into the competency of the award on the ground of jurisdiction in the same way as of a decree which it has to execute and within such narrow limits as have been prescribed by the Full Bench decision of this Court in the case of *Gora Chand Halder v. Prafulla Kumar Roy* (1). But the real answer to the contention, in our opinion, is that the terms of sub-R. (1), R. 22 do not confine the dispute to such as may be referable to membership only. The view we take is supported by such decisions as *Zamindars Bank, Shergarh Kalan v. Suba* (2) and *P. Dasaratha Rao v. C. Subba Rao* (3). The appeal in the judgment cannot succeed. It is accordingly dismissed. We make no order as to costs.

V.S. *Appeal dismissed.*

1. A I R 1925 Cal 907=89 I C 685 (F B).

2. A I R 1921 Lah 418=71 I C 722.

3. A I R 1923 Mad 481=72 I C 838.

A. I. R. 1933 Calcutta 268

MUKERJI AND GUHA, JJ.

Dharnaidhar Ghose --- Plaintiff—Appellant.

v.

Indranarayan Sinha and others—Debtors—Respondents.

Appeal No. 287 of 1928, Decided on 16th July 1931, against decree of Addl. Sub-Judge, Murshidabad, D/- 17th January 1928.

(a) Limitation Act (1908), Arts. 66 and 116—Application under O. 34, R. 6, Civil P. C., is governed by Art. 116—Civil P. C. (1908), O. 34, R. 6.

An application under O. 34, R. 6, Civil P. C., is governed by Art. 116 and not by Art. 66, Limit. Act: *A I R 1926 P C 46, Foll*; *A I R 1929 P C 56, Ref.* [P 269 C 1]

(b) Limitation Act (1908), S. 20—Payment of interest by one brother—Authority to pay on behalf of other brother must be proved to save limitation as against him.

Where a mortgage is executed by two brothers and the mortgagee relies on a payment of interest by one of the brothers as saving limitation, he must prove that such brother had authority to make the payment on behalf of the other brother so as to save limitation as against him or his (latter's) sons. [P 270 C 1]

Naresh Chandra Sen Gupta for Hiratal Chakravarty and Purna Chandra Chatterjee for Sibsan Sircar—for Appellant.

Byomkesh Basu and Narendra Krishna Basu—for Respondents.

Judgment.—This is an appeal from a decision of the Additional Subordinate Judge of Berhampur by which the learned Judge had dismissed the plaintiff's application for a decree under O. 34, R. 6 of the Code. There were two defendants in the suit, the mortgagors who executed a mortgage in favour of the plaintiff in the year 1908. One of these, namely, defendant 1, had made a number of payments on account of the mortgage and had made endorsements in respect thereof on the bond stating that on account of interest these amounts were being paid. These payments continued right down to the year 1923. On 10th July 1920 the plaintiff instituted a suit upon the mortgage and thereafter having obtained a decree purchased the mortgaged property on 16th June 1922 and obtained sale certificate therefore on 25th July 1922. Thereafter on 24th November 1921, the plaintiff made the application under O. 34, R. 6 of the Code. The learned Judge refused the application in so far as defendant 1 was concerned upon the ground that although the said defendant had made the payments aforesaid the last of those payments had been made by him in 1923 which was more than three years before the institution of the suit. The learned Judge was of opinion that in view of the decision of the Judicial Committee in the case of *Ganesa Lal v. Khetramohan Mahapatra* (1), Art. 66, Lim. Act, applied to the application made under the said rule. It is true that there are certain observations in that decision which lend support to the learned Judge's view. But as has been pointed out in several cases in this Court since that decision was passed, amongst which may be mentioned the case of *Balbhaddar Singh v. Budri Sah* (2), the said observations can hardly be taken as deciding the question as to whether it was Art. 67 or Art. 116 that should apply. We are of opinion that having regard to the uniform trend of authorities which have laid down that six years' limitation provided for in Art. 116, Lim. Act applies to the case, the learned Judge's decision, in so far as defendant 1 is concerned, cannot be sup-

ported and must accordingly be set aside.

Defendant son was a minor and was represented in this appeal by his mother as his guardian. He has now applied to appear as a major and has been allowed to appear as such. As regards him the learned Judge held that it had not been proved that defendant 1 made the payments not only for himself but also on his behalf. The learned advocate appearing on behalf of the plaintiff has drawn our attention to the written statement which was filed by defendant 2's son in the mortgage suit, in which he stated that defendant 1 who was the elder brother of his father was the karta of the family of the defendants; that he used to look after all the properties of the defendants and that with the evil object of depriving defendant 2 of his properties, defendant 1 colluded with the plaintiff and got a mortgage deed executed by defendant 2 when he was in a drunken state. It has been argued that this statement is an admission made by defendant 2's son that defendant 1 was the karta of the defendants' family; and upon this argument it has been contended that it was not necessary for the plaintiff to adduce any evidence for the purpose of showing that defendant 1 had authority to make the payments on behalf of defendant 2's son. Our attention has also been drawn to the objection which the son of defendant 2 preferred to the application for a decree under O. 34, R. 6, and in which he made a statement, *vide* para. 2 of the grounds, that since the death of his father he had been living separately and in separate mess from defendant 1. It has been argued that from this statement it should be inferred that it was an admission or at least an implied admission that the two defendants lived jointly at the time of the death of defendant 2, the death of defendant 2 having taken place in August 1922.

It has been argued that payment appears on the bond as having been made by defendant 1 in 1921 when defendant 2 was alive and which date would be within six years from the date on which the suit was instituted. We have considered those arguments with care, but we are not able to hold that merely because of these statements, which may be explained upon more grounds than one, it

1. A I R 1926 P C 56=95 I C 889=53 I A 191=5 Pat 585 (P C)

2. A I R 1926 P C 46=95 I C 829=1 Luck 215=29 O C 163 (P C).

was not the duty of the plaintiff to give some definite evidence showing that there was some authority on the part of defendant 1 to make the payments on behalf of defendant 2 or of his son. The pleadings no doubt are to a certain extent at variance with the evidence which the son of defendant 2 has adduced in the present case that his father was separate in mess from defendant 1 ever since 1314. That statement may or may not be correct. The learned Judge's argument that there were two mortgage deeds which showed that the two defendants were not joint is also not very convincing in the face of the fact the those documents came into existence after the date of the payment to which we have referred. It is also true that defendant 1 was allowed to a certain extent to act on behalf of defendant 2 in matters of execution of mortgage, taking of loan and things of that sort. But these circumstances do not necessarily mean that in the matter of payments which defendant 1 made and which would operate as acknowledgment of the debt, he had any authority to make such payments on behalf of defendant 2. For these reasons we are of opinion that in so far as the learned Judge dismissed the application for a decree under O. 34, R. 6 of the Code as against defendant 2's son he was right.

The result is that in our opinion the appeal is allowed in part. The decree of the learned Judge dismissing the application as against defendant 1 should be set aside and in lieu thereof a decree should be passed under O. 34, R. 6 of the Code in the usual terms as against the said defendant only. The decree of the learned Judge in other respects will stand. No order is made as to costs.

K.S.

Order accordingly.

A. I. R. 1933 Calcutta 270

MUKERJI AND BARTLEY, JJ.

Gorachand Barhal and others—Plaintiffs—Appellants.

v.

Mohitkrishna Kundu and others—Defendants—Respondents.

Appeal No. 58 of 1929, Decided on 1st June 1932, against decree of Third Sub-Judge, 24 Parganas, D/- 9th November 1927.

(a) **Bengal Cess Act (9 of 1880), Ss. 41 (2) and 34—Basis of calculation is valuation roll and not rent actually paid.**

The valuation-roll, until the roll is altered by the revenue authorities, must be accepted as the basis of calculation for the determination of the cess actually payable by a tenure-holder and not the rent actually payable by the tenure-holder for the tenure. [P 270 C 2; P 271 C 1]

(b) **Bengal Cess Act (9 of 1880), S. 37 — Rent varying—Superior tenure holder must proceed under S. 37.**

Where the rent of a tenure varies so as to affect the liability to payment of cess as between the tenure-holder and his superior the latter should proceed under S. 37 of the Act and have the valuation in the valuation roll altered. [P 271 C 1]

Bijankumar Mukerji and Manilal Bhattacharjya—for Appellants.

Judgment.—This appeal is against the decision of the lower Court as to the amount of cesses payable by the respondents. The material facts are that the latter hold a tenure under the plaintiff-appellants, the area of which was found, on measurement, in the year 1893, to be 2,102 bighas. The rent of this tenure was fixed at Rs. 1,511 in accordance with the terms of the contract between the parties; and, in the valuation-roll prepared under the Cess Act, the annual value of the tenure is entered as Rs. 3,913, and the rental as Rs. 1,511.

In 1911, the defendants, respondents here, sued for abatement of rent on the footing that a large area of the tenure had diluviated. The suit was carried to the Privy Council, and in 1922 a decree was passed under which the rent was reduced to Rs. 1,256-10-8-1/4. Plaintiffs have now claimed arrears of rent and cesses for the years 1329 to 1332 B. S. at this rate of Rs. 1,256 old, but allowed a deduction under S. 41, Cl. (2), Cess Act, on the basis of that figure, and not on the basis of the figure, Rs. 1,511, which is actually shown in the cess valuation-roll. The practical result is that they claimed from the defendants Rs. 205-4-18½ as cess, instead of Rs. 197-6-0, the amount payable according to the figures given in the valuation-roll. The Subordinate Judge has held that they are entitled to recover only the smaller amount. He has said in effect that the Courts cannot go beyond the valuation-roll, and that, until that roll is altered by the revenue authorities, it must be accepted as the basis of calculation for the determina-

tion of the cess actually payable. Hence the present appeal.

The question is one of first impression, and it is conceded that there is no authority to guide us. The actual wording of S. 41 (2), Cess Act, is that the tenure holder pays the entire amount of cess calculated on the annual value of the tenure, less a deduction to be calculated at one half the cess rate for every rupee of the rent payable by him for such tenure. At first sight it might seem that this means the rent actually payable for the tenure, irrespective of what is stated in the valuation-roll, and that there is a certain amount of inequity involved in allowing a deduction on the rent given in the valuation-roll, when a smaller amount is really payable or actually paid. But a careful reading of the provisions of the Act seems to us to indicate that its policy is to apportion the liabilities of the various parties on the basis of the valuation-roll, and that the superior is merely a conduit-pipe through which the contribution of the inferior ultimately passes to the Government. The annual value of an estate or tenure is ascertained either on the returns made by the parties themselves or arbitrarily by the Collector, and it is the duty of the latter, under S. 34 of the Act, to note the amount of revenue on which the deduction specified in S. 41 is to be calculated. Similarly, it is the duty of the owner of the estate to make a return of the tenure-holders under him, and of the rents which they pay. On the basis of that return, the deduction allowable under S. 41 (2) of the Act is entered in the valuation-roll. Where the rent of a tenure varies, as it has done in this case, so as to affect the liability to payment of cess as between the tenure-holder and his superior, it is open to the latter to proceed under S. 37 of the Act and have the valuation altered. Where, as in this case, the area of the tenure has decreased since its inception, its valuation presumably alters as well as the rent payable by the tenure-holder.

Since the liability to pay cess, as between landlord and tenure-holder, depends as much on the valuation of the tenure as on the rent payable for it, we are of opinion that, so long as the annual value remains unchanged, the cess payable by the holder of the estate remains unaltered. A part of that cess he re-

alizes from the tenure-holder under S. 41 (2), but to allow him to increase the tenure-holder's contribution when the rent but not the valuation alters is to enable him to make an indirect profit in contravention of the principles of assessment on which the valuation-roll is based. The roll itself suggests that this view is the correct view. Col. 4 is headed :

"Revenue or rent or chaukidar tax on which abatement is to be allowed under S. 41."

In this column the rental figure is given as Rs. 1,511. We think the Subordinate Judge has taken the right view of the matter and we, accordingly, dismiss this appeal. There has been no appearance for the respondents and there will be no order as to costs.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 271

MUKERJI AND GUHA, JJ.

Hari Bhajan Das Sadhu Mohanto—
Plaintiff—Appellant.

v.

Ganapathi Das Goswami and others—
Defendants—Respondents.

Appeals Nos. 290 and 343 of 1928, Decided on 27th July 1931, against decree of Sub-Judge, Murshidabad, D/- 31st March 1928.

Civil P. C. (1908), O. 6, R. 17—Application for leave to amend plaint after trial and decision for review—When can be allowed pointed.

An application for leave to amend the plaint after the trial and decision of the case can be allowed provided the amendment which the plaintiff asks for will not materially alter the complexion of the case or a new cause of action will not thereby be substituted or any inconsistent title will not be in the issue or the new case will not in any way be antagonistic to the old one, and provided the Court is satisfied that the plaintiff is not acting mala fide and that the injury done to the defendant can be compensated for by costs or otherwise: *A I R 1922 P C 219* and *Tildesley v. Harper (1878) 10 Ch D 393; Ref.* [P 274 C 1]

*Urukramdas Chakravarty and Bankim Ch. Roy—*for Appellant.

*Gunada Ch. Sen, Birendra K. De, S. C. Rose, and Narendra Krishna Bose—*for Respondents.

Judgment.—These two appeals have arisen out of two Suits No. 422 of 1922 and No. 293 of 1924, instituted by one Sitaram Das and one Harihajan Das, respectively, for succession to the Mahantship of an Akhra known as the Bara Digambar Akhra, situate at village Debi-

pur in the district of Murshidabad. Mahant Bhagwan Das was its last mahant. He died on 19th Baisakh 1329 (2nd March 1922). No successor to the mahantship being apparent, the police appeared on the scene and took charge of the moveables and eventually an intestacy and escheat case was started in the Court of the District Judge. One Lakshmi Narain Das, amongst others, put in a claim alleging that he was entitled to succeed to the deceased mahant and that he had lent money to him shortly before he died, and further that since his death he had been performing the sheba and puja of the idols in the Akhra and was in possession of all its properties. He also applied to the Magistrate praying that the properties might remain in his possession so long as the rights of the rival claimants were not determined by a competent Court. On 6th July 1922 Sitaram Das instituted Suit No. 122 and in that suit Lakshmi Narain Das was appointed receiver on a security of Rs. 2,500. Suit No. 293 was instituted by Haribhajan Das on 27th September 1932, the plaint being registered under O. 33, R. 3, Civil P.C., on 22nd July 1924. The suits were tried together and were both dismissed. Haribhajan Das has preferred F. A. No. 290 of 1928 and Sitaram Das F. A. No. 343 of 1928.

F. A. No. 290 of 1928.—Appeal No. 290 will be dealt with first. (After discussing the evidence in this case, the appeal was dismissed on facts and the judgment proceeded.)

F. A. No. 343 of 1928.—The plaintiff Sitaram Das claimed to succeed to Bhagwan Das on the allegation that he was spiritual cousin to the latter in the second degree. The following genealogy represents the case that he made:

Keshab Das

Sriram Das	Kanhar Das
Baldeo Das	Gomoti Das
Bhagwan Das	Sitaram Das

He alleged that the right to succeed to the mahantship of the Akhra and the shobaitship of the dieties installed there is governed by the relationship established by initiation by mantra. He alleged that there was no other person, at any rate no other Brahmin, who had

mantra relationship with Bhagwan Das excepting himself. He alleged also that he was initiated by mantra by Gomoti Das whose name appears in the table above. In his evidence he deposed that he had not seen Kanhar Das, the Guru of Gomoti Das; but had heard about him from the latter and also from Bhagwan Das, and had also heard his name pronounced at the time of the annual Sradh. He examined a number of witnesses to support this genealogy. (After mentioning the witnesses examined and their evidence the judgment proceeded). The Subordinate Judge upon the evidence before him found Ex. 4 to be a forgery and held that the witnesses examined in support of the genealogy set up on behalf of the plaintiff was not trustworthy, and that on the other hand the contents of a will which Gomoti Das made would point to the plaintiff not having been a Gurubhai of Bhagwan Das. On these findings he dismissed the plaintiff's suit. After the trial and decision of the case, the plaintiff put in an application for review, putting forward the following genealogy as having been gathered by him from some old documents as regards the genuineness of which no question could arise and which he alleged had been recently discovered by him. This application was rejected :

Damodar Das

Keshab Das	Shanta Das
Sriram Das	Kanhar Das
Baldeo Das	Gomoti Das
Bhagwan Das	Sitaram Das

In these circumstances the plaintiff as appellant in this appeal has asked for leave to amend his plaint by inserting therein the above genealogy and for an order for further trial of the suit thereafter. Before considering the question whether the plaintiff's prayer should be granted it is necessary to see whether defendant 1 has succeeded in showing that he has any title to the mahantship, for if he has done so it would be unjust to allow the plaintiff to fight him on an altered case a second time and the plaintiff's prayer must be refused on that ground alone. His case was that Keshab Das was a mantra disciple while one Mukunda Das was a pupil disciple of

Swarup Das and that the two disciples agreed between themselves that they would succeed to each other generation after generation, in the absence of a mantra disciple, and in support of this agreement he produced a document Ex. D. The Subordinate Judge has found this document to be a forgery and the story of the agreement to be false. We have examined the document itself and the reasons upon which the Subordinate Judge has come to this conclusion and we are in entire agreement with his opinion. It has not been suggested that but for this agreement or but for the absence of a mantra disciple defendant 1 who is a pupil disciple only can have any claim. The Subordinate Judge found further that defendant 1 is a Nimayat Baisnav, and not a Ramyet Baisnav like Bhagwan Das and in that view observed:

"The plaintiff was of the same community, and the late Bhagwan Das as a member of the same community with him could claim to succeed to him in preference to defendant 1 who was not of the same community with him."

With this finding and observation however we do not agree; we think the materials in support of them are not sufficient for holding that defendant 1 is not a Ramayet but a Nimayet Baisnav. Even then defendant 1 will have to establish that there is no mantra disciple of Bhagwan Das and that he himself is a pupil disciple of the same Swarup Das who was the Guru of Keshab Das. This therefore is not a case in which defendant 1 has established his own claim to the mahantship. If therefore he is to remain in possession, he will do so because anybody has not yet succeeded to prove a title thereto. The plaintiff, on the other hand, supported his claim by false evidence, oral and documentary, and this by itself should make us feel extremely unwilling to allow him an opportunity to amend his pleading. We have accordingly considered with care and not without some anxiety whether such leave should be granted. The plaintiff claimed to be a mantra disciple of Gomoti Das and this he has succeeded in proving.

He has also proved that Gomoti Das was a mantra disciple of Kanhar Das, which was his case. The falsity of his defence lay only in his attempt to connect Kanhar Das with Keshab Das. He alleged that Kanhar Das was a mantra disciple of Keshab Das; whereas what he

wants now to show is that Keshab Das and Kanhar Das were spiritually related in a different way, namely, that Keshab Das, spiritual Guru, was one Swarup Das who himself was a mantra disciple of Damodar Das and that Swarup Das had another mantra disciple named Shanta Das, and Shanta Das' mantra disciple was Kanhar Das. The documents which he now wants to rely on are unimpeachable and they do contain these names as so related. Whether the identity of these persons will be established or not is a different matter. The adverse inference which the Subordinate Judge has drawn from the contents of the will of Gomoti Das, in our opinion, does not necessarily follow and so is not a sound one. In these circumstances it is not possible to hold that the amendment which the plaintiff asks for will materially alter the complexion of the case, or that a new cause of action will thereby be substituted or that any inconsistent title will be in issue, or that the new case will in any way be antagonistic to the old one. After all, as the Judicial Committee pointed out in the case of *Ma Shwe Mya v. Moung Mo Anaung* (1):

"All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised."

The question how far the conduct of a party, such as there has been of the plaintiff in this case, should disentitle him to leave to amend his pleadings is one on which there is and can be but little authority. Two of the Judges who were most liberal in granting such leave were Bramwell, L. J., and Bowen, L. J., *Bramwell, L. J., in Tildesley v. Harper* (2), said:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide or that by his blunder he has done some injury to his opponent which could not be compensated for by costs or otherwise."

Bowen, L. J., in *Cropper v. Smith* (3), said:

"It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to overreach. There is

1. A I R 1922 P C 249=48 I A 214 = 48 Cal 832=68 I C 914 (P C).

2. (1878) 10 Ch D 893 = 48 L J Ch 495 = 33 L T 552=27 W R 249.

3. (1834) 26 Ch D 710=19 L J Ch 891 = 51 L T 733=33 W R 60.

no rule that only steps or accidental errors are to be corrected. I reserve to myself the right to consider how a case should be dealt with where there has not been merely a mistake but an attempt to mislead. I do not see here any attempt to mislead."

These observations would seem to suggest that if a false defence is deliberately taken up and persisted in, leave to amend should not be granted. And that must be so, for no Court would be justified in exercising its discretion, however wide a discretion it might have, which may encourage perjury or forgery by letting the party feel assured that however unclean his conduct may be, the discretion will ultimately be used in his favour. But the present case is exceptional in its features: the falsity of the claim does not extend to the whole of the title that was set up but was only confined to one particular link in the entire chain, and defendant 1 can hardly complain of the perjury and forgery that he had to combat with for he readily met them with a forgery very cleverly contrived. Bearing in mind the object of the legislature in enacting O. 6, R. 17 of the Code and considering all the facts and circumstances of the case, we think there is more in favour of the plaintiff than against him and that it would be more in furtherance of justice if we allowed the amendment than otherwise. Such leave however should be dependent on the payment by the plaintiff to defendant 1 of all costs in the litigation within four months from today.

The result is that we allow the appeal and the application filed by the plaintiff and direct that if within four months from today he pays to defendant 1 the entire costs as detailed in the decrees of the Court below and of this Court the decree of the Court below will be set aside and he will be allowed to amend his plaint but only to the extent of putting in the genealogy now put forward by him and of such alteration in his pleadings as may be consequential upon it. On the amendment being made notice thereof will be given to defendant 1 who will be allowed to put in a fresh defence should he consider it necessary to do so. Proper issues will thereafter be framed and the suit will be tried afresh. Defendants 2 and 3 will no longer be treated as parties to the suit. If the order as regards the payment of costs is not complied with, this appeal will stand dis-

missed with costs to defendant 1. The cross-objection is dismissed without costs.

K.S. Order accordingly.

* A. I. R. 1933 Calcutta 274

ROY, J.

Tarunanganath Banerji—Plaintiff.

v.

Premnarayanlal Raizada — Defendant.

Original Civil Suit No. 930 of 1928, Decided on 19th May 1932.

(a) Decree—Setting aside—Falsity of claim or perjured evidence is no ground.

The mere fact that the claim, on which the prior decree has been passed, is a false claim or that the decree had been obtained on perjured evidence is no ground for setting aside a decree: *A I R 1927 Cal 84, Rel on.* [P 276 C 2]

* (b) Civil P. C. (1908), O. 9, R 13—Plaintiff giving wrong address of defendant, but taking no part in service of summons — Service is not deliberately suppressed nor is decree obtained by fraud—Decree, setting aside, Fraud.

If a plaintiff in an action gives a wrong address of the defendant and takes no part in serving the summons on the defendant, the giving of the wrong address itself would not prevent the defendant from appearing before the Court to defend the suit and the plaintiff cannot be charged with having deliberately suppressed the service of summons or having obtained the decree by fraud, even though he may have had some cause for suspecting that the service effected on the defendant at the address given by him might not have been good service: *21 Cal 612, Rel on.* [P 277 C 1, 2]

(c) Civil P. C. (1908), S. 20—Suit to declare decree as void.

A suit to declare that a decree is void being obtained by fraud can be entertained by a Court to which the decree is transferred for execution: *A I R 1923 Cal 425 and 39 All 607, Rel on.* [P 277 C 2]

J. C. Hazra and S. P. Mookerjee—for Plaintiff.

Arun Sen—for Defendant.

Judgment.—The plaintiff in this case sues for a declaration that the ex parte decree, dated the 21st day of June 1927, and made in Suit No. 2748 of 1926, of the Court of Small Causes, Nagpur, is inoperative and not binding on him, and for an order that the said decree should be set aside. He further claims a sum of Rs. 5,000 as damages suffered by him by reason of his arrest in execution of that decree. The plaintiff is a pleader of the District Court of Alipore and ordinarily resides at No. 107/1, Mechua-bazar Street. From 1st February 1926, to 18th June 1926 the plaintiff was employed as a manager of the International

Commercial Co., Ltd., which had its office at No. 84-A, Clive Street, in Calcutta. On 7th May 1926 the plaintiff, as manager of the company, had, by a letter addressed to the defendant, appointed him the agent of the company at Nagpur, on a monthly remuneration of Rs. 50 from 10th May 1926.

On 21st March 1928 the plaintiff was arrested in Calcutta, by a bailiff of the Calcutta Court of Small Causes, in execution of a decree passed against him by the Court of Small Causes, Nagpur, on 21st June 1927. On the same day the plaintiff was released, on his depositing with the Registrar of the Court of Small Causes, Calcutta, a sum of Rs. 250, under protest. In his plaint, the plaintiff has alleged that he was not served with any writ of summons in the Nagpur suit, nor had he any knowledge of the institution of the suit and he makes the case that the decree in the Nagpur suit was fraudulently obtained by the defendant on certain false representations, namely : (a) that it was the plaintiff who had appointed the defendant manager of the company, whereas, in fact, as the defendant knew, the plaintiff merely acted as an agent of the International Commercial Co., Ltd., in the matter of the appointment ; (b) the defendant had been appointed manager of the company at Nagpur, whereas he had been merely appointed an agent of the company ; and (c) a sum of Rs. 500 had been paid to the company by the defendant as and by way of deposit, whereas Rs. 300 only had been paid, and that for the purpose of investing in shares of the company. The plaintiff further alleged that the service of the writ of summons was fraudulently suppressed by the defendant and no notice was served on the plaintiff prior to his arrest.

The plaintiff's case is that the defendant had knowingly given a false address of the plaintiff in the Nagpur Court and had falsely stated in the Nagpur plaint that notice of termination of the defendant's services was given to the plaintiff on 26th August 1926. The plaintiff complains that the defendant had fraudulently procured his arrest in execution of the decree by making false allegations in a petition filed by the defendant in the Court of Small Causes, Calcutta, dated 20th March 1928, to the effect that the plaintiff had delayed payment and

was about to leave the jurisdiction of the Court of Small Causes, Calcutta, to avoid the execution of the decree.

In para. 1 of the written statement, the defendant denies all the allegations contained in the plaint. He then goes on to say that he had no knowledge that the plaintiff ordinarily resided at No. 107/1, Mechuanbazar Street, Calcutta, and that the only address of the plaintiff known to the defendant at the time when he instituted the suit in the Court of Small Causes, Nagpur, was that of the plaintiff's place of business at 84-A, Clive Street. He denies that the plaintiff was really an employee in the International Commercial Co., Ltd., or that his services were dispensed with on 18th June 1926, or that after that date the plaintiff ceased to have any connexion with the said corporation or its affairs. The defendant's case is that the plaintiff had represented to him that the plaintiff was the principal and all in all of the company, that the plaintiff had induced the defendant to enter into a contract of service with the plaintiff in his individual capacity, and on false pretexts had led the defendant to part with Rs. 500 on the understanding that the money would be refunded on the termination of the defendant's services. The defendant alleged that he gave a notice to the plaintiff on 26th August 1926, signifying his intention not to serve the plaintiff any longer and demanding the return of the Rs. 500. As the plaintiff failed to pay the defendant's dues in spite of repeated demands, the defendant was, on 10th October 1926, compelled to file a suit in the Court of Small Causes, Nagpur, for the recovery of Rs. 632-3-0 due from the plaintiff. He asserted that the summons in the suit was duly served on the plaintiff and he denied that the decree had been obtained by fraud.

After the passing of the decree and in March 1928 the defendant alleges he came from Nagpur and saw the plaintiff several times in Calcutta and asked him to pay off the decretal amount which the plaintiff had promised to pay. While at Calcutta, in March 1928, the defendant learnt that the plaintiff was going to leave the jurisdiction of the Court of Small Causes, Calcutta, and the defendant bona fide took steps to execute the decree which had been sent to the Court

of Small Causes, Calcutta, for execution. The defendant denies that he had been guilty of any wrongful conduct in taking steps in execution. The defendant has submitted that this Court has no jurisdiction to entertain this suit. On these pleadings certain issues were submitted and accepted on behalf of the parties, which I need not set out here.

The main questions for determination are whether the decree passed on 21st June 1927 was obtained by fraud and whether this Court has jurisdiction to try this suit. Learned counsel on behalf of the plaintiff has sought to attack the decree, broadly speaking, on the grounds: (a) that the claim against the plaintiff in the Nagpur suit was a false claim founded on false allegations and the defendant knew that he had no cause of action against the plaintiff; and (b) that the defendant had fraudulently suppressed the service of the writ of summons and had knowingly given a false address to the Nagpur Court for service of the writ on the plaintiff. (His Lordship after considering the oral evidence which was not satisfactory proceeded to consider the documentary evidence.) The plaintiff has tendered a certified copy of the plaint and the order sheet in the Nagpur suit as also a certified copy of the writ of summons alleged to have been served on the plaintiff. An examination of the plaint shows that there were two defendants in the Nagpur suit: (1) The Managing Director, the International Commercial Co. Ltd., 84/A, Clive Street, Calcutta, (2) T. N. Banerji, Manager of defendant 1; and the claim was for the recovery of a sum of Rs. 632-3, details of which were given. No separate address was given of defendant 2 in the plaint.

The writ of summons which was issued was addressed to T. N. Banerji, c/o The International Commercial Co. Ltd., 84/A, Clive Street, Calcutta. On the back of the writ there is an endorsement by the bailiff of the Court of Small Causes, Calcutta, to the effect that on 27th November 1926, he served the summons on the defendant's assistant, who accepted service but refused to sign the original, at No. 84/A, Clive Street, Calcutta. It is rather difficult to understand how, when the evidence shows that the writ against the Managing Director of the company, who was defendant 1

to the suit, was returned unserved on 19th November, with a report that the business of the company had been closed, there could have been any service of the writ on Banerji at the office of the company. The order sheet makes it clear that, on 11th February 1927, the present defendant had taken time to make inquiries with regard to the company and that a fresh summons was taken out for service on defendant 1 in the Nagpur suit on 10th March 1927, which was made returnable on 21st June 1927. On 21st June 1927, the plaintiff gave up his claim against defendant 1 and obtained an ex parte decree against Banerji. (His Lordship then discussed the merits of the Nagpur suit and proceeded). With regard to the question as to whether the defendant knew the plaintiff's residential address at the time when he instituted his suit in the Nagpur Court, I must say I am unable to accept Banerji's story that the defendant had seen the plaintiff's private address in some book or paper of the company when the defendant had interviewed the plaintiff prior to his appointment and, on the evidence, I am not prepared to hold that Raizada knew the plaintiff's residential address prior to the passing of the decree. I see no reason for refusing to accept Raizada's positive testimony that the only address of Banerji known to him at the time of the institution of the Nagpur suit was the address at 84/A, Clive Street. (His Lordship then considered the contentions of the parties and proceeded). I do not think, on the authorities, there can be any real doubt that the mere fact that the claim, on which the prior decree has been passed, is a false claim or that the decree had been obtained on perjured evidence is any ground for setting aside a decree. *Muk-tamalr Dasi v. Ram Chandra Dey* (1). Nor is there any question that a fresh suit will not lie to set aside a decree on the ground of mere non-service of summons. *Narsingh Das v. Rafikan* (2).

I do not propose to review all the cases bearing on this subject, nor to discuss in detail the authorities cited before me. I think I should be guided by the principle laid down in *Mahomed Golab v. Mahomed Sulliman* (3). In my view,

1. A I R 1927 Cal 84=97 I C 879.
2. (1910) 37 Cal 197=5 I C 198.
3. (1891) 21 Cal 612.

the plaintiff in this case will only be entitled to have the Nagpur decree set aside if he can satisfy the Court that the decree had been obtained by fraud practised by the defendant and that the plaintiff was prevented by reason of the defendant's fraud from placing his case before the Nagpur Court. On the facts, I have come to the conclusion that the plaintiff has failed to make out his case. As I have already indicated, I am unable to hold that the defendant, at the time of the institution of the Nagpur suit, knew that the plaintiff's connexion with the company had ceased or that the writ of summons on Banerji could not be served at 84/A, Clive Street, nor am I prepared to hold that the defendant had come to know the plaintiff's residential address at any time prior to the passing of the decree. I hold that Raizada was not guilty of knowingly giving a false address of the plaintiff to the Nagpur Court or of fraudulently suppressing service of summons. The writ of summons in the Nagpur suit was, in the ordinary course, transmitted by the Nagpur Court to the Calcutta Court of Small Causes for service on Banerji at the address given on it and the return of the bailiff of the Calcutta Court of Small Causes purports to show that service was in fact effected on one of Banerji's assistants at 84/A, Clive Street.

It has not been shewn, nor attempted to be shewn, that Raizada had anything to do with the actual service of the summons on Banerji, nor has there been any suggestion made that Raizada had procured a false return of service. I think Raizada is well entitled to take his stand on the fact that the return of the Calcutta Court of Small Causes showed that the summons had been served and that the Court at Nagpur had chosen to accept the service of summons in the manner indicated on the return as good service and had proceeded to pass a decree on that footing. To my mind, the question as to whether Raizada gave a false address for service on Banerji or an address which he may have had reason to believe was not the correct address cannot affect the position very much. If a plaintiff in an action gives a wrong address of the defendant and takes no part in serving the summons on the defendant, the giving of the wrong address by itself would not prevent the defendant from appear-

ing before the Court to defend the suit. In such a case, in the normal course of events, the summons should come back unserved and, in the absence of proof that the summons had been duly served, no Court would pass a decree. The return of the bailiff of the Calcutta Court of Small Causes does show that service was effected on Banerji in a certain manner. The Nagpur Court has accepted it as good service on Banerji and has thought fit to pass a decree on that footing. Once it is conceded that Raizada had nothing whatsoever to do with the actual serving of the summons, it becomes evident that he cannot be charged with having deliberately suppressed the service of summons or having obtained the decree by fraud, even though he may have had some cause for suspecting that the service effected on Banerji at 84/A, Clive Street, might not have been good service.

In my judgment, the decree of the Nagpur Court was not obtained by fraud and cannot be set aside. The plaintiff has not been able to prove that there has been fraudulent suppression of summons or that he was prevented by reason of any fraud on the part of the defendant from placing his case before the Nagpur Court. I regret very much the conclusion to which I have come, as I cannot help feeling that Banerji had no opportunity of contesting the Nagpur suit and that he had a substantial defence to put forward. I think that, if an application had been made to the Nagpur Court under the provisions of O. 9, R. 13, Civil P. C., the *ex parte* decree, made by that Court, would, in all probability, have been set aside. The plaintiff however has chosen not to go to the Nagpur Court and has sought to set aside the decree in this suit, on the ground that it had been obtained by fraud. I have held that he has failed to make out his case and the consequence is that the decree stands. Learned counsel for the defendant had raised a point as to the jurisdiction of the Court to entertain this suit. I do not think there is any substance in that point. The cases *Indian Provident Co. Ltd. v. Govinda Chandra Das* (4) and *Khushali Ram v. Gokul Chand* (5) furnish clear authority that this Court has jurisdic-

4. A I R 1923 Cal 425=65 I C 818.

5. (1917) 39 All 607=41 I C 352.

tion on the facts of this case and I hold accordingly. Mr. Hazra for the plaintiff admitted, at the very outset, that the plaintiff's claim, in so far as it relates to damages for wrongful arrest, must depend on the plaintiff succeeding in having the Nagpur decree set aside on the ground of fraud. Having regard to the conclusions I have arrived at, there can be no question therefore of the plaintiff getting any decree for damages. In the result, the suit fails and must be dismissed with costs.

R.K.

Suit dismissed.

* A. I. R. 1933 Calcutta 278 Special Bench

RANKIN, C. J., MUKERJI AND
MITTER, J.J.

Anukul Chandra Parihal and another
—Petitioners, In re.

Dainik Nayak and Swadesh Press,
In re.

Application under S. 23, Indian Press (Emergency Powers) Act 23 of 1931, Decided on 22nd December 1932.

(a) Government of India Act (1915), S. 72
—Ordinance once issued may be repeated—
Special Powers Ordinance (10 of 1932),
S. 77.

The same conditions, which may at one time create an emergency, may, whether they continue or disappear, be regarded as again creating an emergency. There is nothing in S. 72 which may be construed as indicating that an Ordinance, which, under it, is to remain in force for six months, cannot be repeated. And hence S. 77, Special Powers Ordinance 10 of 1932, is not ultra vires: *A I R 1931 P C 111, Rel on.* [P 279 C 1]

* (b) Press Emergency Powers Act (23 of 1931), S. 23 — Newspaper describing agency which has opposed and humiliated India and has been persecuting her by keeping her under subjection — These expressions can refer only to Government — These expressions are therefore objectionable under S. 23.

For a subject nation to pray to Srikrishna on a "Janmashtami" day for attainment of political freedom is not a thing which can be legitimately condemned. But for an innocent sentiment of such character, expressions such as "uplifted hand of oppression," "oppressed and humiliated India," "India persecuted and under subjection" and "Piteous wail of a suffering people" will have no place and would be wholly inapposite. These expressions assume the presence of an agency which has oppressed and humiliated her, has uplifted its hand for oppressing her further, and has been persecuting her by keeping her under subjection and being heedless of the piteous wails of her suffering people. The only agency for which it is possible to behave in that way is the Government established by law, and the expressions, having been used with reference to it, obviously tend

to bring it into hatred or contempt and are calculated to excite disaffection towards it.

[P 279 C 2; P 280 C 1]

K. C. Chakravarty—for Applicants.

A. K. Koy and S. M. Bose—for the Crown.

Mukerji, J.—This is an application under S. 23, Press (Emergency Powers) Act 23 of 1931. Petitioner 1 is the printer and publisher of a newspaper "Dainik Nayak" and petitioner 2 is the keeper of the "Swadesh Press" in which it is printed. The Local Government having, by orders made on 1st October 1932, declared forfeited to His Majesty a sum of Rs. 100 out of the security deposit of Rs. 500 made by petitioner 1 and the whole amount of the security deposit of Rs. 100 made by petitioner 2, in the exercise of their powers under S. 8, sub-S. (1) and S. 4, sub-S. (1) respectively of the said Act, the petitioners have made this application to set aside the said orders. The offending article appeared in the issue of the said newspaper of date 24th August 1932. Two passages in that article appeared to the Governor-in-Council to contain words of the nature described in sub-S. (1), S. 4 of the Act, as amended by S. 77 of the Special Powers Ordinance No. 10 of 1932, as those words, in the opinion of the Governor-in-Council:

"tend to bring into hatred or contempt the Government established by law in British India or to excite disaffection towards His Majesty's Government."

The first contention urged on behalf of the petitioners is that S. 77, Special Powers Ordinance No. 10 of 1932, was ultra vires. The argument is that Cls. (c) to (i) of this section, but for the words "or which tend, directly or indirectly," which precede the clauses, are mere reproduction of Cls. (c) to (i) as contained in S. 63, Special Powers Ordinance No. 2 of 1932, and inasmuch as the latter Ordinance was promulgated on 4th January 1932, and the former on 30th June 1932, the reproduction of the clauses had the effect of prolonging the life of the earlier Ordinance against the express provision of S. 72, Government of India Act, as amended in 1919, which says that an Ordinance so promulgated shall be in force for six months only from the date of its promulgation. It has been argued also that if it is a state of emergency that gives the Governor-General authority to

promulgate an Ordinance, the emergency which was caused by the conditions which existed on 4th January 1932 cannot be said to have continued as an emergency till 30th June 1932, because during the interval that elapsed there was ample time to have recourse to the legislature for such enactment as may have been necessary to meet the situation. The contention, in my opinion, is not well founded. It assumes that once a situation of emergency is created, it is the same emergency that continues; on the other hand, the same conditions, which may at one time create an emergency, may, whether they continue or disappear, well be regarded as again creating an emergency. Whether at any particular moment there is a state of emergency or not is a matter entirely for the Governor-General to judge: see *Bhagat Singh v. Emperor* (1). And there is nothing in S. 72, Government of India Act, which may be construed as indicating that an Ordinance, which under it, is to remain in force for six months, cannot be repeated.

The next contention of the petitioners is directed to establish that the passages which are said to be objectionable are not really so, if they are properly read and understood. Some objection has been taken to the translation of the article, it being said that the word "dharma" should be translated as "religion" and not "righteousness," and the word "adharma" as "irreligion" and not "un-righteousness" or "evil," and that "Murari" means not "slayer of Mura" but only "enemy of Mura." I am prepared to concede that such meanings as the petitioners suggest are more literal. So far as "Murari" is concerned it is only an appellation of Sri Krishna and no sinister inference need, in any case, be drawn from the use of the word. As regards "dharma" and "adharma" I see no point in the difference as to their meaning, for "righteousness" is but the practical manifestation of "religion," and "religion" and "righteousness" are, in a sense, synonymous when used with reference to conduct of human beings or institutions.

Learned advocate for the petitioner, as I understand his arguments, desires

us to read the article as meaning that as India at the present moment is being oppressed by wrongs done to her by her own people or by a section of her people on account of the irreligious lives into which they have plunged themselves, the writer was invoking Sri Krishna to manifest Himself on earth once again as He had bound Himself by promise to do when the cup of sin and iniquity would be full to its brim, and to destroy the irreligion that was being practised by her people and deliver her from her present miserable plight. He desires us to hold that Janmashtami, which is the day on which Sri Krishna was born, is an occasion when one may not inappropriately be given to thoughts of this nature, because He took His birth to destroy those forces which were the embodiment of "irreligion" and lust of power, such as Kansa and Duryodhana. He has argued that the expression "to set your mother in chains free from her shackles" has been used metaphorically to mean the deliverance of India from such prejudices and irreligious practices as have conduced to hamper her progress. I am of opinion that the article cannot possibly bear such an interpretation.

It is quite true that Janmashtami is a day for pious thoughts and wishes, and I am prepared to concede that for a subject nation to pray to Sri Krishna for attainment of political freedom is not a thing which can be legitimately condemned. But for an innocent sentiment of such character, expressions such as "uplifted hand of oppression," "oppressed and humiliated India," "India persecuted and under subjection," and "piteous wail of a suffering people" will have no place and would be wholly inapposite. It is possible that one will not be far wrong if he attributes the present condition of the country to want of reverence for religion, but the expressions to which I have referred clearly indicate something very different from that as being what is actually meant. The expressions assume the presence of an agency which has oppressed and humiliated her, has uplifted its hand for oppressing her further, and has been persecuting her by keeping her under subjection and being heedless of the piteous wails of her suffering people. The only agency for which it is possible to behave in that way is the Government established by

1. A I R 1931 P C 111 = 1931 Cr C 521 = 131
I C 415 = 58 I A 169 = 32 Cr L J 727 = 12
Lah 280 (P O).

law, and the expressions, having been used with reference to it, obviously tend to bring it into hatred or contempt and are calculated to excite disaffection towards it.

We have been asked to read the quotations from the Geeta which are to be found in the article in the light of their context. This, of course, we have to do, but I do not see what advantage the petitioners gain thereby. The Geeta no doubt embodies in its sayings the highest and noblest of truths. The three quotations are from the sayings of Sri Krishna in circumstances which, if they are at all taken into consideration, would put a still worse complexion on the article under consideration. In my judgment therefore the application should be dismissed.

Rankin, C. J.—I agree.

Mitter, J.—I also agree.

v. S. Application dismissed.

* * A. I. R. 1933 Calcutta 280

PANCKRIDGE AND PATTERSON, JJ.

Jagendra Chandra Roy—Accused—Petitioner.

v.

Superintendent of the Dum Dum Special Jail—Opposite Party.

Misc. Case No. 160 of 1932, Decided on 16th January 1933.

* * (a) Ordinance (10 of 1932), S. 80—Sentence imposed under Ordinance (2 of 1932) continues to have effect even after its expiry.

The expression "anything done in pursuance of any provision" of such and such Ordinances covers the case of penalties inflicted under Ordinance 2 and the other expiring Ordinances referred to in Ordinance 10, and sentences imposed under the expiring Ordinance do continue to have effect even after the date of its expiry.

[P 281 C 1, 2]

(b) Interpretation of Statutes—Penal Statute—Penalties under statute are not affected by repeal of statute.

Penalties that have been incurred while a statute is in force, are not (in the absence of an express provision to the contrary), affected by the mere fact of the statute having ceased to be in force by express repeal or by expiration by effluxion of time: *Stevenson v. Oliver*, 8 M & W 231, *Rel. on.*

[P 281 C 2]

* (c) Government of India Act (1915), S. 72—Sentences under Ordinance are not intended to expire with the Ordinance.

It is not the intention of the Parliament in limiting the duration of an Ordinance to six months to limit also the sentences of imprisonment that might be imposed under any such Ordinance to sentences that would expire with the expiry of the Ordinance. There is nothing

in the wording of S. 72 to justify such a conclusion, although no such proviso may have been inserted in the Ordinance. [P 282 C 1, 2]

(d) Interpretation of Statutes—Penal Statute—Rule laid down.

No doubt a penal statute should be strictly construed but it is nonetheless true that every statute, whether penal or not, should be construed in a manner consistent with common sense, and that if the intention of the legislature is not apparent from the words of the statute itself, it ought to be presumed to have been such as is consistent with reason and justice.

[P 282 C 2]

N. K. Basu and Ramendra Chandra Roy—for Petitioner.

Advocate-General and J. K. Mukerji—for the Crown.

Patterson, J.—The petitioner was convicted under S. 21, Ordinance 2 of 1932, on 12th March 1932 for having disobeyed or neglected to comply with an order that had been made by the District Magistrate of Bakargunj under S. 4 of that Ordinance and that had been duly served on the petitioner on 4th March 1932. He was sentenced to undergo rigorous imprisonment for 18 months and to pay a fine of Rs. 150 and in default to undergo a further term of imprisonment for three months: he is now serving out his sentence in the Dum Dum Special Jail. By this Rule the Superintendent of the Jail has been called on to show cause why the petitioner should not be set at liberty on the ground that the provisions of S. 21, Ordinance 2 of 1932, authorizing the Court to pass sentences of imprisonment which would continue beyond the date of expiry of the said Ordinance are ultra vires of S. 72, Government of India Act of 1919, and also on the ground that the sentence of rigorous imprisonment for 18 months passed on him ceased to have effect after the said date. It appears that Ordinance 2 of 1932 came into force on 4th January 1932 and that it remained in force up to and including 3rd July 1932, on which date it expired under the provisions of S. 72, Government of India Act, which limit the duration of an Ordinance under that section to a period of six months. It further appears that before the expiry of Ordinance 2 of 1932 another Ordinance (Ordinance 10 of 1932) was made by the Governor-General in Council under S. 72, Government of India Act, and that it came into force on 30th June 1932. This Ordinance, among other things, re-

enacted the provisions of S. 4, Ordinance 2 of 1932, and also the provisions of S. 21 of that Ordinance, while S. 80 contained a saving clause to the effect that anything done in pursuance of any provision of Ordinance 2 should be deemed to have been done in pursuance of the corresponding provision of Ordinance 10.

Now S. 72, Government of India Act, lays down that an Ordinance made under that section shall for the space of six months from the date of its promulgation have the like force of law as an Act passed by the Indian legislature, and that the power of making such Ordinances is subject to the like restrictions as the power of the Indian legislature to make laws. That being so the two Ordinances with which we are now concerned may, for the purposes of the present case, be regarded as standing on precisely the same footing as if they had been temporary Acts passed by the Indian legislature. Ss. 4 and 21, Ordinance 2, are perfectly clear and unambiguous, as are also the corresponding provisions of Ordinance 10, and this being so, it must I think be held that S. 80, Ordinance 10, provides a complete answer to the petitioner's contention that at any rate since 3rd July 1932, (the date on which the Ordinance 2 expired), he has been illegally detained in custody. It has been urged on his behalf that if, apart from the provisions of Ordinance 10, he would have been entitled to be released from custody on the expiry of Ordinance 2, the terms of S. 80 of the former Ordinance are not sufficiently clear and precise to justify his further detention. It is contended that if the intention of the legislature, (the legislature in the present instance being the Governor-General), was that sentences imposed under the expiring Ordinance should continue to have effect even after the date of its expiry, it should have expressed its intention with greater clearness and should not have left it to be gathered by inference; that the words of S. 80 do not make it at all clear that such was the intention; and in particular that the words "anything done," as used in that section, do not include penalties. I do not agree with these contentions: I cannot imagine any more comprehensive expression than "anything done in pursuance of any provision" of such and

such Ordinances, and it seems to me to be perfectly clear that this expression covers, and was intended to cover, the case of penalties inflicted under Ordinance 2 and the other expiring Ordinances referred to in Ordinance 10.

The conclusion stated above is of itself sufficient for the disposal of this Rule, but as the question of the competence of the Governor-General to authorize the Courts by means of an Ordinance to pass sentences of imprisonment for terms extending beyond the date of expiry of such Ordinance has been raised by this Rule and has been fully discussed before us, I think it is desirable that this question should be decided. If the Ordinance had been expressly repealed, the question would probably have presented very little difficulty in view of the provisions of S. 38, Cl. (2), Interpretation Act of 1889 and of Ss. 6 and 30, General Clauses Act of 1897, but although these provisions do not apply in terms to the case of a temporary statute the term of which has expired, it may very reasonably be contended that they merely give statutory expression to a rule of construction which was already in existence and which applied with equal force to statutes that had been expressly repealed and to temporary statutes the terms of which had expired. This rule of construction was recognized in England as far back as the year 1841 in *Stearns v. Oliver* (1), in which a question similar to the one now under consideration arose with reference to the effect of the expiry of an Act on rights acquired while the Act was in force.

The learned Judges who dealt with that case were of opinion that not only rights acquired under a temporary Act, but also penalties imposed thereunder, would survive its expiration. The principle underlying their decision appears to have been that transactions that have been completed, rights that have been acquired and penalties that have been incurred while a statute is in force, are not (in the absence of an express provision to the contrary), affected by the mere fact of the statute having ceased to be in force, a principle which has since received statutory recognition in the Interpretation Act of 1889 in the

1. (1841) 8 M & W 234 = 10 L J Ex 338 = 5 Jur 1064.

case of express repeal, though not as yet in the case of expiration by effluxion of time. This rule seems to me to be founded not only on considerations of convenience, but also of reason and justice, and it ought in my opinion to be kept prominently in mind in endeavouring to decide the question now under consideration.

The question is really one of construction, and relates mainly to the construction of S. 72, Government of India Act. S. 21, Ordinance 2 of 1932, authorizes the imposition of sentences of imprisonment that may extend to two years, and is clearly within the competence of the Indian legislature to create offences by statute and to make them punishable in this manner: it was therefore *prima facie* within the competence of the Governor-General to make and promulgate an Ordinance containing provisions of this character. The question is whether it was the intention of Parliament in limiting the duration of an Ordinance to six months, to limit also the sentences of imprisonment that might be imposed under any such Ordinance to sentences that would expire with the expiry of the Ordinance. There is nothing in the wording of S. 72 to justify such a conclusion, and in my opinion Parliament cannot possibly have intended anything so unreasonable. To hold otherwise would be to hold that Parliament intended not only to prevent the Governor-General from authorizing the Courts to impose such sentences of imprisonment as might be necessary for the purpose of dealing effectively with the emergency the existence of which the promulgation of an Ordinance pre-supposes, but also that the maximum sentences of imprisonment that the Courts might be authorized to impose should vary from six months rigorous imprisonment in the case of convictions on the date on which the Ordinance came into force, to imprisonment till the rising of the Court, or something equally futile, in the case of convictions on the date on which the Ordinance was due to expire. The consequences of such an interpretation have only to be stated for its absurdity to become apparent, and I have no hesitation in holding that the interpretation that the petitioner would have us put on S. 72 cannot possibly be the correct interpretation.

It is true that a penal statute should

be strictly construed, but it is nonetheless true that every statute, whether penal or not, should be construed in a manner consistent with common sense, and that if the intention of the legislature is not apparent from the words of the statute itself, it ought to be presumed to have been such as is consistent with reason and justice. If the test be applied to the provisions of S. 72, it is clear that the legislature can never have intended that sentences authorized by an Ordinance should not extend beyond the term of the Ordinance, or that such sentences should automatically expire with the expiration of the Ordinance. The section will not bear the interpretation sought to be put on it by the petitioner, and that interpretation cannot be accepted as correct. It was also suggested on behalf of the petitioner that as an Ordinance is necessarily based on the existence of a state of emergency it ought to cease to have effect as soon as the emergency is over, and that sentences imposed under the provisions of an Ordinance ought logically to terminate with the termination of the Ordinance. The argument is clearly fallacious for the reasons already indicated, and does not call for further comment.

Before leaving the case I ought perhaps to refer to another argument that was urged by the learned advocate appearing on behalf of the petitioner. It was pointed out that the Defence of India Act of 1915 and the Emergency Powers Act of 1920 were temporary statutes which, like Ordinance 2 of 1932, contained provisions by which offences were created and made punishable with imprisonment and that both these Acts contained special provisos to the effect that penalties imposed thereunder should not be affected by the expiry of the Acts, or (in the case of the Emergency Powers Act) of the regulations framed thereunder. It was contended that the fact that such provisos were considered necessary in the case of those two Acts show that if it is intended that punishments inflicted under the provisions of temporary statutes should be given effect to after the expiry of those statutes, it is necessary that this should be specifically stated. I do not agree with this contention, for having regard to the rule of construction indicated in *Steavenson v. Oliver* (1) and already referred to in

the earlier portion of this judgment, I am of opinion that the provisos in question were not really necessary and that they were merely inserted (as is frequently done in the case of provisos and saving clauses) as a precaution against misinterpretation of the intention of the legislature. Moreover I find that out of some 12 Ordinances promulgated between 1922 and 1932 by which inter alia offences were created and penalties provided, only two, (viz.: Ordinances 4 and 8 of 1930), contain provisos of the nature indicated above. These two Ordinances related to martial law and empowered the military authorities to frame regulations creating offences and imposing penalties, but I have been unable to discover any possible reason why the provisos in question were inserted in these two Ordinances and not in the others. In these circumstances I do not think it is possible to draw any such inference as the learned advocate for the petitioner would have us draw from the fact that the Emergency Powers Act and the Defence of India Act contain provisos of the nature indicated above.

The petitioner has in my opinion failed to show that the sentence of imprisonment passed on him was illegal or that it ceased to have effect on the expiry of the term of the Ordinance. The rule ought therefore to be discharged.

Panckridge, J.—I agree.

R.K.

Rule discharged.

A. I. R. 1933 Calcutta 283

GUHA AND M. C. GHOSE, JJ.

Aghore Chandra Jalui—Petitioner.

v.

Rajnandini Debi and others—Opposite Parties.

Civil Rules Nos. 336 and 445 of 1932, Decided on 5th July 1932, against order of Munsif, First Court, Howrah, D/- 13th February 1932.

(a) Bengal Tenancy Act (1885), Ss. 26-J and 188—Mere application is sufficient for recovery of landlord's fee and compensation.

Landlords are entitled to recover balance of transfer fee and compensation under S. 26-J by means of an application: *A I R 1933 Cal 24, Foll.* [P 284 C 1]

(b) Interpretation of Statutes—Construction—True meaning of passage may be found by comparison with other provisions.

The true meaning, exact scope and significance of any passage occurring in a statute may be found not merely in the words of that passage, but on a comparison of the same with other parts of the statute, and the intention of the Legis-

lature ascertained in that way: *River Wear Commissioners v. Adamson*, (1877) 2 A C 743 and *Easter Co. v. Comptroller of Patents*, (1898) A C 576 Ref. [P 283 C 2; P 284 C 1]

Naresh Chandra Sen Gupta and *Shamadas Bhattacharjee*—for Petitioner.

Bijan Kumar Mukerjee and *Apurba Charan Mukherjee*—for Opposite Parties.

Guha, J.—The Rules issued by this Court in the cases before us, were directed against an order of the Munsif, First Court, Howrah, passed in Miscellaneous Cases Nos. 117 and 131 of 1931, granting relief to the opposite party, on applications made by them, purporting to be under S. 26-J, Ben. Ten. Act, for realization of landlord's fee and compensation, as mentioned in that section. The applications were made on the footing that the petitioners in this Court were the purchasers of portions of occupancy holdings of which the opposite party were the landlords. The applications so made were resisted by the tenants, petitioners before us. The decision of the Munsif went against them, and this Court was moved to set aside the order of the Court below. The question argued before us on behalf of the petitioners was that the Court below acted illegally in the exercise of its jurisdiction in going into complicated questions of title and status of the tenant otherwise than in a suit properly framed for the purpose. It was contended that recovery of landlord's fee and compensation, as provided by S. 26-J, Ben. Ten. Act, must be by a suit instituted for that purpose, and not by an application.

There was no doubt that S. 26-J, as it stands, does not expressly mention the procedure to be followed for the purpose of recovery of landlord's fee and compensation. The intention of the Legislature however is to provide a procedure of a summary nature in the matter of realization of the balance of the fee payable on transfer under Ss. 26-C to 26-E, Ben. Ten. Act; and that intention is clearly expressed in S. 188 of the Act, definitely enumerating the filing of an application under S. 26-J as one of the acts which the law authorizes co-sharer landlords to do, acting together, or by an agent authorized to act on their behalf. The true meaning, the exact scope and significance of any passage occurring in a statute may be found not merely in the words of that passage but on a compari-

sion of the same with other parts of the statute, and the intention of the legislature ascertained in that way: see *River Wear Commissioners v. Adamson* (1) and *Easter Co. v. Comptroller of Patents* (2). In our judgment therefore the landlords were entitled under the law to recover the balance of transfer fee together with compensation, as mentioned in S. 26-J, Ben. Ten. Act, by means of an application, as made in the case before us. It may be mentioned that the decision we have arrived at, on the question of interpretation of S. 26-J, Ben. Ten. Act, arising for consideration in the case before us, is in consonance with the view expressed by this Court previously on the subject: see per C. C. Ghose, J., in the case of *Hari Mihan Sarkar v. Lokenath Mukerji*, Civil Revision Case No. 768 of 1931 decided on 3rd February 1931 and per Jack, J., in the case of *Srinath Bose v. Dehendra Nath* (3). The Rules are discharged and the order of the Court below is confirmed. We make no order as to costs in these cases.

M. C. Ghose, J.—I agree.

B.R./R.K. Rule discharged.

1. (1877) 2 A C 743.

2. (1898) A C 576.

3. A I R 1933 Cal 24=141 I C 627.

A. I. R. 1933 Calcutta 284

S. K. GHOSE, J.

Khowaz Ali—Plaintiff—Appellant.

v.

Sayed Mia and others—Defendants—Respondents.

Appeal No. 2214 of 1929, Decided on 30th June 1931, against decree of Dist. Judge, Tipperah, D/- 2nd April 1929.

Bengal Village Self-Government Act (5 of 1919), Ss. 4 and 31—S. 31 does not apply to private lands.

Though "road" as defined in S. 4, Cl. (8) may extend over private property, as private property is expressly excluded by S. 31, the section cannot apply to a path on a private land: *Attorney-General v. Horner*, (1884) 14 Q B D 254 and *Wells v. London Tilbury and South-end Railway*, (1877) 5 Ch D 126, *Dist.* [P 285 C 1]

Hemendra Kumar Das—for Appellant.

Syed Nasim Ali—for Respondents.

Judgment.—This appeal relates to a suit for recovery of khas possession of lands on declaration of plaintiff's title thereto. The plaintiff and the defendants are all residents of the village Palibari. The plaintiff's case is that

the lands in Sch. 1 formed a public Gopat lying to the south and west of his tank adjoining his homestead. At the request of the villagers the plaintiff re-excavated the tank and there was an agreement between the plaintiff on one side and certain persons representing the villagers on the other by which the villagers gave up the right to the aforesaid Gopat and in exchange the plaintiff agreed to make a new path on the land of his tenancy lying on the other two sides of the tank. This land is described in Sch. 2. This arrangement was approved by the Union Board at a meeting and the plaintiff took settlement of the land in Sch. 1 from the landlords. His possession however over the land of Sch. 1 was resisted by the defendants who instituted a case under S. 133, Criminal P. C., and it was decided against the plaintiff. The plaintiff therefore sued for declaration of his title to the land of Sch. 1 and for recovery of possession thereof. Amongst the several defendants a few supported the plaintiff's case and the rest contested it. The trial Court found that the arrangement as per Ex. 6 upon which the plaintiff based his case was a matter between the plaintiff on one side and some villagers on the other and that these villagers did not act in a representative capacity. The villagers as a whole therefore did not lose their right of way over the land in Sch. 1 and in that view the trial Court dismissed the suit. On appeal the learned District Judge agreed with the Munsif on practically the same grounds. Hence this second appeal by the plaintiff.

In this appeal the learned advocate for the appellants concedes that he cannot base his case on the aforesaid arrangement as evidenced by the document Ex. 6. But he contends that this arrangement was ratified by the Union Board at a meeting under S. 31, Bengal Village Self-Government Act 5 of 1919, and therefore it ought to prevail. This argument does not seem to have been made at the trial, but it was made before the District Judge and he thought that S. 31 of the Act did not apply because the land was private property. It is pointed out "road" as defined in S. 4, Cl. (8) of the Act means "any road" street or passage whether a thoroughfare or not over which the public have a right of way and it is contended that

this means that "road" as defined in the Act may extend over private property. Nevertheless S. 31 of the Act provides that the Union Board shall have control of all roads, etc., within the Union, not being private property and not being under the control of the Local Government, or the District Board or the Local Board. Therefore private property is expressly excluded by this section. This I think is consistent with reason, because the various things which the Union Board is empowered to do under this section according to Cls. (a) to (f) are things which cannot be done with respect to privately owned lands. Mr. Nasim Ali pointed out that there is no provision for compensation for private owners, if their land is to be taken by the Union Board while directing a road. He has drawn my attention to an English case of 1877, namely, *Wells v. London Tilbury and South-end Railway Co.* (1). There the Act that was sought to be interpreted expressly recited that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, but no provision for compensation was made.

It was held that upon the true construction of the Act, it did not interfere with private rights of way, but only with public rights of footway. To the same effect are the remarks in another English case, namely, *The Attorney-General v. Horner* (2). In the present case no doubt the zamindar has been made a party but he was no party to the arrangement upon which the plaintiff based his claim for relief. As regards the land in Sch. 2 the plaintiff was only a tenant and it has been found by the Courts below that the new diversion over the land of Sch. 2 has not yet been carried out and as a matter of fact the plaintiff does not claim any relief in respect of land in Sch. 2. Another difficulty in the way of the appellant is that this point which is based upon the resolution passed by the Union Board does not stand on proper evidence, for the simple reason that the resolution itself has not been put in evidence. There is only the deposition of

the President and it goes to show that the Union Board apparently acted under the impression that all the villagers had agreed to the diversion and this, it has been found, was not the case. In the circumstances I do not think there is any force in the contention on which this second appeal has been argued. I have however some sympathy for the plaintiff-appellant. I dismiss this appeal, but at the same time I order that each party do bear his own costs in this Court.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 285**

JACK, J.

Bishnu Charan Pal—Petitioner.

v.

Jogendra Kumar Bhowmik and others
—Opposite Parties.

Civil Rules Nos. 1100 and 1224 of 1931, Decided on 2nd May 1932, against order of Dist. Judge, Berhampur, D/- 25th May 1931.

Bengal Tenancy Act (1885), S. 13—Rent decree—Tenure sold in mortgage decree—Purchaser offering rent, but refused—Landlord suing old tenant for arrears accruing after purchase and purchasing land himself—Purchaser can deposit decretal amount and set aside sale to landlord—Civil P. C. (1908), O. 21, R. 89.

A permanent transferable tenure was sold in execution of a mortgage decree. The purchaser offered to pay rent to the landlord in respect of that holding. But the latter refused to accept it and sued the old recorded tenants for arrears of rent. Portion of these arrears had fallen due after the tenure was sold to the purchaser in the mortgage sale. The landlord however obtained a rent decree and in execution thereof himself purchased the holding.

Held: that the decree obtained by the landlord was not a rent-decree nor the sale, a rent-sale. O. 21, R. 89, Civil P. C., was applicable, and the decretal amount could be deposited by the purchaser at the mortgage sale and the sale to the landlord set aside: *A I R 1930 P C 193*, *Rel on.* [P 286 C 2]

Kumud Bhandu Bagchi — for Petitioner.

Bijan Kumar Mukerji — for Opposite Parties.

Judgment. — These Rules have been issued upon the opposite parties to show cause why an order refusing to set aside two sales in execution of two decrees for arrears of rent should not be reversed. The petitioner is the purchaser at a mortgage execution sale of the two transferable permanent tenures in question. The landlords subsequently purchased these tenures in execution of decrees for

1. (1877) 5 Ch D 126=37 L T 302=25 W R 325.

2. (1884) 14 Q B D 254=54 L J Q B 227=33 W R 93=49 J P 926.

arrears of rent and it is admitted that a portion of the arrears claimed in the rent suit fell due after the petitioner purchased the tenures in the mortgage sale. The landlords ignored the petitioner and sued the recorded tenants for the entire rent, and the question is whether the decrees in rent suits were rent decrees or money decrees. This case came up to this Court on a previous occasion and it was referred back for determination whether the decrees were rent or money decrees. The trial Court found that they were rent decrees, inasmuch as the Court found the landlord's fee had not been paid under the procedure laid down in S. 13, Ben. Ten. Act. He came to this conclusion from the statement of the landlord and from the facts that in the order sheet of the mortgage execution case there was no record that the landlord's fees had been paid.

The appellate Court came to the same finding and dismissed the applications, it being held that the petitioner could not come under O. 21, R. 89, Civil P. C. The Courts below seem to have overlooked the provisions of Bengal Council Act 1 of 1903 which lays down that no transfer shall be deemed to be invalid merely on the ground that the landlord's fee prescribed by S. 12 or S. 13 has not been paid. It is doubtful also whether they gave sufficient weight to the presumption that arises under S. 114, Evidence Act, that the procedure laid down in the Code was carried out by the Collector at the time of confirmation of sale. But apart from that, we have the evidence of the mortgagee that after the petitioner's purchase he approached the Tahsildar as well as the landlord to pay rent as manager of the petitioner, telling them of the petitioner's purchase, but they did not accept the rent. The trial Court held that this being no compliance with the provisions of S. 13, Ben. Ten. Act, S. 12 of the Act had no application in the present case. But there can be no doubt on this evidence that the landlords were perfectly well aware of the transfer at the mortgage sale and by bringing the suit for rent against the former tenants only they were claiming money which is not really rent, for admittedly a portion of the money claimed as arrears of rent fell due as after the transfer of the holdings and was not rent. In these circumstances the sale

cannot be regarded as rents sales. If any authority is required for this view it is to be found in the case of *Jitendra Nath Ghose v. Mon Mohan Ghose* (1).

There it was pointed out by their Lordships of the Privy Council that under the Tenancy Act of 1885 instead of the transferee being bound to go to the landlord to get his name recorded, it was provided that a voluntary transfer must be made by a registered instrument and that before registration a fee was to be paid by the transferee and notice given by the Registration Office through the Collector to the landlord or, in the case of an execution sale, by the executing Court. In this state of the law their Lordships can see no foundation for the contention that a landlord can ignore all transfers of the tenure and rely upon decrees obtained by him against persons whom he chooses for his own purposes still to record as his tenants, though he knows or must be taken to know that their interest in the tenure has ceased. They point out that according to the decisions of the Board in *Surapati Roy v. Ram Narayan Mukerji* (2) and *Chintamani Dutt v. Rash Behari Mondal* (3), the original tenure holders would no longer be liable for the rent and that an effective decree therefore could only be obtained against the transferees. The Rules must accordingly be made absolute and the petitioner's applications under O. 21, R. 89, Civil P. C., are allowed. The sales will be set aside, as the petitioner is said to have deposited the amount referred to under the provisions of that rule. Each party will bear its own costs.

R. R. / R. K. *Rules made absolute.*

1. A I R 1930 P C 193=57 I A 214=58 Cal 301=126 I C 422 (P C).
2. A I R 1929 P C 88=50 I A 155=50 Cal 640=73 I C 193 (P C).
3. (1892) 19 Cal 17.

A. I. R. 1933 Calcutta 286

RANKIN, C. J. AND MITTER, J.

Gobardhandas and another — Defendants—Appellants.

v.

Gopaldas Modi and others—Plaintiffs—Respondents.

Appeals Nos. 22 and 24 of 1932, Decided on 29th April 1932, from original order in Suit No. 1517 of 1929.

(a) *Executor—Executor taking money for himself—Court has power to pass interlocu-*

tory order directing him to bring amount in Court or furnish security.

After a testator's death *G* and *D*, two of the executors and also residuary legatees under the will, drew large sums of money belonging to the estate. Disputes having arisen between the executors, an administration suit was filed and, by consent, *D* and *H* were appointed receivers in that suit with liberty to divide the properties among the residuary legatees, after providing and securing payment of the liabilities of the estate and of the legacies. Shortly thereafter, another order was made removing the two receivers and appointing the Official Receiver in their place. Then the widow of the testator, brought an application, asking that *D* and *G* be directed to bring into Court the sums they had taken :

Held : that the Court had the power after considering the affidavits filed by the parties to pass the interlocutory order directing them to bring the money in Court or furnish security for the same : *English cases referred.*

[P 288 C 2]

(b) **Executor—Executor being also residuary legatee taking money for himself before paying debts and legacies is breach of trust.**

An executor, who is a residuary legatee, is not entitled, to help himself out of the residuary estate without making provision for the debts and specific legacies and other matters which are prior thereto. It is only after these matters have been cleared that the estate of the testator becomes the property of the residuary legatee. Hence where an executor who is also a residuary legatee takes the money for himself before paying debts and legacies, it is a breach of trust on his part and no question of title arises : *Fordham v. Wallis*, (1853) 10 Hare 217, *Ref.*

[P 290 C 1]

Pugh, S. R. Das and S. C. Roy—for Appellants.

N. N. Sircar, C. L. Jhoonjhoonwalla, S. N. Banerjee, H. C. Majumdar and P. N. Banerjee—for Respondents.

Rankin, C. J.—Two appeals are before us—Nos. 22 and 24 of 1932. They are brought respectively by Lala Gobardhandas and Lala Dinanath, two persons, who, with other three, are the executors of the will of one Raghumull Khandolwal, who died on 5th September 1926, probate being taken of his will on 10th January 1927. Raghumall appears to have died a wealthy man and, by the provisions of his will, he, first of all, directed that the residue of his property should go to certain persons. The two appellants before us were his nephews and they were to get an equal one-fourth share, his wife was to get another and his daughter, married to one Hansraj, was to get another. They were to be entitled to carry on the business in equal shares and were to be entitled to the goodwill and so forth in equal shares. There were various legacies and five per-

sons were appointed executors and trustees—the two appellants, Hansraj, who had married his daughter, one Gopaldas Modi, who afterwards became the plaintiff in this suit, and the widow. These persons were to act by majority, they were to act by resolutions passed at meetings or by resolutions passed by circulation. The testator having died in September 1926, we find that trouble first began when the plaintiff in the present suit was brought on 29th July 1929, the plaintiff being Gopaldas Modi, one of the executors. The plaintiff asks for administration of the estate and the grounds, upon which the administration is asked for, are not only that the executors are quarrelling among themselves and not only that the administration of the estate is not proceeding, but that the estate is getting into difficulties, being unable to meet the claims on it and that the debts and liabilities are not being dealt with.

Among other reasons stated in the plaint of July 1929, one is that the executors—the defendants Dinanath and Gobardhandas—are wrongfully withdrawing large sums of money from the estate claiming to be entitled thereto as residuary legatees and to that allegation the appellant Dinanath says that he has not wrongfully withdrawn any money, but that he has taken small loans from the estate with the consent and approval of the plaintiff and his other co-executors and executrix. The appellant Gobardhandas, in his written statement, gives a traverse in which he denies that he ever wrongfully withdrew any money from the estate. Thereafter there was a petition brought for the appointment of a receiver and the first order that was made on that matter was an order by consent. The application was by the widow, Srimati Bhagabati Debee, who was one of the defendants in the suit, and she made various charges, the gist of which is to be found for the present purpose in para. 27 of her petition. She said that Dinanath in collusion with Gobardhandas—although the suit was still pending and the debts and legacies had not been paid—had borrowed money in the name and on behalf of the estate at Delhi and had withdrawn a lakh of rupees out of the estate and that Gobardhandas had withdrawn a sum of about Rs. 60,000, that they had not repaid the

moneys and that the estate was in a bad condition. So she was alleging that, pending the actual proceedings in the suit for administration, the two appellants had been helping themselves to the money of the estate by means of the Delhi firm. It may here be explained that, by a resolution of the executors, Gobardhandas, who lived at Delhi, was made responsible for the Cawnpore branch—Dinanath being responsible for the Delhi branch. As a result of that application, an order was made by consent, by which Hansraj who, as one may put it, was on the side of the plaintiff, and Dinanath were appointed joint receivers and the order gave these receivers liberty to divide the properties amongst the residuary legatees, after providing and securing payment for the liabilities of the estate and payment of general and pecuniary legacies; that order was dated 24th March 1931, and, shortly after that, another order was made removing these two persons as receivers and appointing the Official Receiver to be the receiver in their place and stead and to take possession of the estate immediately, that order being dated 16th June 1931.

Thereupon, in January 1932, Srimati Bhagabati Debee, the widow, brought a motion before the learned Judge, asking that Dinanath be directed to bring into Court the sum of Rs. 1,49,000 and Gobardhandas the sum of Rs. 54,299. The case made by the affidavit in support of the motion is on the following lines. After the appointment of the Official Receiver, inspection has been obtained of the Delhi books of account and the Delhi books of account are discovered to show that, in the Sambat year 1987, Dinanath, who was in charge of the Delhi firm and whose books of account these are, is debited in that year with Rs. 1,23,339—money which he has taken from that firm. There is another sum debited in the workshop account book and there is a further sum in the account of this year taken from the Calcutta account book and debited to the Delhi office, where it should have been debited to Dinanath's account. It is further brought out that, in the year 1928, a sum of Rs. 7,025 has been paid out on account of Dinanath, though it has been wrongly put in the bad debts account. In this way, there is very

nearly one and a half lakhs of rupees shown by Dinanath's own books in the Delhi business to have been taken by Dinanath from the estate. I may here point out that not only is there shown a sum of Rs. 7,025 transferred in the bad debts account, which appears to have been taken in 1928, but the largest item—an item of Rs. 1,23,339 does not come into these books to the debit of Dinanath, until the Sambat year 1987—presumably after that had been concluded—which corresponds to the period from 31st March 1930 to 31st March 1931. In the Delhi books, so far as Gobardhandas is concerned, we find some Rs. 2,000 odd in bad debts account taken in 1928; but the other items which come to his debit in the Delhi books are, first of all, a debit of Rs. 46,000, then afterwards a debit which has come to the Delhi office from Calcutta of some Rs. 5,810. It may here be observed that it is quite clear from these accounts alone that the original allegation in para. 27 of the application for the appointment of a receiver was only too plainly justified, namely that, apart altogether from any small sums that might have been taken in 1928 since the plaint was brought in July 1929, these two people would appear to have been repeatedly helping themselves to as much of the testator's estate as they could very well manage to take, after exhibition had been completely made of the risky condition of this estate and the chance that it would be insolvent in the end.

I come therefore on this footing to see whether this Court has power, on the principles applicable to interlocutory orders, to make the order which the learned Judge has made. The learned Judge has taken the view that it is quite impossible still to say whether this estate will turn out to have enough money to pay the debts and the specific legacies. There has been hard swearing on both sides. The applicant says that the valuation for probate of the estate appears to show a deficiency of some Rs. 5,00,000. The appellants, on the other hand, maintain that the assets of the estate instead of being Rs. 11,00,000 will be Rs. 20,00,000 and that there will be a large sum, as they hope, to come to the residuary legatees. The learned Judge regards that, as entirely specula-

tive and he thinks that, at all events, he ought to act upon the footing that there is the serious probability to be faced that the prior claims on this estate will more than exhaust the whole of the assets. In these circumstances, he comes to the conclusion that the Court would not withhold some protection to the creditors and others whose interests are really at stake. He says:

With regard to unfairness, it is probable that at one time all the family thought that a surplus would remain and they all agreed to the course upon which these two respondents embarked. At that time the only people likely to suffer, if anybody was to suffer at all, were the creditors and, had this family not fallen out among themselves, no doubt this claim for refund would never have been made.

When he comes to make the order, he directs that the present appellants should bring the respective sums taken by them into Court, but he gives them the alternative of finding security for the amounts. This may or may not be a logical alternative; but the learned Judge explains that he does this because the rest of the family "undoubtedly approved the course that was originally taken" and because "a refund in cash will undoubtedly be a hardship on the respondents."

I have pointed out that the evidence in this case goes to show that the great bulk of the money was drawn out after this suit had been instituted and I am not prepared to give the smallest attention to the suggestion that the sums of money, which we have to deal with, are sums in respect of which either of these appellants can, as a matter of fact, apart from the ineffectiveness of such a point in law, take shelter under consent of other parties. There is some evidence, upon which it may turn out to be true, that the appellants were not the only people who had been irregularly helping themselves to the estate of the testator whenever any part of that estate came within reach, but there appears to be not a tittle of evidence in support of the allegation that either of these appellants got the consent of the executors as a body formally or informally to any single one of the drawings in respect of which they are now called upon to refund.

In that state of affairs it has been pointed out to us by Mr. Pugh, appearing for Gobardhandas, and Mr. Roy, appearing for Dinanath, that our powers

on an interlocutory motion—even in a case where an administration order has already been made in respect of Raghumull's estate—are limited by certain principles. We have been referred to the case of *Freeman v. Cox* (1), where it has been laid down that for interlocutory purposes in such a case as the present the defendant should only be ordered to pay money into Court which he does not dispute to be owing and which he admits to be in his hands. There is a case *In re Benson* (2), which Mr. Pugh says is the highwater mark of orders of this character, and Mr. Pugh suggests that the order of North, J., in that case was hardly consistent with subsequent decisions in the Court of appeal. We have been asked to consider the case of *Hollis v. Burton* (3), and, in particular, the case of *Neville v. Mathewman* (4), where it is said that the money must be in the hands of the defendant and that there must not be any bona fide dispute about title and another case of *Nutter v. Holland* (5), which turns out however to have reference to another jurisdiction altogether, namely, to the jurisdiction of the Court on an originating summons, the governing condition of which is that, upon an originating summons, the trustee will not be held answerable on the footing of default. Finally, the case of *Crompton & Evans' Union Bank v. Burton* (6) has been put before us as an authority for the proposition that the appellant, in a case like the present, would have a complete defence to such a motion by saying "true, I have had the money; but I have paid it away."

Now, it appears to me that the general teaching of these cases is this: that we have to go to the evidence upon this motion from the point of view of seeing what exactly the facts are according to the appellants themselves. The doctrine is that the plaintiff cannot get a remedy prior to the hearing of the suit by a

(1878) 8 Ch D 148=47 L J Ch 560=26 W R 689.

(1893) 1 Ch 39=68 L J Ch 5=79 L T 590=47 W R 264.

(1892) 3 Ch 226=67 L T 146=40 W R 610.

(1894) 3 Ch 315=63 L J Ch 724=7 R 511=71 L T 282=42 W R 675.

(1894) 3 Ch 408=63 L J Ch 932=7 R 491=71 L T 508=43 W R 18.

(1895) 2 Ch 711=61 L J Ch 811=13 R 792=73 L T 181=44 W R 16.

"battle of affidavits." In the present case, there have been affidavits and we have to see exactly how much of "battle" these affidavits disclose. (His Lordship then considered the affidavit in support of the motion, and that on behalf of Gobardhandas, and proceeded.) We have then to consider whether there is very much in either of the two points that were taken on Gobardhandas's behalf: can we hold our hands on the ground that Gobardhandas has a bona fide dispute of title, or can we hold our hands on the ground that Gobardhandas has satisfied us sufficiently for the present purpose, that, though he took the money, he has not got it now? There is no question about title. It does not matter whether this executor says that he has borrowed the money from the testator's estate or whether he says that he has helped himself in anticipation of his share in the residuary estate. As a mere matter of law, we know that that money, if it is in his hands, is money which he has obtained by breach of trust. There is no arguable question as to the right of an executor, who is a residuary legatee, to help himself out of the residuary estate without making provision for the debts and specific legacies and other matters which are prior thereto. It is only after those matters have been cleared that the estate of the testator becomes the property of the residuary legatee.

We have been referred to the case of *Fordham v. Wallis* (7), where it was said that a payment by the executor to the residuary legatee, while the debts remained unpaid, was an absolute and unqualified breach of trust. In the present case, not only there was a breach of trust on the part of the executor who did it but it was a breach of trust on the part of the executor who took the money for himself. There is therefore nothing in the question of title. It does not matter for the present purpose what this executor disputes on the question of title. (After examining the affidavits, the judgment proceeded.) In these circumstances, it seems to me that we will not be at all straining our powers if we uphold the order which the learned Judge has made. I think that these appeals should be dismissed with costs.

7. (1858) 10 Hare 217=22 L J Ch 548=17 Jur 228=1 W R 118.

As proceedings to enforce the order have already been taken, I think, that it is not necessary to limit too short a time within which the appellants should give security. The appellants are at liberty to complete the securities to the satisfaction of the Registrar within one month from today. This order is not to interfere with any of the execution proceedings unless and until the securities are lodged. When they are lodged, the appellants will have liberty to bring those execution proceedings to an end.

Mitter, J.—I agree.

K.S.

Order accordingly.

A. I. R. 1933 Calcutta 290

GUHA AND M. C. GHOSH, JJ.

Satish Chandra Pal—Defendant—Appellant.

v.

Reshee Case Law—Plaintiff—Respondent.

Appeal No. 321 of 1931, Decided on 15th June 1932, against appellate order of Addl. Dist. Judge, Midnapur, 10/- 29th June 1931.

(a) **Landlord and Tenant—Plea of suspension of rent on account of dispossession by landlord—Onus is upon tenant to prove dispossession and not upon the landlord to prove restoration where finding in previous suit was that tenant was dispossessed by landlord.**

In cases where the question of suspension of rent arises on account of dispossession by landlord in respect of the whole or a part of the demised premises, the onus is upon the tenant to prove eviction and the extent of such eviction, and that it relates to the period for which rent is claimed by the landlord. If the landlord seeks to recover rent on the footing that the tenant was in possession of the entire area demised, the question of eviction must be decided on the facts and circumstances of the particular case before the Court, irrespective of the decision in the previous case. It would not be right to lay down as a proposition of law generally that the dispossession found in a previous suit should be deemed as against the landlord to continue up to the time of the institution of the subsequent suit for rent, and that there was any presumption against him which it was for the landlord to rebut by proof of facts showing that effective steps had been taken to restore the tenant to possession of the lands from which he was found to have been dispossessed in a previous litigation: *A I R 1931 Cal 537* and *41 Cal 493 (P C)*, *Foll.*; *9 I C 568, Dist.* [P 292 C 1, 2]

(b) **Evidence Act (1872), S. 101—Onus immaterial.**

Question of onus is not of importance where all relevant facts are before the Court and the

Court has drawn its own inferences from those facts. [P 292 C 1, 2]

Joges Chandra Roy, Panchanan Ghose, Durgadas Roy and Jatindra Nath Mitra—for Appellant.

Narendra Chandra Bose and Nalin Chandra Paul—for Respondent.

Guha J.—The history of the case giving rise to this appeal has been set out in detail in the judgment of the Court below, and it is not necessary to recapitulate the same for the purpose of the appeal now before us, excepting the fact that in a suit for rent for a previous period, 1329 to 1332 B.S., it was held that the defendant-appellant in this appeal was dispossessed from 120 bighas of land out of the total area of 2877 bighas comprised in the tenure in respect of which rent was claimed by the plaintiff-respondent. The claim in the suit out of which this appeal has arisen was for realization of arrears of rent for the years 1331 to 1336 A.S., as also for the period from Aswin to Chaitra 1336 B.S.; there was also the claim for cesses and damages. The defendant-appellant in this Court contested the plaintiff's claim on various grounds. The defence with which we are concerned in this appeal is the one which related to the dispossession by the plaintiff from a part of the tenure, disentitling him to recover rent as claimed in the suit. The point for determination raised by the trial Court on this part of the case was, whether the defendant had been "restored to possession of the portion of the tenure complained of."

According to the trial Court, it was for the plaintiff to show whether the tenants' grievance had been remedied by taking effective steps to restore the tenant to possession of the lands. This was said with special reference to an observation made by this Court in the judgment passed in *Reshee Case Law v. Satish Chandra Pal* (1). The parties to it were the same as those in the appeal before us now. The learned Subordinate Judge, in the trial Court, observed that the evidence on plaintiff's side was far from convincing, and he was not satisfied that the defendant's possession had been restored. The decision of the trial Court was against the plaintiff, and it was held that the rent claimed in the suit "must remain in suspension" till

the defendant was proved to have been put into possession of the lands from which he had been dispossessed. On appeal by the plaintiff, the learned Additional District Judge considered that the point for decision in the appeal was whether the defendant was entitled to obtain suspension from payment of rent on the ground of alleged dispossession by the plaintiff for the period in suit. The learned Judge observed that for the defendant to succeed, he must prove that the earlier dispossession of which mention was made by the trial Court, continued down to the period in suit. The Court of appeal has then come to the finding that the plaintiff did not appear to have realised any rent from any under-tenant during the period in suit, the clear implication being that there was no dispossession by the landlord in respect of any part of the tenure during the period for which rent was claimed from the tenant in the suit out of which this appeal has arisen. The learned Additional District Judge has, upon the findings, arrived at by him, on the materials before him, held that the defendant had not been kept out of possession of any portion of the demised premises by the plaintiff, and that he was "not entitled to obtain suspension from payment of rent." The case was remanded to the trial Court for decision of other questions arising upon the defence of the tenant defendant relating to the kists by which rent was payable, and the payment of cesses and damages as claimed by the plaintiff. The defendant has appealed to this Court.

It must be noticed at the outset that in view of certain observations in the judgment of this Court in a case to which reference has been made above, the learned Subordinate Judge in the trial Court had placed the onus of proof entirely on the plaintiff to prove that the tenant had been restored to possession of the lands in respect of which there was dispossession by the landlord at a previous period. The observations made by this Court were in consonance with the view expressed by this Court from time to time upon the facts and circumstances of particular cases in which the question of suspension of rent arose on account of dispossession by landlord in respect of the whole or a part of the demised premises; but the question remains,

that dispossession as alleged by the tenant in any particular case must relate to the period for which rent was claimed by the landlords. It would not be right to lay down as a proposition of law generally that the dispossession found in a previous suit should be deemed as against the landlord to continue up to the time of the institution of the subsequent suit for rent, and that there was any presumption against him which it was for the landlord to rebut by proof of facts showing that effective steps had been taken to restore the tenant to possession of the lands from which he has found to have been dispossessed in a previous litigation. The decision of this Court in the case of *Purna Chandra v. Basik Chandra* (2), on which very great reliance was placed on behalf of the appellant before us, does not strictly bear out the general proposition. As has been pointed out in that case, whether there has been an eviction or not depends upon the particular circumstances of each case. The tenant's right to suspension of rent continues, as it has been held in many cases, till effective steps are taken by the landlord to restore him to possession. Although the proposition has been stated in a general form in some of those cases, Mookerjee, J., in *Purna Chandra's* case (2), mentioned above, went into the question of eviction arising for consideration in the case before him, for the purpose of deciding the same in favour of the tenant. The question of eviction must, in our judgment, be decided on the facts and circumstances of the particular case before the Court, irrespective of the decision in a previous case, on the question of dispossession, if the landlord seeks to recover rent on the footing that the tenant was in possession of the entire area demised, as he has done in the case before us.

It is difficult to appreciate the applicability of the rule of *res judicata* in regard to dispossession during the period of suit in a case of this description. The question of the burden of proof however as has been urged on behalf of the appellant is a very material question in such a case, although it may very well be said in the case before us all the relevant facts were before the Court below, and it has drawn its own inference on those facts, and held against the defen-

dant in the suit : the question of onus was not therefore of importance. On principles and rules of general application, as also upon the authority of decisions of Courts in England, to which reference has been made by Sir George Rankin, C. J., in delivering the judgment of the Full Bench of this Court in the case of *Arun Chandra Singha v. Bhagaban Chandra Roy* (3), there appears to be no doubt that the onus is upon the tenant to prove eviction, and the extent of such eviction, where the plea of such eviction is raised with a view to disentitle the landlord to realize rent in its entirety. As indicated by the learned Chief Justice in the judgment, the decision of the Judicial Committee of the Privy Council in *Durga Prasad Singh v. Rajendra Nurayan Bagchi* (4) supports the view that the onus was on the tenants to make out a case, if they had one, for abatement of rent. It may be mentioned that nothing more than abatement of apportionment could be decreed in favour of the appellant in the suit out of which this appeal has arisen, if eviction in respect of any area could be made out by him. A lessee claiming apportionment must prove the value of the land withdrawn from the demise, ascertained on the date of such withdrawal. The burden of proof lay upon the tenant: the landlord in such a case was not a person who was prosecuting an equitable claim to an apportionment; he was a person to whose legal claim to an entire rent, the tenant, was in law entitled to make out, what was in law a defence to a part of the claim. So far as the tenant was concerned it was a plea of partial discharge from his covenant; and it followed therefore that it must be made good by the tenant, as the covenant was admitted : see *Smith v. Maling* (5) and *Salts v. Battersby* (6). There was a single plea to be taken and substantiated by the tenant, a single issue to be tried, and there could not be any shifting of onus in such a case.

In our judgment there is no question of any particular direction by this Court binding upon the parties in this case as

3 AIR 1931 Cal 537=133 IC 577=53 Cal 155 (FB).

4. (1912) 41 Cal 4 10 IA 223=21 IC 750 (PC).

5. (1608) Cro Jac 16=79 ER 140.

6. (1910) 2 KB 155=79 LJ K 937=102 JT 730.

indicated by the trial Court, there is no question also of the application of the rule of *res judicata* so far as the tenants' plea of partial eviction and consequent suspension of rent, so far as the period in suit were concerned, the onus was upon the tenant to make good his defence, independently of the decision in the previous suit for rent, in regard to a previous period, the decision in the previous suit might be treated as evidence in favour of the defendant. Examined from whatever point of view either on the footing that the onus was upon the tenant-defendant to make out his case of suspension or apportionment of rent, or judged from the standpoint that upon the entire evidence before the Court, the final Court of facts has come to the finding negating the defence of the tenant-defendant, the landlord plaintiff's claim for rent for the period in suit must be allowed. The learned Additional District Judge in the Court of appeal below directed himself rightly in stating that in the present suit it had to be found independently of the dispossession proved in the previous suit for rent, whether the dispossession continued in fact during the period for which rent was claimed, and we must accept his finding that the defendant-appellant had not been kept out of possession of any portion of the demised premises.

In the result the decision arrived at by the learned Judge in the Court of appeal below and the order of remand made by him are affirmed. The appeal is dismissed with costs. The hearing fee in this appeal is assessed at three gold mohurs.

M. C. Ghose, J.—I agree.

B.R./R.K. *Appeal dismissed.*

A. I. R. 1933 Calcutta 293

JACK, J.

Raja Reshee Case Law—Petitioner.

v.

Jarilal Mahapatra and others—Opposite Parties.

Civil Rule No. 480 of 1931, Decided on 15th July 1931, against order of Munsif, 3rd Court, Midnapur, D/- 27th February 1931.

Civil P. C. (1908). O. 21, R. 100—R. 100 includes auction-purchaser's legal representative—Bengal Tenancy Act (1885), S. 26-F.

Although the wording of O. 21, R. 100, refers only to the auction purchaser it includes his

legal representatives also. A landlord obtaining possession of a holding under S. 26-F, Ben. Ten. Act, becomes the legal representative of the auction-purchaser as regards the holding in question and therefore the remedy of a person dispossessed by legal representatives of a purchaser is the same as against a purchaser. [P 293 C 2]

Nalin Chandra Pal—for Petitioner.

Satcowripati Roy and Bireswar Chatterji—for Opposite Parties.

Judgment.—This rule has been issued calling upon the opposite party to show cause why an order allowing an application under O. 21, R. 100, Civil P. C., should not be set aside. This rule was issued on the ground that in a matter arising out of an application under S. 26-F, Ben. Ten. Act, the Court below had no jurisdiction to entertain a claim under R. 21, R. 100, Civil P. C. This rule runs as follows:

"Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or where such property has been sold in execution of a decree, by the purchaser thereof he may make an application to the Court complaining of such dispossession.

It is urged that the dispossession under O. 21, R. 100, must be by the purchaser of the property sold in execution of a decree. In this case the dispossession was by the landlord who was put into possession under S. 26-F, Ben. Ten. Act. Under Cl. 6, S. 26-F, the right, title and interest in the holding shall be deemed to have vested in the immediate landlord, whose application has been allowed, from the date of making the order under Cl. 5. The landlord, petitioner, was put into possession under the provisions of this section as against the opposite party and it is clear that he has obtained possession owing to the fact that there was an auction sale and that he has been put in the position of an auction purchaser by virtue of the provision of S. 26-F. It is clear also that under Cl. 6, S. 26-F, it is the intention of the legislature to put the landlord in the position of the auction-purchaser as regards his rights and liabilities. In fact the landlord becomes the legal representative of the auction-purchaser as regards the holding in question, and although the wording of O. 21, R. 100 refers only to the auction-purchaser it seems clear that it must be intended to include his legal representatives. There seems to be no reason why a person who is dispossessed by the legal representatives of the purchaser should not have

the same remedy against them as against the purchaser. I think therefore that this rule must be discharged with costs—hearing fee, one gold mohur—and I order accordingly.

K N./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 294 Special Bench

RANKIN, C. J., C. C. GHOSE, AND S. K. GHOSE, JJ.

Madhusingh Kaiharta and others—
Accused—Appellants.

v.

Emperor—Opposite Party.

Death Ref. No. 11 and Criminal Appeals Nos. 664 and 692 of 1931, Decided on 30th November 1931.

(a) Criminal P. C. (1898), S. 297—Accused committing robbery charged under S. 396—Number of accused less than five—Charge under S. 396 split up and treated as charge under S. 302 together with charge under S. 392—Accused convicted of murder—Conviction held illegal—Penal Code, Ss. 302, 392 and 396.

Where, in a trial of persons accused of having committed robbery, the Judge directed the jury that if they found that the persons taking part were not shown to be five in number, they could split the charge under S. 396 and treat it as a charge under S. 302 together with a charge under S. 392, i. e. treat it as a substantive charge of murder plus a substantive charge of robbery and the jury acting upon the direction convicted two of the accused of murder:

Held: that the convictions were liable to be set aside and the accused were to be retried upon a substantive charge under S. 302 and a substantive charge under S. 392. [P 295 C 1,2]

(b) Penal Code (1860), Ss. 302 and 396—Charges under S. 302 is not minor to that under S. 396.

The charge under S. 302 is not a minor charge to the charge under S. 396. The charge under S. 396 is a charge under which a person who has not committed murder is liable to be held to commit murder, because he is a member of a gang of dacoits in the course of which somebody else committed murder. [P 295 C 1]

Manindra Nath Banerji—for Appellants.

Anil Chandra Roy Choudhury—for the Crown.

Rankin, C. J.—In this case we have before us a reference under S. 374, Cr. P. C., in respect of the accused man Madhusingh who has been sentenced to death. We have also an appeal on the part of Madhusingh and we have further an appeal on the part of Powali, the co-accused, who was also convicted under S. 302, I. P. C., but was sentenced to transportation for life. Both the accused were also convicted under S. 392, I. P. C.,

of robbery, but no separate sentence was passed by the learned Judge upon this charge. It appears that there were five accused persons and the prosecution case was that six persons had really been concerned in murdering a Marwari Shroff, Badrinarayan Agarwalla, and his servant Lin Lalung. The prosecution case was that Badri was going with his servant with certain rupees and small change to a Tea Estate called Kulikuehi and that, having crossed the Kapili river ferry and having come to a little streamlet called Sahoridang, Badrinarayan and his servant were fallen upon by the accused and were killed. They appear to have been cut to death with long handled instruments of the character of a dao. The prosecution case was that the accused persons had met on the day before the occurrence and at a time previous to that to arrange this murder for the purpose of robbery. The prosecution case also was that more than five persons were taking part in the transaction. In the end, there being very little evidence except the confession of Powali which was evidence against him, the jury came to a clear finding, first of all that the evidence of conspiracy on the previous occasions was insufficient and they acquitted all of the accused persons on the charge of conspiracy. In the second place they found that it was not made out that so many as five persons had taken part in the occurrence at all, the result being that S. 395, I. P. C., was entirely inapplicable to the case.

The learned Judge had told that, if the jury found that the persons taking part were not shown to be five in number, they could then split up the charge under S. 396 and treat it as a charge under S. 302 together with a charge under S. 392, I. P. C., that is to say, treat it as a substantive charge of murder plus a substantive charge of robbery; and the jury in bringing in their verdict against the two appellants before us have acted upon that direction. The result is that, although these persons have all been acquitted on the conspiracy charge and in addition to that were only indicted for what I may call constructive murder under S. 396, and although the conditions on which the applicability of that section depends have not been made out, these people have been convicted of murder without ever being properly

charged. The matter is said to have been made better—although I think it has been made worse—by reason of the muddled form under which the charge under S. 396 was drafted in the Sessions Court. It appears to have been drafted by somebody who really ought to obtain some further instruction in drafting because he charged all the accused that they committed dacoity by robbing Lin Lalung and that, in the commission of such dacoity, Powali murdered Badrinarayan and Mudhusingh murdered Lin Lalung. Then it is said that in that way they all committed an offence under S. 396. As the charge contains the statement that Powali murdered Badrinarayan and Mudhusingh murdered Lin Lalung if it said that this charge may be regarded by us as though it contained within itself a charge under S. 302. If it did, presumably Powali was only charged with murdering Badrinarayan and presumably Madhusingh was charged with only murdering Lin Lalung. As a matter of fact, though the evidence is not consistent upon this matter, it would appear that the main bulk of the prosecution case was to show that Powali murdered the servant and Madhusingh murdered the master. We do not know what the jury thought about that matter. We do not know who murdered whom according to the view taken by the jury. The confession of Powali is an important matter to consider and this matter has not been dealt with in a way which can possibly be supported. It is quite clear that the charge under S. 302 is not a minor charge to the charge under S. 396. The charge under S. 396 is a charge under which a person who has not committed murder is liable to be held to commit murder because he is a member of a gang of dacoits in the course of which somebody else committed murder. That being so, the condition of this record is quite out of order and these two accused persons must be remanded for retrial.

The appeals must be allowed, the convictions and the sentences on these two accused must be set aside and their cases must be remanded for retrial. It is necessary to say that the case about the antecedent conspiracy under S. 120-B, I. P. C., should not be restarted against these people and the case is not to be

restarted against them on the footing that there were five people taking part. The case is to be started against them upon a substantive charge under S. 302, and a substantive charge under S. 392, I. P. C.

C. C. Ghose, J.—I agree.

S. K. Ghose, J.—I agree.

R.M./R.K.

Appeal allowed.

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RANKIN, C. J. AND COSTELLO, J.
Surenadrakrishna Roy—Appellant.

v.

Shree Shree Ishwar Bhubaneswari Thakurani—Respondent.

Appeals Nos. 23, 24, 25 and 93 of 1931, Decided on 13th May 1932, from judgment of Buckland, J., in Suit No. 154 of 1929.

(a) **Letters Patent (Calcutta), Cl. 12—Land partly within and partly without local limits —Each defendant need not be interested in land within jurisdiction.**

If a suit brought in the High Court (original side) is properly framed, so as to embrace land partly within and partly without the local limits, it is in all cases a question of the discretion of the Court and if the Court exercises its discretion in favour of entertaining the suit, the jurisdiction cannot be questioned. It is not necessary that each defendant or set of defendants must be interested in some land within the jurisdiction: *A I R 1920 Cal 131* and *A I R 1922 Cal 500, Expt. and Dist.*; 29 Cal 871, *Rel on.*

[P 300 C 1,2]

(b) **Hindu Law — Religious endowment — Family idol — Whether the endowment can be set aside by consent of all parties interested—Quære.**

It is doubtful whether under Hindu law at any particular time by consent of all the parties then interested in the endowment, a dedication can be set aside even if the idol is a family idol (*Quære*): 2 Cal 341 (P C), *Expt. A I R 1926 Cal 1083* and *A I R 1925 Cal 442, Ref.* [P 302 C 1]

(c) **Hindu Law — Religious endowment — Consent decree does not terminate debuttar character if such estate is not represented.**

A consent decree obtained in a suit in which the debuttar estate is not represented does not terminate the debuttar character of the dedicated properties and the consent decree is not binding upon the debuttar estate. [P 302 C 2]

(d) **Limitation Act (1908), S. 10 and Art. 144—Person not accepting shebaitship—His possession is not tainted with fiduciary relationship and is adverse to deity.**

A man is not born responsible as a shebait and does not become a shebait against his will if he has never accepted the office of shebait, nor acted as a bailiff or a trustee of deity. He may be treated as an outsider and, for all purposes a stranger. His possession is not tainted in any way by a fiduciary relationship subsisting between him and the idol, and is adverse to the deity: *A I R 1922 P C 123, Foll.* [P 302 C 2]

(e) Hindu Law — Religious endowment — Idol is not perpetual minor.

The doctrine that an idol is a perpetual minor is an extravagant doctrine as it is open to shebait or any person interested in an endowment to bring a suit to recover the idol's property for debuttar purposes : 37 Cal 885 (P C), *Rel on.*

[P 303 C 1]

(f) Limitation Act (as amended in 1929), S. 10 and Art. 144 — Shebait's possession cannot be adverse.

As regards an idol's property, a shebait stands in a fiduciary relationship to the idol and there can be no adverse possession by shebait.

[P 303 C 2; P 304 C 1]

(g) Limitation Act (1908), Art. 144 and S. 28 — Joint shebait's dividing debuttar property between them — Rent and profits applied by them to their own purposes — Still idol's right is not extinguished.

The possession of two joint shebait's does not become adverse to the idol, even when they openly claim to divide the property between them. The fact of their possession is in accordance with the idol's title, and the change made by them, in the intention with which they hold, evidenced by an application of the rents and profits to their own purposes and other acts does not extinguish the idol's right, because such a change of intention can only be brought home to the idol by means of the shebait's knowledge and the idol can only react to it by the shebait. No doubt any descendant of the founder can bring a suit against the shebait on the idol's behalf but such persons have no legal duty to protect the endowment and, until the shebait is removed or controlled by the Court, he alone can act for the idol : A I R 1926 Mad 769, *not foll.*

[P 304 C 2]

(h) Hindu Law — Religious endowment — Family idol.

While dealing with a family idol, there is no presumption that the settlor's ever intended that the family ceremonies, as the income increased, should become more and more expensive : 19 Cal 513 (P C), *Rel on.*

[P 306 C 2]

(i) Hindu Law — Religious endowment — Shebait — Provision for residence is valid — But ultimate direction to build for heirs is for benefit of heirs.

A gift for the maintenance of a shebait or for the residence of a shebait would be a gift *sub modo* to the idol. A personal right may be given to members of the family to reside in the house provided for the thakur or provided for the shebait ; but an ultimate direction for the building of houses for the residence of the heirs is by no means on the same footing as a direction for the provision of a residence for the shebait.

[P 307 C 1]

(j) Hindu Law — Religious endowment — Construction — No absolute interest held created in favour of deity but only charge for worship and upkeep.

The directions in a deed of endowment as regards the income of the property were really four. The first was the provision for taxes and repairs ; the second for worship and the feeding of Brahmins ; the third provision was a direction to accumulate and build tenanted houses and the final provision was a provision for the erection of a house or houses for the convenience of residence and habitation of the heirs which

was the ultimate destination of the net proceeds, subject to the expenses of the worship :

Heli : that there was a charge for the upkeep, worship and expenses of the idol and that the idol could not claim to have an absolute interest in any portion of the property which was governed by the provision that tenanted houses should be built on the land for the increase of the income of the trust.

[P 306 C 2; P 307 C 2]

S. M. Bose, S. N. Banerji and B. Roy Chaudhuri—for Appellant.

S. C. Mitter, Nripendra Nath Sircar and P. N. Banerjee—for Respondent.

Rankin, C. J. — We have before us three appeals Nos. 23, 24 and 25 of 1931, by different parties—defendant in a suit brought by a Hindu deity on 22nd January 1929, for the purpose of establishing title and obtaining possession of, (a) four properties alleged to have been dedicated to the deity on 5th May 1888, and (b) certain mofussil properties alleged to have been purchased on behalf of the plaintiff deity by a conveyance, dated 5th April 1896. The plaintiff's claim in respect of one of the four properties comprised in the deed of 1888, namely, the property known as 45, Elliot Road, was withdrawn at the trial and need not further concern us. The learned Judge, by his decree, dated 19th December 1930, has declared that the plaintiff is absolutely entitled to the other properties comprised in these two deeds free from all encumbrances. He has directed such of the defendants, as have been found by him to be in possession, to deliver up possession to the plaintiff and has given other forms of relief to the plaintiff as against mortgagee-defendants not in possession. He has directed, as against Brajanath De, that an account of mesne profits be taken. The other reliefs need not be mentioned here.

In Appeal No. 23, the appellant is Brajanath De, who, with his brother Rakhalechandra De, was a grantor of the deed of 5th May 1888, by which he was declared to be a shebait of the plaintiff deity. In Appeal No. 24, the appellant is Satyacharan De, the younger son of Rakhali. Satya appears to have been born in February, 1899. He is the son of Rakhali, by his second wife, whose name is Sreemati Thakamani Dasoo. Appeal No. 25 is brought by two sets of mortgagees, who may be called the Ray defendants and the Mandal defendants, and who claim under mortgages made in 1922 and 1924, respectively, by Pulin-

bihari De, the elder son of Rakhai. Pulin's estate is before the Court, it is represented by Mohini and Jamini, but we have already pointed out that Mohini should sue as plaintiff on his own account as well as on behalf of the idol and this amendment has without objection been ordered by us. By the deed of 1888, the two brothers Rakhai and Braja dedicated to the idol properties, which now may be regarded as four: (i) 30, Beniapukur Road, (ii) 46, 47 and 48, Phullagan Road, (iii) 45, Elliot Road and (iv) 4, Royd Street.

Of these properties, though all are in the environs of Calcutta, only 4, Royd Street, is within the ordinary original civil jurisdiction of this Court. The deed provides that, out of the income to be produced from the properties, a sufficient sum is to be set aside for repairs; then that the sheba is to be performed in a manner therein set forth; that Government securities are to be purchased out of the surplus income left after meeting these expenses and that, when a sufficient sum has in this way been accumulated the shebais are to cause tenanted houses to be built on the dedicated land and that, out of the increased surplus, buildings are to be erected for the residence and habitation of the heirs of the grantors. The deed states that the value of the properties granted as debuttar is Rs. 47,000.

In 1892, Rakhai and Braja entered into a document, which shows that, at that time, they had a business which had not been dedicated to the idol; and, in 1895, this document was cancelled by another, which shows that the brothers possessed properties at 34 and 35 Beniapukur Road, another property in Hooghly and a shop in Wellesley Street. On 5th April 1896, Rakhai and Braja, on the narrative that the purchase price of Rs. 2,461-11-0 had been saved by the idol out of the debuttar property, executed a Bengali conveyance, selling their mofussil property, excluding their dwelling house, to the idol for this sum. Prima facie, in 1896, the brothers were still acting on the basis of the deed of 1888. Rakhai died in 1901. Braja is still alive and is a defendant in this suit. By his will, dated 29th July 1901, Rakhai appointed Pulin his executor, his younger son Satya to become executor when he attained majority. He directed Pulin

not to sell anything till Satya came of age. He directed that his wife Thakamani

"is to be maintained out of my estate and will have a right to reside in my house."

The reference to the house is apparently a reference to 30, Beniapukur Road, which had all along been used in fact as the family dwelling house, consistently with the deed of 1888, but which was one of the dedicated properties. In December 1902, Rakhai's widow, Thakamani, as the mother and next friend of Satya, who at that time was about four years of age, brought a Suit No. 852 of 1902—on the original side of this High Court—to set aside the deeds of 1888 and 1896, on the allegation that the dedication to the idol was, on the part of Rakhai and Braja, a mere colourable device, never intended to be valid or operative but intended merely to be used as a shield against creditors of the grantors "should occasion arise in that behalf although no such occasion has arisen." The defendants to this suit were first of all Braja and Pulin. They were described in the cause title as alleged shebais of the deities. The infant sons of Braja and Pulin were also impleaded as defendants. In this suit, Braja pleaded that Rakhai, his elder brother, had always represented to him that it had been the wish of their father that they should dedicate the properties and he denied that the dedication was a fraudulent device. Pulin, while making no admission as to the invalidity of the dedication, submitted to the Court that he had no objection to a partition being made of the property, if the Court thought it to be void or inoperative for any reason. The minor defendants pleaded that they had no knowledge of the matters and that they left their interests in the suit to the judgment, care and protection of the Court. Pulin, in 1903, had taken out probate of his father Rakhai's will and, in his affidavit of assets, had not set forth any of the dedicated properties. The hearing of the suit came on before Stephen, J., on 14th June 1904.

The learned counsel for the plaintiff, in opening the case, asked, according to the minute, that the deed of endowment be declared null and void, but that if it were found to be partially operative, a scheme may be framed for

the purpose of worship and the remainder declared invalid. He objected to the legality of the provisions in the deed for the devolution of the office of shebait. While the plaintiff's counsel was still opening the case, the learned counsel for Braja said that he did not want to take a hostile attitude. He referred to the doctrine laid down in *Doorganath Roy v. Ram Chunder Sen* (1), and suggested that, as the idol was a family idol, by consent of all the parties, the dedication could be set aside. Pulin's counsel left the construction of the deed in the hands of the Court. Counsel for the infant-defendants suggested that there was a sufficient dedication to the idol. Pulin's counsel supported the suggestion, which had been made on behalf of Braja, that a private dedication could be annulled by the consensus of the whole family. The hearing having been adjourned, the case was called on six days later, namely, on 20th June. Braja's counsel suggested that the debattar should be put an end to and that this would be to the benefit of the infants. Counsel for the infant-defendants suggested that a small portion should remain debuttar for carrying on the sheba, but this proposal received little support and was dropped. In the end, the Court made a consent decree in the nature of a preliminary decree for partition, directing the property to be divided into moieties, one to go to Braja and the other to belong to Pulin and Satya jointly, with liberty to Satya to claim a further partition to separate his one-fourth share from Pulin's. Braja was appointed receiver. The Court certified that this was for the benefit of the infant sons. The decree is expressed to be a decree by consent of the adult parties by their respective counsel. It set aside the deeds of 1888 and 1896 and directed them to be cancelled by the Registrar of this Court and a copy of the decree to be sent to the Registrar of Deeds and Assurances.

Under this decree, Braja collected rents from the tenanted property comprised in the endowment, giving receipts as receiver on behalf of himself, Pulin and Satya, on the footing that the shares of each were 8, 4 and 4-annas, respectively. Receipts dated 1311, 1312 and 1313 have been produced in evidence.

On 12th June 1906, a final decree for partition was made by Stephen, J. The parties had really come to terms as to the properties to be allotted to each and the decree allotted the properties to be in accordance with that agreement, gave judgment for Rs. 5,000 owelty money in favour of Braja against Pulin and Satya, and directed the parties to execute the necessary conveyances. So far as Braja is concerned, there can be no doubt that he has at all times acted quite consistently under this decree. On 2nd September 1907, he sold 45, Elliot Road, which had been allotted to him to one K. K. Mitter. This property is now not in suit.

Satya, at the time of the decree (1906), was about eight years of age, and the properties which had been allotted jointly to Pulin and him were taken charge of by Pulin. Thakamani, Satya and Pulin went on living together at No. 30, Beniapukur Road, and it is clear, upon the evidence that Pulin collected rents of the properties allotted jointly to himself and his brother and as executor of Rakhal's will from other income-producing properties. Out of moneys coming into his hands from one source or the other, he paid the expenses of the joint family, i. e., he maintained Satya and his mother together with himself. Between 1906 and 1910, No. 30, Beniapukur Road was on the Assessment Register in the name of Pulin for self and Satya; Nos. 47 and 48, Phulbagar Road appear to have been put into the name of Pulin Mohini, the eldest son of Pulin, who brings this suit on behalf of the idol, states that his father was dealing with these properties as his own secular properties (Q. 9) and that he has come to know that, after the decree for partition, the properties were divided (Q. 56). There seems indeed to be no reason to doubt that, as Mohini says, since the partition, the names were changed into the names of Braja, Pulin and Satya and that the rents have been collected and appropriated in accordance with the decree, Pulin and Satya together possessing their shares of the dedicated properties for many years. The case, as made by the plaintiff, is that none of the properties claimed are in the possession of the deity.

When we come to the year 1917, we find that Satya is coming of age. In 1918, he gets a grant of probate to his

father's will jointly with Pulin. It is evident that, at this time, he is not satisfied with merely living at No. 30, Beniapukur Road, and being maintained by Pulin; and, on 20th August 1918, he sued Pulin at Alipore for partition. In this plaint (para. 5), he treats the properties partitioned by the decree of 1902 as joint properties of Rakhal and Braja. He says that his father, Rakhal, had some self-acquired properties as well and that Pulin has been managing all these since his father's death. He says that, till the end of the Bengali year 1324 (i. e., April 1918), Pulin had paid to him and his mother only the costs of maintenance and had kept all the balance of income in his own hands. He charges Pulin with having appropriated to his own use assets of a money-lending business belonging to his father's estate. He makes other charges against Pulin, says that the whole of his father's estate has been administered and asks for partition and accounts. He includes among the immovable properties of his father, Nos. 34 and 35, Beniapukur Road, which had never been dedicated at all, as well as No. 30, Beniapukur Road, and Nos. 46, 47 and 48, Phulbagan Road, which had been dedicated. By his written statement in this suit, verified in December 1918, Pulin set up the deed of 1888 and claimed that the decree of 1906 was fraudulently obtained and that the properties had not lost their debuttar character. He alleged that, since the death of his father, he, Satya and Thakamani had lived together in the same mess and the rent of the ejmali tenanted houses and lands had been jointly realised and spent to meet the expenses of the ejmali family.

In this connexion, he makes allegations intended to parry the claim for accounts. A receiver was appointed in the suit and, on 16th June 1921, a preliminary decree for partition and accounts was made by the Subordinate Judge. From this decree, Pulin appealed to the High Court. He asked to be allowed to adduce in evidence a document which he said showed that the decree of 1904 was the result of a collusive arrangement between himself and his uncle Braja. The High Court, however on 30th March 1922, dismissed his appeal and refused to allow to go behind the consent decree of 5th June 1906, to which he was a

party and, upon which he had for a long time acted. On 5th September 1922, Pulin executed a mortgage to the Ray defendants, in respect of which they are now impleaded. The mortgage was for Rs. 28,000 and the mortgaged properties were Nos. 46 and 47, Phulbagan Road. He recited the deed of 1888 and the decrees of 1904 and 1906. On 12th March 1924, he granted a further mortgage for Rs. 25,000 to the Mandal defendants, mortgaging No. 30, Beniapukur Road and Nos. 46, 47 and 48, Phulbagan Road, as also Nos. 34 and 35, Beniapukur Road to them, and reciting the Ray's mortgage.

In December 1924, Pulin died intestate, leaving his sons Mohini and Jamini as his heirs and, in 1926, the Ray mortgagees filed a mortgage suit at Alipore against his sons and the Mandal defendants as interested in the equity of redemption. In April 1927, Mohini filed a written statement, in which, among many other defences, he set up a claim that the mortgaged property is debuttar. As he did not appear at the hearing of the suit, a preliminary mortgage decree was made ex parte on 17th February 1928, followed by a final decree on 28th July of that year. Mohini, having failed in his application to set aside the ex parte decree, brought this suit on 22nd January 1929, on behalf of the deity. It is quite obvious that Mohini's father, Pulin, having lost everything and run through the whole of his property is the fact which accounts for his son's effort to set up the property as debuttar. The right of the idol however is a different thing from the merits of Mohini.

Logically, issue I which claims attention is the contention on behalf of the mortgagee-defendants that the learned Judge had no jurisdiction to entertain this suit as against them, on the ground that no one of the properties mortgaged to them by Pulin is within the limits of the Ordinary Original Civil Jurisdiction of this Court. The only one of all the debuttar properties, which lies within that jurisdiction, is the property, No. 4, Royd Street, which on the partition of 1906, went to Braja. The Beniapukur Road and Phulbagan Road properties were outside that jurisdiction. The learned Judge has restrained the mortgagee-defendants from putting up their mortgaged properties to sale and

has declared the title to be with the idol. The question of jurisdiction must be answered by reading Cl. 12, Letters Patent of 1865. The suit, in my judgment, is a suit for land within the meaning of Cl. 12, which says that this Court shall have jurisdiction to entertain a suit if the land is situated either wholly or, in case the leave of the Court shall have been first obtained, in part within the local limits of its Ordinary Original Jurisdiction. In the present case leave was granted under Cl. 12. The contention of the mortgagee defendants is that O. 1, R. 3, Civil P. C., proceeds on the assumption that the Court has jurisdiction and that the provisions of that order cannot be used to extend the jurisdiction given by the Letters Patent. They rely upon *Bengal and North Western Ry. Co. Ltd. v. Sadaram Bhairodan* (2). That was a case not of a suit for land, but one, where various causes of action having been brought against various defendants, it appeared that the whole of the cause of action against one defendant had arisen entirely outside the limits of the jurisdiction. In such a case, O. 1, R. 3 which merely has the effect of allowing parties or causes of action to be joined if the Court has jurisdiction to deal with them, was held to be an insufficient foundation upon which to introduce a cause of action which was not within Cl. 12 at all.

It seems to me however that under Cl. 12, the case of suits for land requires separate consideration. It contemplates a suit being brought for land and such land being situated partly within and partly without the jurisdiction. The cause of action does not matter in such a case, except in so far as it affects the property of the joinder of the claim to the different parcels of land in the same suit. Two different suits cannot certainly be rolled into one for the purpose of obtaining jurisdiction over land outside the limits. If however the claim to the different parcels of land is properly based upon a common title and the right to relief arises out of the same set of facts, I do not think it can be laid down that each defendant or set of defendants must be interested in some land within the jurisdiction. It is to be observed that the question whether, in any

particular case, the jurisdiction is to be exercised is left to the discretion of the Court. In *Krishna Kishore De v. Amarnath Kshetry* (3), the mortgagee of certain land outside the local limits sub-mortgaged his interest, at the same time granting a mortgage over property within the limits as security for the same debt. The sub-mortgagee—so to call him—brought a suit on the Original Side against the original mortgagor and the mortgagee. It was held that leave under Cl. 12 had been improperly granted and that the decrees were without jurisdiction. It was held that the proper course would have been to bring a suit in the High Court to enforce the mortgage over the Calcutta property and to foreclose the sub-mortgagee's interest in the other mortgage, but that the mofussil properties could only have been sold in a suit brought in the mofussil Court. This decision proceeded partly upon considerations as to "cause of action" and partly upon the view that the original mortgage contemplated a suit in the mofussil Court. Now, jurisdiction under Cl. 12 of the Letters Patent cannot depend upon the question whether the leave has been properly granted as a matter of discretion.

It must depend upon the question whether the suit is of the class described by the clause as the class with reference to which the discretion is given. Cl. 12 must be applied, in my judgment, on the footing that the land which the plaintiff can properly claim in one suit is to be determined first of all by certain principles or rules of law. I do not think the test can be whether the plaintiff, in order to succeed as regards land within the limits, is obliged to join parties interested in other land; especially if this means whether he could have dispensed with their presence by framing his suit in some other way, and bringing a multiplicity of suits. If a suit is properly framed, so as to embrace land partly within and partly without the local limits, it is in all cases a question of the discretion of the Court and if the Court exercises its discretion in favour of entertaining the suit, the jurisdiction cannot be questioned. I see no other way to make Cl. 12 work. It may or may not be hard upon a person who has taken a

mortgage of land at Alipore that he should be impleaded in Calcutta. I think it would be harder still if important questions of title had to be litigated separately as between different parties, to the great increase of litigation and at the risk of partial and inconsistent decisions. The passage, which the learned Judge has quoted from the case of *Nundo Kumar Nasker v. Banomali Gayan* (4), affords some support to the construction which I have put upon Cl. 12. The clause must, in any event be considered with reference to the particular case made by the plaintiff. Here the plaintiff's case was that Braja and Pulin jointly held the shobaiti, that the decrees of 1904 and 1906 were collusive and void otherwise. The idol, on that case, could not sensibly have sued Braja to recover the Royd Street property without bringing Pulin's representatives before the Court, and without so doing it would have asked in vain for any equitable relief against Braja such it claimed. Pulin's mortgagees have taken title, with their eyes open, under the decree of 1906, and if his estate must be impleaded they must be joined. It may here be noted that if the dedication of the mortgaged lands be held to be not an absolute debuttar but a charge for the worship of the idol extending over the mortgaged lands and the Royd Street property together with other lands, it would be necessary in a suit to declare and enforce the charge that all the lands affected should be dealt with in one and the same suit. The objection as to jurisdiction should, in my opinion, be dismissed.

The next issue for decision is whether the dedication of 1888 was valid and effective. This issue was formulated at the trial, but that it was not pressed is clear. The learned Judge says:

"it has not been argued that there was no valid dedication or that the idol was not effectively endowed with the properties in suit by the deed of 1888."

In this Court, an endeavour was however, made to raise the question. The mortgagee-defendants, by their written statement, pleaded that the deeds of 1888 and 1896 were never given effect to and were never meant to be operative, but were merely colourable and benami. On that issue, the burden of proof lies

heavy upon them and the question is one of fact. It appears that the deposition of Thakamani Dasoe had been taken on commission at great length at the instance of the mortgagees and Mr. A. K. Roy, who appeared for the mortgagees, in opening his case, said:

"Then there was some evidence taken on commission. Having regard to the view I am going to take of this case and the way I am going to put it before Your Lordship I don't think I shall have to refer very much to this evidence if at all. I may be wrong, but I am proposing to take a certain course which will not necessitate my reading this evidence before you, but as the evidence has been taken I don't know whether I shall be right in not reading it altogether. I simply tender it and leave it there. I will perhaps refer Your Lordship to passages in it that I may want. It is part of the record."

In fact, as we are informed, a passage from the deposition, bearing upon the question of the consensus of the whole family to abrogate the debuttar in 1904, was read to the learned Judge, but no part of this evidence was read to him, having any bearing upon the question whether the deeds were fraudulent or colourable. Thakamani Dasoe is a witness, who, in 1902, alleged, on behalf of Satya, as we have seen, that the deed was a shield against possible creditors, though no occasion to use it had arisen. That is a singularly feeble case and her evidence is small support for it. She is a biased witness, a witness whom we have not seen and having made this case in the suit of 1902, she called no evidence whatever in support of it. If, moreover, this matter had been pressed before the learned Judge, it was a matter upon which the plaintiff would, in my opinion, have been entitled, if necessary, to give rebutting evidence. It is idle to ask us now to allow this question of fact to be agitated in the Court of the appeal. I have no doubt, the main reason why this point was abandoned was that the evidence in support of it was thought to be hopelessly insufficient. Any question which can be raised on the face of the deed of 1888, however is in a different position. If it can be contended, as a matter of construction, that the document does not vest the properties in the idol, but merely charges them with a sufficient sum for the maintenance of the worship, this contention can be considered here. As I am not of opinion that this contention can be upheld as to all the properties, it will be

convenient, for the present, to proceed on the hypothesis that the properties were absolutely dedicated and to examine this hypothesis later.

On this assumption, the next issue is whether or not it has been shown either that the debuttar character of the properties was validly terminated in 1904 or that the plaintiff deity is bound by the decrees made in the suit of 1902. It seems to me that it is one thing to bring a suit against a Hindu God for a declaration that the members of the family have terminated the endowment and, upon proper proof of this, to obtain a declaration to that effect, and another thing altogether to take a consent decree setting aside the deed of endowment in a suit constituted as the suit of 1902 was constituted. I am not prepared to hold on the strength of the well-known passage in the case of *Doorganath Roy v. Ram Chunder Sen* (1), that there is in Hindu law any warrant for the proposition that at any particular time by consent of all the parties then interested in the endowment, a dedication can be set aside. The passage, so much relied upon, does not appear to me to be intended as a considered opinion to that effect, and before importing any such doctrine into Hindu law there is much to be considered. I respectfully adopt what Chatterjee, J., said upon this subject in *Chandi Charan Das v. Dulal Chandra Paik* (5), and I would also here refer to the observations of Chakravarti, J., in *Sreepati Chatterjee v. Khudi Ram Banerjee* (6).

I am, moreover, not satisfied, upon the evidence of Thakamani, coupled with the fact that no female member of the family did bring a suit to challenge the decree of 1904, that the consent of the female members of this family to put a complete end to this debuttar was, at any time, thought of or asked for or obtained. Pulin and Braja were described by the "plaintiff as "alleged shobait" in the cause title of the suit. Nothing in the way of proof of a proper legal termination of the debuttar was adduced before the Court and the Court came to no findings either of fact or of law. It acted on the consent of the adult defendants and, as the determination of the debuttar was of advantage to the patri-

monial interests of the minor defendants, the Court allowed them to consent to the decree. Such a consent decree has no greater operation and is subject to all the infirmities of a bargain made between the parties. In my judgment the question whether the debuttar character of the properties was validly terminated in 1904 must be answered in the negative. Notwithstanding that the proceedings in the suit of 1902 were in no way fraudulent, the decrees of 1904 and 1906 are not binding upon the debuttar estate.

Proceeding still upon the assumption that the properties were absolute debuttar, the next question in my opinion is the question of limitation. Satya's father having died in 1901, when he was two years old, his mother in the following year repudiated, on his behalf the validity of the endowment. Under the decree of 1904, a moiety of the dedicated property was declared to belong jointly to Satya and Pulin. Satya though an infant of five or six years, was thereafter in possession according to his share. From 1906 the possession of Pulin was the possession of Satya and vice versa. Between 1904 and 1906 the properties were in possession of a receiver on behalf of Braja, Pulin and Satya according to their shares. In my judgment no question arises as to Satya being a shobait of the deity on the death of his father. A man is not born responsible as a shobait and does not become a shobait against his will: he had never accepted the office of shobait, nor acted as a bailiff, still less as a trustee of the deity. He may be treated as an outsider and, for all purposes a stranger. I am not prepared to hold with the learned Judge that because the moiety allotted to Pulin and Satya was not in 1906 divided between them by moles and bounds, Satya has not had adverse possession against the idol within the meaning of Art. 144 of the schedule to Limitation Act. If Satya had not been in actual enjoyment of his share at all, still the possession of Pulin would have been the possession of Satya. But Satya was as much in possession as his brother and his possession according to his share is not tainted in any way by a fiduciary relationship subsisting between him and the idol. As the Limitation Act stood, 12 years after 1904, S. 10 of the Act did

5. A I R 1926 Cal 1088=98 IC 684=54 Cal 80.

6. A I R 1925 Cal 442=82 IC 840.

not apply: see *Vidya Varuthi Thirtha v. Balusami Ayyar* (7).

The doctrine that an idol is a perpetual minor is, in my judgment an extravagant doctrine contrary to the decision of the Judicial Committee in such cases as *Damodar Das v. Lakhan Das* (8). It is open to shobait or any person interested in an endowment to bring a suit to recover the idol's property for debuttar purposes. While strong facts may be necessary in order to establish adverse possession, in any case in which there is a reasonable possibility that the possession is being held under the idol's title, the facts of the present case are clear and plain; so far as any member of this family was concerned, the utmost publicity and the utmost solemnity attached to the change, by which Braja took the Elliot Road and Royd Street properties, and Rakhal's branch took the other properties. Had Rakhal's branch by the same decree taken a partition between themselves, the matter might have been slightly plainer, which was plain enough already. Satya was not acting fraudulently in collusion with Pulin. I attach no importance, either in fact or in law, to the circumstance that the possession enjoyed by Satya was enjoyed in the ordinary manner in which family property is enjoyed in Bengal by a member of a Hindu family. The learned counsel for the plaintiff has complained of the paucity of evidence as to Satya's possession of the debuttar properties for the 12 years after 1901. This cannot be meant to apply to the property at 30, Beniapukur Road, but in any case it is entirely explained by the fact that the plaintiff, both by his case and by his evidence, admitted the possession of Pulin and his younger brother from the beginning.

It is not in the least necessary to inquire how much pocket-money Pulin allowed to Satya out of the estate or what was spent upon his maintenance while Rakhal's branch all lived together at 30, Beniapukur Road. Nor is it necessary to pursue any inquiry as to how much of the money spent on the ejmali establishment could have been derived from other properties left by Rakhal. I

7. A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad. 831 (P C)

8. (1910) 37 Cal 885=37 I A 147=7 I O 240 (P O).

will consider in a moment whether Braja and Pulin, having accepted the office of shebait, can be heard to set up adverse possession against the deity within the meaning of Art. 144. Assuming that Pulin cannot, I hold that Satya can and that no fiduciary relationship of Pulin to the deity prevents Satya alleging as the fact was, that to the extent of his share he had adverse possession. We have seen that after Satya came of age in 1917 and quarrelled with Pulin, so far as to bring a suit against him for partition of his share, Pulin by his written statement, set up the debuttar character of the properties with which we are concerned. Save as a defence to his brother's claim, I am satisfied that Pulin, at no time made any pretence that the properties on which his branch of the family were living were debuttar. As an obstruction to Satya's right to partition, a contention of debuttar was thought to suit his interest. When he failed to prevent his brother from getting a decree, he mortgaged these very properties in 1922 and 1924 for large sums of money. In my judgment, it is proved that, from 1904 and even from 1906, Satya had adverse possession of his share openly, continuously and completely. Assuming therefore that all the properties in suit were absolutely dedicated, the suit as against Satya fails.

The mortgagees, if the property mortgaged to them was dedicated absolutely, cannot defeat this suit, by reason of the lapse of time, since the date of their mortgages of 1922 and 1924. On this point, their defence must be that their mortgagor's possession extinguished the title of the idol. They may say that Art. 142 applies to the plaintiff's suit, but, if the suit as against them is treated as a suit for possession, the idol is in a position to answer that twelve years before this suit, say 1916, it was in possession by its shebait Pulin. If, by that time, Pulin's wrongful dealings had not extinguished the idol's right, they amount to no more than a cloud upon its title. Both Braja and Pulin were shebaites who had accepted office; neither of them was a trustee in the sense that the debuttar property was vested in him. But they were managers or bailiffs for the idol as regards its properties. The office of shebait has other aspects, but that, as regards an idol's property, he

stands in fiduciary relationship to the idol, is a proposition which cannot be questioned. Assuming that S. 10, Lim. Act, as it stood before 1929, did not apply to them, we have to consider whether, prior to that year, the idol had lost all right to recover the properties, with the result that S. 28 of the Act came into play and extinguished its title. Unless they can be heard to allege and unless they can prove that their possession has been adverse to the idol within the meaning of Art. 144, their possession is the possession of the idol however flagrant be the breaches of fiduciary duty committed by them. Twelve years from 1904 is 1916; twelve years before this suit of January 1929 is January 1917. As the position has not altered, in the meantime let us look at 1917 and the reasoning will apply both to the shebait and the mortgagees. If the idol had brought its suit in 1917 what, according to the substance and truth of the facts alleged in the present plaint and proved in the present case, would have been the nature of its claim?

"The property is mine : it is in the hands of my bailiffs : they are dealing with it wrongfully : restrain their wrongful acts or direct them to hand it over to another agent on my behalf."

Such a claim is on the basis of the plaintiff's present possession by the hand of the defendants and, in my judgment, that is the real character of the claim as against Pulin's estate and Braja in the present suit. Verbal criticism of para. 16 of the present plaint cannot alter the legal character of the case made, on the facts alleged by the plaint and established by the evidence. The real question therefore is whether the shebait as against the idol could have said in 1917:

"The idol is not in possession by us because for twelve years we have claimed the properties for ourselves."

That is Art. 144 or nothing. Before the judgment of the Judicial Committee in the case of *Vidya Varuthi Thirtha v. Balusami Ayyar* (7) it appears to have been generally assumed that S. 10, Lim. Act, would have rendered impossible such a contention on the part of a shebait. That decision, not less by its reasoning than by its authority, made it impossible to hold that a shebait is a person in whom the debuttar property is vested in trust for a specific purpose. The Limitation Act was, in consequence, amended

by Act 1 of 1929, so as to bring shebait within the section, but the case before us must be dealt with apart from this amendment. If a shebait can set up Art. 144 against the idol, no case could well be stronger, on the facts, than the present case, where the parties honestly thought themselves entitled to bring the endowment to an end and satisfied a Judge that they had done all that was necessary for that purpose. I am not prepared to hold, as a matter of construction of the Limitation Act, that an idol is a perpetual minor as was suggested in *Ramu Reddy v. Ranganadasan* (9), that a bailiff or manager is in the same position as a tenant mortgagee or pawnee who have a possession on their own account, or that a bailiff, whose open claim to be in possession in his own rights is acquiesced in by his principal for twelve years, cannot come under Art. 144. But, in the present case, we have to see whether, the possession of two joint shebait becomes adverse to the idol, when they openly claim to divide the property between them.

The fact of their possession is in accordance with the idol's title, and the question is, whether the change made by them, in the intention with which they hold, evidenced by an application of the rents and profits to their own purposes and other acts, extinguishes the idol's right. I am quite unable to hold that it does, because such a change of intention can only be brought home to the idol by means of the shebait's knowledge and the idol can only react to it by the shebait. Adverse possession, in such circumstances, is a notion almost void of content. True, any heir or perhaps any descendant of the founder can bring a suit against the shebait on the idol's behalf and, in the present case, it may be said that the acts of the shebait must have been notorious in the family. But such persons have no legal duty to protect the endowment and, until the shebait is removed or controlled by the Court, he alone can act for the idol.

In *Seetaramaraju v. Subbaraju* (10) the question was discussed whether possession could be adverse against a lunatic and the opinion was expressed that,

9. A I R 1926 Mad 769=49 Mad 513.
10. A I R 1922 Mad 12=15 Mad 361,

under the Limitation Act, this would depend upon whether any fiduciary relation subsisted between the parties. I do not find it necessary to examine the particular provisions of the Act as to lunatics and minors, and I am not suggesting that there can be no adverse possession against an idol. It is sufficient to hold that there could be no adverse possession by the shebait.

These findings dispose of the present case upon the assumption unchallenged in the trial Court that the true effect of the deed of 1888 was to grant the property absolutely to the Thakur so as to make it absolutely debuttar. This question of construction was not in the pleadings separated out from the question whether the deed could be shown by extrinsic evidence to represent no more than a colourable pretence of dedication not intended to be acted on. The written statement of Braja in para. 2, however

"submits that no valid dedication was effected by the said two documents nor was any charge created in favour of the idol or anybody else."

In para. 2 of Satya's written statement he

"denies that there was any dedication absolute or otherwise in favour of the said deity."

Issue 1 framed is:

"Was there a valid dedication effected by the instrument of 5th May 1888 and the deed of sale of 6th April 1896?"

In this Court, the learned counsel for the appellants raised the contention that the true effect of the deed of 1888 is to provide that, after the expense of religious worship and ceremony has been met, the surplus income is to be invested in tenanted houses for the production of still greater revenue and that the sole purpose mentioned as the ultimate destination of the fund is the building of a house or houses in which the settlers' descendants or some of them may reside and that, this not being a religious or charitable purpose at all, the deed cannot be construed as an absolute dedication of the property. We have been referred to the cases of *Sonatum Bysack v. Juggutsundree Dossee* (11), *Ashutosh Dutt v. Doorga Churn Chatterjee* (12) and *Har Narayan v. Surja Kunwari* (13) as authorities for the pro-

11. (1859) 8 M. I. A. 66=2 Suther 37=1 Sar 721 (P. O.).

12. (1879) 5 Cal 438=6 I. A. 182 (P. O.).

13. A. I. R. 1921 P. C. 20=63 I. C. 34=48 I. A. 143=48 All 291 (P. O.).

position that, in view of the ultimate destination of the income, the passages in the deed, which describe the properties in the schedule as being properties granted to the auspicious lotus feet of the deity and which forbid the shebait to sell or mortgage the properties or let them out at a permanently fixed rent, do not avail in law to carry the properties to the deity in absolute right.

The deed of 1888 opens by describing how Lalchand and Kalachand established the deity in their life-time, how they prospered, how they bought land on Royd Street and in Entally, how "with the income of all the said lands and with the money earned by them" they used to cause daily and special shebas to be performed, Brahmins and poor persons to be fed and festivals to be observed. It then recites that Lalchand died, that Kalachand purchased land on Elliot Road, that he continued the sheba and festivals as before, that he intended to build a house on the land in Entally for the location of the Thakuranis and for the residence of the shebait and to make the house and the lands specified in the schedule debuttar but that he died before carrying out his intention, that after his death, Rakhal, "with the income of all the said lands," caused the sheba to be performed and people to be fed as before that when Braja had attained majority the two brothers had been carrying on the sheba, etc., as before. The deed then recites that Rakhal and Braja had built a house for the location of the Thakurs and the residence of the shebait on the Entally land and states that for the continuance in perpetuity of the shebas and the feeding of Brahmins, etc., in perpetuity, they grant the properties in the schedule to the auspicious lotus feet of the Thakuranis as debuttar. They make provision for the shebaiti right to go to their male heirs by primogeniture; they provide that the shebait should keep accounts and that other heirs shall be competent to inspect the accounts. There is a provision for the removal from office of a shebait acting improperly, and a provision to exclude females from the shebaiti. There is a provision in certain circumstances for shebait to be appointed by deed. It is provided that the shebait are to employ two durwans and a mali and other servants for the

purposes of the sheba and a Tehsildar for keeping accounts, collecting rents, etc., as well as a pujari to perform the worship. Then come the passages, upon which the present question must turn. Out of the income is first of all to be reserved sufficient money for taxes and repairs to the thakurbarhi and the existing house at Entally then, out of the said income the shebaita are to cause the daily and other worship to be performed and "at an outlay of reasonable expense" shall entertain Brahmins, feed the poor. The deed proceeds:

"The shebaita shall purchase Government securities, that is company's papers, with the surplus annually left after meeting the prescribed expenses."

It provides that, when a large amount of money gradually accumulates in this manner, they shall cause tenanted houses to be built on the lands specified in the schedule and take measures for improvement and increase of the income of the debuttar properties. So far therefore the deed contemplates that there shall be a surplus and that this surplus shall be invested so as to increase.

In the next passage in the deed the shebaita are given a right to reside in the house in which the deities are located and as far as practicable other heirs may reside in the house. Then comes the only clause which operates to give an ultimate destination to the accumulating funds: The shebaita are directed

"to build with the said money additional masonry buildings on the debuttar lands and give them for the convenience of residence and habitation of our heirs. If, in the course of time, the number of heirs becomes large, the nearer heirs shall reside in these houses so far as practicable."

The remaining passages in the deed are important in so far as they disclose that the tenants on the scheduled lands are mere tenants-at-will, which means that, so far as occupied, the property was bustee property. It states that the value of the properties granted as debuttar is Rs. 47,000. When we look at the schedule, items 2 and 3 are the Elliot Road and Royd Street properties, the former being over 4 bighas in area and the latter 5 kottas. The first item is the Entally land, having an area in excess of 6 bighas, within which the thakurbarhi stands on 14 kottas of land and the tenanted house on about 1 kotta of land, the remaining lands being let to temporary tenants,

that is, being bustee property. This land is bounded on the north by Phulbagan Road and on the west by Beniapukur Road. By 1906, as we see from the final decree of that year, portions of this property had come to be known as 30, Beniapukur Road, and 46, 47 and 48, Phulbagan Road, which, as we have seen, went to Rakhal's branch, that is to Pulin and Satya, at the partition. The mortgage of the Rays covers 46 and 47, Phulbagan Road, and the mortgage of the Mandals covers, in addition, 30, Beniapukur Road, 48, Phulbagan Road, and 34 and 35, Beniapukur Road.

Now, on the construction of the deed of 1888, I cannot doubt that the thakurbarhi and the house built for residence of the shebaita on what is now 30, Beniapukur Road, are absolutely dedicated to the idol. And if the deed can in law be given that effect the same result would, *prima facie*, follow as regards the rest of the lands mentioned in the schedule. Upon the authorities however I am of opinion that this effect cannot be given to the deed as regards the other properties. The directions as regards the income of the property are really four. The first is the provision for taxes and repairs; the second is the provision for worship and the feeding of Brahmins, etc., within which may be grouped the provision for the durwans, mali, pujari and tahsildar and the whole may be referred to generally as the provisions for the sheba; the third provision is a direction to accumulate and build tenanted houses. This is in the nature of an investment clause. The final provision is a provision for the erection of a house or houses for the convenience of residence and habitation of the heirs. This appears to me to be the ultimate destination of the next proceeds, subject to the expenses of the worship. I cannot regard the directions as to worship, the feeding of Brahmins, etc., as an expanding trust. With reference to the feeding of Brahmins and others, the direction is that this is to be "at an outlay of reasonable expense," and earlier passages in the deed show that the intention was to continue the family ceremonies as they had been performed from the time of Lalchand and Kalachand. We are dealing with a family idol and there is no presumption that the settlers ever intended that the family ceremo-

nies, as the income increased, should become more and more expensive. What was said by Lord Hobhouse in *Surendro Keshub Roy v. Doorgasoodery Dossee* (14) is applicable here:

"There is no indication that the testator intended any extension of the worship of the family thakurs. He does not, as is sometime done, admit others to the benefit of the worship. He does not direct any additional ceremonies. He shows no intention save that which may be reasonably attributed to a devout Hindu gentleman, viz., to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the thakurs whom he venerates most. But the effect of that when the estate is large is to leave some beneficial interest undisposed of, and that interest must be subject to the legal incidents of property."

It is true that, in this case, the deed does not contain a schedule setting forth in detail the expenses to be incurred for the worship. It is also true that, if we confine ourselves to what can be collected from the deed itself, we know that the value of the properties is put down, doubtless for purposes of stamp, as Rs. 47,000, which would include the value of the thakurbarhi and shebait's house. But we know that the property was in Calcutta or in its immediate vicinity, that parts of it were bustee land and that, as a means of increasing the income, it was contemplated that the land should be built upon and houses let out at a rent. I think it is clear, according to the tenor of the deed, that the income was expected from the first to be more than sufficient for the worship, and that it was intended, as time went on that it would prove much more than sufficient. I think therefore that the observation of Lord Hobhouse is in point. The ultimate direction for the building of houses for the residence of the heirs is by no means on the same footing as a direction for the provision of a residence for the shebait.

From the case of *Jadu Nath Singh v. Thakur Sita Ramji* (15), it is clear that a gift for the maintenance of a shebait or for the residence of a shebait would be a gift sub modo to the idol. In my judgment, this is not a gift sub modo to the idol. It is quite clear that a personal right may be given to members of the family to reside in the house provided for the thakur or provided for the shebait: *Bhuggobutty Prosonno Sen v.*

14. (1891) 19 Cal 513=19 I A 108 (P O).
15. A I R 1917 P O 177=42 I O 225=44 I A 187=20 O O 200=39 All 553 (P O).

Gooroo Prosonno Sen (16). This provision is of a different character. It may be good or bad, but it is as much a gift for the benefit of some or all of the heirs as if the settlors had directed the ultimate balance to be distributed among them or invested for their benefit. We must apply the principles expressed in the judgment of Lord Shaw in the case of *Har Narayan v. Surja Kunwari* (13):

"The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries to the property, subject to a charge for the upkeep and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will."

It appears to me that the only construction which it is possible, in law, to put upon the deed of 1888, notwithstanding the language of certain passages therein, is that there is a charge for the upkeep, worship and expenses of the idol and that the idol cannot claim to have an absolute interest in any portion of the property which is governed by the provision that tenanted houses should be built on the land for the increase of the income of the trust. It is, I think, otherwise with the thakurbarhi and the shebait's house on 30, Beniapur Road. Since 1904, Satya, for reasons already given, acquired a one-half share in the thakurbarhi and shebait's house by adverse possession against the idol. It will not do to say that because the image has been located in the house, as an image may be located in the dwelling house of any Hindu, the idol has been in possession of this property. Neither Pulin's estate nor Pulin's mortgagees, however have any answer to this suit as regards the other half share. The property conveyed by the deed of 1696, is, I think, in the same position as the other properties under the deed of 1888. Apart from the plaintiff's claim to a half share of the thakurbarhi and the shebait's house at 30, Beniapur Road, it seems to me that the idol is entitled to a declaration that the properties in suit are subject to a charge for the worship and ceremonies described in the deed of 1888. As I think it is only right to allow the question of the construction of the deed to be raised on this appeal, notwithstanding defective pleading by the defendants and the fact that

16. (1897) 25 Cal 112.

they did not take their point before the learned Judge, I cannot refuse to the plaintiff relief in this suit in respect of the charge. I think therefore that the charge should be declared and that it should be referred to the Registrar, or such officer as he may appoint, to enquire what would be a sufficient annual sum to meet the expenses of the worship and ceremonies. I think it should also be referred to him to enquire whether since 12 years before this suit the worship of the idol and the ceremonies have in fact been duly and properly observed and provided for and, if not, to what extent the expenditure has been insufficient to answer the requirements of the deed. I do not propose, for the present to do anything further by way of enforcement of the charge, but there will be liberty to all parties to apply.

The result is that this appeal is allowed and the decree of the learned Judge must be set aside. In lieu thereof there will be a new decree to the following effect: (1) declaring that in the thakurbarhi and shebait's house at 39, Beniapur Road, the plaintiff is absolutely entitled to one-half share by virtue of the deed of 1888, the other half share belonging to Satya; (2) declaring that, in respect of the other properties in the plaint in this suit mentioned, other than No. 45, Elliot Road, the plaintiff is entitled to a charge for the upkeep, worship and expenses of the idol and ceremonies connected therewith under the deed of 1888; (3) directing the enquiries hereinbefore mentioned. There must be an order for joint possession of the thakurbarhi and house to be delivered to the shebait of the plaintiff idol in respect of its one-half share. The Mandal defendants should be restrained from entering upon or putting up to sale or otherwise dealing with the thakurbarhi and house. All the mortgagee defendants should be restrained from selling or otherwise dealing with any of the other properties mortgaged to them otherwise than subject to the charge in favour of the idol and after giving notice thereof. As to costs in the circumstances though Satya is hit by the declaration of charge, he appears to me to have had a good answer to the suit as framed and I think he should have his costs against Mohinimohon Do personally and also against the idol's estate both at first in-

stance and on this appeal. As regards the other defendants, I think the order for costs made by the learned Judge should stand against them and that there should be no costs of this appeal on either side.

Costello, J. — I have had the advantage of reading the judgment that has just been delivered by my Lord and I agree with him on all the points in the case.

R.K. *Appeals allowed.*

* A. I. R. 1933 Calcutta 308

MALLIK AND REMFRY, JJ.

Ali Hussain and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 16 of 1932, Decided on 25th May 1932.

(a) Criminal P. C. (1898), S. 235 — Two realizations by blackmail — Common purpose and design and continuity of action — No prejudice to accused who fully knew case against them — Trial is not bad for misjoinder.

To determine whether or not a series of acts would form parts of the same transaction the most important points to be considered are whether there was a common purpose and design and continuity of action. [P 309 C 2]

Blackmailing was evidently the common purpose of the accused and the second of the two realizations was in continuation of the action in the first and both were in fulfilment of a common design of blackmailing. Moreover by a joint trial on charges relating to the two incidents the accused were not prejudiced in any way as the whole case for the prosecution was disclosed from the very beginning and the accused fully understood that case and were given full opportunity to meet it.

Held : that there was no misjoinder of charges or vitiation of trial. [P 310 C 1]

b) Penal Code (1860), S. 420 — Accused wearing khaki dress, threatening to take complainant to thana for extortion — Accused not police officer nor saying so, but complainant given to understand that he is — Deception was proved.

The facts that the accused wore a khaki shirt and a round brush cap, threatened to take the complainant to the thana, and the fact that there could not be any manner of doubt that the accused gave the complainant to understand that he was a police officer which he was not and that he had the authority to take to the thana which authority he did not possess, amount to deception, where the accused used this representation to blackmail the complainant though the accused may not have told the complainant that he was a police officer. [P 310 C 1]

* (c) Evidence Act (1872), S. 25 — Confessional statement not used as such may be used to show that accused gave different versions to Court and police.

A confessional statement made to a police officer if not used as a confession may be used by the Court to show that the story which the ac-

cused gave at the time of the trial had not been given to the police officer. [P 310 C 2]

(d) Criminal P. C. (1898), S. 388—Sentence not of fine only— Instalments cannot be allowed.

There is no provision except S. 388 by which a fine can be ordered to be realized by instalments. But it has no application where the sentence is not a sentence of fine only. [P 310 C 2]

Anil Chandra Roy Chowdhury — for Appellantss.

Nirmal Chandra Chakravarty — for the Crown.

Mallik, J.—Of the two appellants Ali Hussain, appellant 1, has been convicted under S. 420, I. P. C., and sentenced to detention till the rising of the Court and to a fine of Rs. 250. Appellant 2 Saiyed Din has been convicted under Ss. 420 and 114, I. P. C., and sentenced to detention till the rising of the Court and to a fine of Rs. 60. The allegations on which the two appellants were charged were briefly these: The complainant Amarendra Nath Dhar is a clerk in the service of a firm styled as D. L. Mitter and Company. He is a respectable young man fond of betting at the races and takes the risk of betting outside the rings with the possible consequence of being charged with gambling. On one Saturday about the middle of August last he attended the races and did some betting outside the enclosure with unlicensed bookmakers. He lost some money and was coming home, and when he was near the Plassey Gate on the Maidan, the accused Ali Hussain met him and saying that he had seen him betting with unlicensed bookmakers threatened to take him to the thana. Ali Hussain had at the time a khaki shirt and a round brush cap on his head. Ali Hussain told him that he would not take the complainant to the thana if the complainant would spend Rs. 100. On the intervention of appellant 2, Saiyed Din who happened to arrive at the place at the time, the amount was subsequently reduced to Rs. 40.

The complainant then left the place and when accused 1 came to the house of the complainant the complainant had to pay him Rs. 40 as arranged before. A few days later the two accused came to the house of the complainant again and accused 1 told him that unless he would pay another Rs. 15 to accused 2, accused 2 would report the matter to the uparwalas and that both of them

might get into trouble. The complainant thereupon asked them to come and meet him at the Esplanade near the tramway shed. On the following Saturday the complainant however went and reported the whole matter to a Sub-Inspector, Bhakti Bhusan Roy by name, and it was arranged that the complainant when he would meet the two accused at the Esplanade would take them to the Wellington Square and would make some payment to the accused persons when the police could remain somewhere near by hiding. As arranged the two accused came and met the complainant at the Esplanade on the appointed Saturday and according to that arrangement the three persons went to Wellington Square and when a five rupee note which has been previously marked was handed over to accused 1 the appellants were arrested by the police.

The case for the defence was that the complainant owed Rs. 26 to Ali Hussain, that Ali Hussain made several demands for payment of the money; that there was an altercation in consequence and that when the complainant after taking the accused to Goltalao (Wellington Square) was giving to Ali Hussain a five rupee note the police arrested them. According to the defence of Ali Hussain, Saiyed Din who was to get Rs. 5 from Ali Hussain accompanied him to Goltalao. On behalf of the defence one witness was examined in the case. The learned Magistrate however disbelieved the defence story and believing the case for the prosecution convicted and sentenced the two accused persons in the way as stated before.

On behalf of the appellants a number of points were raised before us. In the first place it was said that there had been a misjoinder of charges and that the whole trial has been vitiated thereby. It was said that the first day's transaction, namely, payment of Rs. 40. had no connexion whatsoever with the payment of Rs. 5 at Goltalao and that the two incidents could not be said to be parts of one and the same transaction. This contention does not seem to me to be well founded. To determine whether or not a series of acts would form parts of the same transaction the most important points to be considered are whether there was a common purpose and

design and continuity of action. In the present case blackmailing was evidently the common purpose and the second realization was in continuation of the action in the first and both, in my opinion, were in fulfilment of that common design of blackmailing design originating from the discovery of the complainant betting outside the enclosure. It is to be observed moreover in this connexion that by a joint trial on charges relating to the two incidents the accused do not appear to have been prejudiced in any way. The whole case for the prosecution was disclosed from the very beginning and the accused fully understood that case and were given full opportunity to meet it.

The second point taken on behalf of the appellants was that the conviction for cheating is unsustainable inasmuch as there was no false representation and therefore no deception. There may not have been any words used to tell the complainant that accused 1 was a police officer. But from the facts that accused 1 wore a khaki shirt and threatened to take the complainant to the thana there could not, in my judgment, be any manner of doubt that the accused gave the complainant to understand that he was a police officer which he was not and that he had the authority to take him to the thana which authority he did not possess and this, in my opinion, did amount to deception.

Then it was urged on behalf of the appellants that the conviction was bad inasmuch as it rested entirely on the uncorroborated evidence of the complainant himself. But in this connexion it is to be observed that the complainant was before the trying Magistrate and that the Magistrate had the full opportunity to notice his demeanour and to observe the way in which he deposed. The Magistrate appears to have been impressed by the convincing manner in which the witness gave his deposition. It was said that the story which the complainant gave was not a probable one because the complainant was not an uneducated rustic who might easily be taken in by such representations as the accused are alleged to have done. But persons who are not uneducated rustics do sometimes become victims to swindlers and blackmailers.

It was said that it was not very probable that the complainant should submit to the accused when it is remembered that a conviction for gambling could not be visited with any thing more than a few rupees fine. Next it is to be remembered that the complainant was in the employ of a firm and a conviction for gambling might entail losing his job in that firm.

Mr. Roy Chowdhury next took exception to the admission of some evidence in the case which according to him was inadmissible. The evidence to which he took exception was a statement of Babu Bhakti Roy, the Sub-Inspector of Police, to the effect that accused 1 had told him that when he had detected the complainant in committing sodomy in the race-course the complainant offered to give him bakshis if he would let him go and he did let him go. It was said that this evidence amounted to a confessional statement made to a police officer and was therefore inadmissible under S. 25, Evidence Act. Admitting that the statement was a confessional statement made to a police officer the learned Magistrate does not appear to have used it as a confession. What it was used for by him in the case was that the story which the accused gave at the time of the trial had not been given to the police officer. As to this there was no dispute. The first accused in his statement recorded under S. 342, Criminal P. C., stated that he had made no statement before the daroga. This contention must therefore fail.

Lastly, it was contended by Mr. Roy Chowdhury that the sentence inflicted on the two accused persons in the present case has been unduly severe and that in case we should maintain the order of conviction in its entirety we should direct that the fine be paid by instalments. The sentences inflicted do not appear to me to be excessive and I am not aware of any provision except S. 388, Criminal P. C., by which a fine can be ordered to be realised by instalments. But S. 388 has no application to the present case inasmuch as the sentence in the present case was not a sentence of fine only. As stated in the beginning both the accused had been sentenced to rigorous imprisonment for a day besides the sentence of fine.

The result is that the appeal is dismissed. The fine will now be realized.

Remfry, J.—I agree.

M.N.

Appeal dismissed.

A. I. R. 1933 Calcutta 311

GUHA AND BARTLEY, JJ.

Chhogan Lal Bagri—Appellant.

v.

Behari Lal Saha Ray and others—

Respondents.

Appeal No. 197 of 1930, Decided on 15th July 1932, against order of Sub-Judge, 2nd Class, Mymensingh, D/- 23rd January 1930.

Limitation Act (9 of 1908), Art. 180—Application for delivery of possession by auction purchaser — Sale confirmed — Appeal preferred against order dismissing application for setting aside sale—Time runs from appellate order—Appeal held maintainable—Civil P. C., (1908). S. 47.

In execution of his mortgage decree the decree-holder purchased the property on 17th September 1924. One of the judgment-debtors applied for setting aside the sale but the application was dismissed on 30th May 1925 and the sale was confirmed on that date. An appeal filed against the order dismissing the application for setting aside the sale was also dismissed on 25th July 1927. An application for delivery of possession was then made by the purchaser on 18th January 1929.

Held: (1) that the application was governed by Art. 180 and was in time as the three years began from 25th July 1927 when there was final order confirming the sale: 23 Cal 775 (PC), *Foll* and A I R 1930 Cal 86 (PC), *Expl* and *Dist*. (2) that as the order was passed by the Court under S. 47 rejecting application for delivery of possession by the decree-holder auction purchaser, an appeal was competent.

[P 311 C 2, P 312 C 1]

Braj Lal Chuckerbutty, Birendra Kumar De and Debendra Nath Bhattacharji—for Appellant.

Amunda Charan Karkoon—for Respondents.

Guha, J.—This appeal is directed against an order passed by the learned Subordinate Judge, 2nd Court, Mymensingh, on 23rd January 1930, holding that an application for delivery of possession made by a decree-holder auction-purchaser was barred by limitation. The purchase was made by the decree-holder at a sale held on 17th September 1924, in execution of a mortgage decree. The judgment-debtor No. 5 applied for setting aside the sale on 31st October 1924, and that application was dismissed on 30th May 1925. The sale was confirmed on that date. There was an appeal by the judgment-debtor against the order dismissing the application for setting

aside the sale, and the appeal was dismissed by this Court on 25th July 1927. The application for delivery of possession was made on 18th January 1929. The limitation applicable to such an application would be the one prescribed by Art. 180, Sch. 1, Lim. Act, and it was incumbent upon the purchaser to make the application within three years from the date when the sale in execution of the decree became absolute. There was no question of suspension of the period of limitation or extension of the period of limitation involved in a case like the present. As observed by their Lordships of the Judicial Committee of the Privy Council in the case of *Bajinath Sahai v. Ramgout Singh* (1), there could be no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation. In the case before us there was the application for setting aside the sale held in execution of the decree, and that application was made within 30 days of the date of the sale. On the facts of this case therefore the decision of this Court in the case of *Neckbar Sahai v. Prakash Chandra Nag* (2) is not an authority against the appellant before us, regard being had to the observations made in that case at (p. 614 of 56 Cal) of the report.

In the words of their Lordships of the Judicial Committee of the Privy Council in *Bajinath Sahai's* case (1) mentioned above, it could not be said, when the parties were litigating as to whether the sale should be confirmed or not, that the sale had become final or conclusive. The confirmation of the sale therefore dates only from the date when the litigation following upon the application for setting aside the sale terminated on 25th July 1927, the date of the final decision of this Court, in that litigation, and in our judgment the law of limitation was not a defence to this application for delivery of possession made by the decree-holder auction-purchaser, the appellant before us. It may be mentioned that a preliminary objection as to the maintainability of the appeal to this Court was raised on behalf of the respondents. As the order of the Court below was passed on an ap-

1. (1895) 23 Cal 775=28 I A 46=7 Sar 1 (PC).

2. A I R 1930 Cal 86=120 I C 107=56 Cal 608.

plication under S. 47, Civil P. C., made by the judgment-debtor No. 4, there can be no doubt that the appeal is competent. In the above view of the case, this appeal must be allowed; the order of the Court below against which this appeal is directed, is set aside, and the appellant's application for delivery of possession made before the lower Court is allowed, with the result that possession is to be delivered by the Court to the appellant as prayed by him. The appellant is entitled to his costs in this Court as also in the Court below. The hearing fee in the appeal to this Court is assessed at three gold mohurs. Let the record be sent down as soon as possible.

R.K. *Appeal allowed.*

A I. R. 1933 Calcutta 312

C. C. GHOSE AND MITTER, JJ.

Collector of Dacca—Appellant.

v.

Ashraf Ali and others—Respondents.

Appeals Nos. 62 to 93 and 191 to 198 of 1928, with cross-objections in No. 191, 192, 194 and 196 of 1928, Decided on 5th August 1931, against original decrees of Addl. Dist. Judge, Dacca, D/- 21st July 1927.

(a) Land Acquisition Act (1894), S. 23—Compensation—Tenancy land—True test of, is to ascertain market value of land and then to apportion amongst persons having different interests.

The true tests for determining the amount of compensation which ought to be awarded to the proprietors in the case of tenancy lands is to ascertain the market value of the land. The correct rule in all cases of this class is that the land to be acquired is to be valued in the first instance including all interests and the amount so ascertained has then to be apportioned amongst the parties interested according to their interests; *A. I. R. 1919 Mad. 222, Ref.*

[P 313 C 1, 2]

(b) Evidence Act (1872), S. 74—Letter forwarding proceedings of public meeting is not public document.

A letter to the Collector forwarding the proceedings of a public meeting held at a certain place is inadmissible in evidence as it is not a public document within the meaning of S. 74.

[P 314 C 1]

(c) Land Acquisition Act (1894), S. 23—Valuation of plot close by is no basis of valuation of land far apart.

The valuation with reference to a plot which is very close to the acquired land cannot form the basis of valuation with regard to the lands far apart; but where the distance between the plots is so negligible as 75 yards it does not make any difference when valuing a land on the locality if the valuation is based on a document

with reference to one plot in the locality which is of the same description with similar advantages as the other plots. Similarly land outside the Municipal limits can be valued in the same way as land in close proximity to the Municipal area. [P 314 C 1]

Sarat Chandra Basak and Nasim Ali—for Appellant.

Nagendra Nath Dutt, Sris Chandra Dutt, Bhudhar Haldar, Bhupendra Kishore Basu, Brojo Lal Chakravarty, Radha Benode Pal, Radhika Ranjan Guha, Nagendra Nath Bose, Rajendra Chandra Guha, Amarendra Nath Bose, Sachindra Kumar Roy, and Suresh Chandra Mazumdar—for Respondents.

F. A. Nos. 191 to 198 of 1928.

Judgment.—These are eight appeals by the Collector of Dacca and arise out of eight references under S. 18, Land Acquisition Act, at the instance of the proprietors of the land which have been compulsorily acquired for the purposes of certain sewerage works in the town of Dacca. The Collector valued the interest of the proprietors on a certain basis. He first of all determined the average rate of rent per bigha which the tenants were liable to pay to the proprietors and he ascertained the same at the rate of Rs. 2 per bigha. After ascertaining it the Collector was of opinion that the proprietors will get 25 years purchase of this after deduction of the collection charges and the Government revenue. To this the Collector added in favour of the proprietors a further sum equal to $\frac{1}{4}$ th share of the compensation assessed for tenancy interest on account of the loss of selami. This was the method adopted with reference to lands in the occupation of tenants. With regard to the lands in the khas possession of the proprietor he valued his interest for garden and tank at Rs. 500, for raised bhiti at Rs. 400, for ordinary bhiti at Rs. 375, for raised nal at Rs. 325, for ordinary nal at Rs. 300, for kacha road at Rs. 125 and for nala at Rs. 50 per bigha.

Eight references were made before the Land Acquisition Judge of Dacca and it was contended before him that the Land Acquisition Deputy Collector has adopted a wrong method for ascertaining the compensation of the tenanted lands. It was argued that the proper method which the Collector should have adopted was to ascertain the market value of the lands and then to deduct the value of

the occupancy right for awarding compensation to the proprietors. Adopting this as the basis on which compensation should be allowed the Land Acquisition Judge proceeded to determine the market value of the lands in these eight references, and after considering several documents, in particular two which were deeds of sale prior to the date of the declaration, he has increased the amount of compensation to a much larger sum than that awarded by the Deputy Collector. In these eight cases, it is to be noticed no evidence was given on behalf of the Collector of Dacca as will appear from the order made in the order sheet, namely, order No. 26, dated 22nd July 1927. The Land Acquisition Judge has increased the compensation and the increase is shown at p. 48 of the printed paper book in part I of Appeal No. 192 of 1928. It is not therefore necessary to state in detail the amounts by which the compensation has been increased by the Land Acquisition Judge.

Against this order of the Land Acquisition Judge increasing the amount of compensation awarded by the Collector these eight appeals have been preferred by the Collector of Dacca, and the main argument which has been advanced for the appellant by the learned Senior Government Pleader has been that the Land Acquisition Judge has adopted a wrong method in awarding compensation to the proprietors and he contends that the method adopted by the Land Acquisition Collector was the right method. The respondents have however pointed out that this contention put forward on behalf of the Collector is opposed to the principle laid down in the Land Acquisition Act and is opposed to a series of authorities both of this Court and of the other High Courts in India. The true test for determining the amount of compensation which ought to be awarded to the proprietors is to ascertain the market value of the land. As was pointed out by Sir John Wallis, Chief Justice of Madras as he then was, in the case of *Raja Pittapuram v. Revenue Divisional Officer, Coconada* (1), the correct rule in all cases of this class is that the land to be acquired is to be valued in the first instance including all interests in it and the amount so ascertained has then

to be apportioned amongst the parties, interested according to their interests. This is also the view which has been recently adopted by the learned Chief Justice and Mukerji, J., in an unreported decision in *F. A., 6 of 1929* which was decided on 19th February 1931 and the precise argument which has now been advanced on behalf of the Collector of Dacca was advanced in that case on behalf of the Collector of Jalpaiguri and was negatived. Having regard to these authorities the contention of the Collector regarding the principle on which compensation should be awarded must be negatived.

An argument has next been addressed with reference to the paucity of the evidence furnished on behalf of the proprietors with reference to the market value of lands near about the disputed lands, and it is said that the Land Acquisition Judge was not justified in proceeding to determine the market value of the lands practically on two documents one of which is Ex. 1 which is a lease which was taken by the witness who was examined on behalf of the claimants (one Muhammad) of some nal land in mourasi right on payment of selami of Rs. 1,050 per bigha on 21st July 1921. It is said that the sum which is mentioned in this deed as selami for the lease was really excessive and did not really represent the value of the land in or about the locality. Considerable stress has been laid on the circumstance that whatever may be the value as indicated in the document of 31st July 1921 there has been considerable depreciation of that value by reason of the construction of the sewerage works prior to the date of the acquisition, of the land now in question, and it is said that the value in documents with reference to lands which were situated in the same locality prior to the opening of the sewerage works cannot furnish a true criterion of the value of lands after these works have been started, and reference has been made to the evidence of some of the witnesses examined on behalf of the claimants to show that the locality has become uninhabitable by reason of the bad smell which issues out of the outfall works.

Reference in particular has been made to the evidence of witness 1 for the claimant Muhammad who stated at p. 35.

that he had not purchased any land after the construction of the dumping ground. But the same witness states that the price of lands in the locality has increased notwithstanding the construction of the dumping ground, and we have been asked by the learned Senior Government Pleader to discredit his evidence in view of the statement made by some of the witnesses that bad smell issues from the outfall works. In support of this contention a document Ex. 15 has been sought to be relied on on behalf of the appellant. This was a letter to the Collector of Dacca forwarding the proceedings of a public meeting which was held in the town of Dacca. It seems to us difficult to understand how this document can be admitted in evidence. It is surely not a public document within the meaning of S. 74, Evidence Act. All that is proved is that that a letter was sent by one Rebati Mohan Das who happened to be the president of that meeting. This evidence again had not been given in the cases in which these eight appeals arise and Mr. Brojo Lal Chakravarty, who appears for the respondents in some of the cases, rightly contends that this should not in any event be admitted in evidence against his clients.

It has next been argued with reference to the situation of the land covered by Ex. 1 as appears from the map No. 2 of the big book of maps in Appeals Nos. 191 to 198 of 1928 that the document Ex. 1 refers to one particular plot which is just outside the Municipal limits of the town of Dacca and that the other plots acquired are at a considerable distance from it, and it is said that the valuation with reference to a plot which is very close to the acquired land cannot form the basis of the valuation with regard to other lands which are far apart. It has however been pointed out on behalf of the respondents that the distance at any rate as regards some of these lands is only about 71½ yards and we do not think that it makes any difference when valuing a land in the locality if the valuation is based on a document with reference to one plot in the locality which is of the same description with similar advantages as the other plots. The learned Senior Government Pleader saw the force of this argument and tried to point out that with reference to this

plot there was considerable road frontage which advantage was not enjoyed by the other plots acquired, and he refers in particular to the situation of this land covered by Ex. 1 and to the road which was intended to be connected with the public road. Special reference was made to the recital at p. 20 of the paper book Part 2 of Appeal No. 120 of 1928 which is to the following effect:

"Towards the western side of the aforesaid land there will be a road 15 feet in width extending towards the north where it meets another road coming from the west at a point forming the south-east corner of Mr. Kesh Babu's garden from which road it will lead one to this land; you shall be entitled to use this road."

This recital however does not show that the land which formed the subject of Ex. 1 was in a better situation than other lands by reason of there having been an extensive road frontage. Then it was argued that the Land Acquisition Judge has been unmindful of the circumstance that land outside the Municipality is not to be valued in the same way as land which is in close proximity to the Municipal area. We do not see any force in this contention and we are not prepared to accept it. On all these grounds we are of opinion that the conclusion arrived at by the Land Acquisition Judge regarding the amounts of compensation awarded by him seems to be right. The result is that all these eight appeals must be dismissed with costs. We assess the hearing fee at two gold mohurs in each of these appeals. There are cross-objections in F. A. Nos. 191, 192, 194 and 196, and they have not been pressed. They are dismissed without costs. (Then their Lordships took appeals Nos. 62 to 93 of 1928 and dismissed them with costs).

V.B./R.K. *Appeals dismissed.*

A. I. R. 1933 Calcutta 314

RANKIN, C. J. AND MITTER, J.

Kanai Lal Misra—Appellant.

v.

Ram Nibash Bajaj and others — Respondents.

Appeal No. 219 of 1929, Decided on 26th May 1932, from original decree of Addl. Sub-Judge, Burdwan, D/- 2nd May 1929.

Practice—Substitution of legal representatives of defendant—Application for — Not only cause title should be corrected but plaint also should be amended showing how

legal representative is responsible for claim
—Civil P. C. (1908), O. 22, R. 4.

If some person who is not an heir or concessis of a deceased defendant is substituted in his stead it is necessary not merely that the name of the person should be substituted or added in the cause title but that the plaint should also be properly amended making the allegations according to which the plaintiff claims to treat the added defendant as in some way responsible for the debt of the deceased defendant and the method of treating the petition for substitution as part of the plaint is particularly objectionable because a petition is generally drawn very differently from a proper plaint.

On the death of the defendant the plaintiff made an application to the Court saying that K "has been possessing the deceased's moveable properties. Hence, for the purpose of meeting all sorts of objections, it is necessary to include the said K also in the category of the defendants" and upon that an order was made "plaintiff applies for substituting K of the address and particulars as mentioned in the petition in place of the deceased defendant 1. Be it so and the petition be treated as part of the plaint."

Held: that the petition disclosed no cause of action against the person proposed to be added except that he "has been possessing her moveable properties." That even if K be a legal representative at all, he could only be so added because he has intermeddled with the estate of the deceased defendant which she left at her death. The petition disclosed no such cause of action and hence the order was bad. [P 315 C 2; P 316 C 1]

Bijan Kumar Mukherjee, Sanat Kumar Chatterjee and Monilal Bhattacharjee—for Appellant.

Atul Chunder Gupta and Nagendra Nath Rose—for Respondents.

Rankin, C. J.—In my judgment this appeal succeeds. The plaintiff brought his suit asking for relief in the alternative: first of all, for declaration of title and possession of 200 bighas of land in Mauza Jaba in the Asansol District and alternatively, for judgment for Rs. 7,400 or, in default compensation. His case was that Rani Shyama Sundari Debi had given him a lease for 999 years of this property in Mauza Jaba and had received from him selami of Rs. 6,000 and nazar of Rs. 1,000 on or about 29th July 1920, that he was resisted by certain persons, defendants 2 and 3 in the suit, and had not obtained possession of the land demised and that he was entitled to a decree either for possession or else for recovery from the lady or her estate the sum of Rs. 7,400 which he had paid on that account. The suit itself was brought on 12th July 1922 and the lessor, Rani Shyama Sundari Debi, died on 18th Feb-

ruary 1927 pending the suit. Now, the heir of the lady's stridhan and also the person who was the reversioner after the lady's Hindu widows' estate to her husband was defendant 2, Raja Promotha Nath Malin, he being the son of her husband's brother and when the lady died it was, of course, quite proper that her heir should represent her estate. On 19th July 1927 however the plaintiff made an application to the Court saying that the present appellant Babu Kanai Lal Misra

"has been possessing the Rani's moveable properties. Hence, for the purpose of meeting all sorts of objections, it is necessary to include the said Kanai Lal Babu also in the category of the defendants"

and upon that an order was made on 19th July 1927:

"Plaintiff applies for substituting Kanai Lal of the address and particulars as mentioned in the petition in place of the deceased defendant 1. Be it so and the petition be treated as part of the plaint."

Upon that I desire to say that it seems to me that this is a signal example of a very bad practice in the lower Court. If it is desirable that some person who is not an heir or concessis of a deceased defendant should be substituted in his stead, it seems to me to be very necessary not merely that the name of the person should be substituted or added in the cause title but that the plaint should also be properly amended making the allegations according to which the plaintiff claims to treat the added defendant as in some way responsible for the debt of the deceased defendant; and this method of treating the petition as part of the plaint is particularly objectionable because a petition is generally drawn very differently from a proper plaint. In the present case, this petition discloses no cause of action against the person proposed to be added except that it says that he

"has been possessing her moveable properties. Hence, for the purpose of meeting all sorts of objections, it is necessary to include the said Kanai Lal Babu also in the category of the defendants."

Now, in that unfortunate state of things, the appellant filed a written statement. He stated that the plaintiff had no cause of action against him and that he was not concerned with the present suit. He further stated that :

"the late Rani made a gift of some of her moveable stridhan properties to this defendant; but, for that reason, this defendant cannot by any

means be liable for the money mentioned by the plaintiff."

The issues in the suit were settled long before. No issue was framed at the hearing with reference to this appellant and no reference to the appellant appears to have been made in the judgment until at the very end where the learned Judge says this:

"The decree money will be realized from the assets of the deceased defendant 1 Shyama Sundari in the hands of her representatives defendants 1ka to 1gha,"

thereby holding on some facts or other which do not appear to have been considered that for the purposes of the suit to establish a debt due by the deceased defendant this appellant is a legal representative. Of course, if he is a legal representative he would be liable only to the extent of the assets in his hands. In this case, the appellant has been held liable with certain other people. On what ground he has been added I do not know. Even if he is a legal representative at all, he can only be so added because he has intermeddled with the estate of Shyama Sundari which she left at her death. No facts whatever are to be discovered from the judgment in support of any such case: there is neither pleading, issue or evidence nor discussion of the matter. Now, before us it has been pointed out that the plaintiff put in evidence two deeds of gift executed by Rani Shyama Sundari Debi in favour of the appellant: one on 16th January 1919 and the other on 28th April 1920. These are deeds of gift relating to immovable properties. They are, I imagine, no evidence at all that the lady did not also make a gift of moveables. In addition to them certain documents were put in evidence which merely show, if they are evidence at all against the appellant, that he at various times claimed that by a deed of agreement, according to one document registered on 20th July 1922, he became entitled to certain moveables that at that time belonged to the Rani. The lady did not die till 18th February 1927. That, in no way, assists the plaintiff. The position is, as far as I can see, that, even assuming that it was competent to a person who sought to establish a debt due from the estate of the lady to raise in the same suit the question as to whether or not a stranger in addition to her heirs had interfered with her estate after her death, there is no evidence to

show that this appellant had at any time interfered with anything that at the date of her death was part of her estate. In my judgment the decree, in so far as it is passed against the present appellant, is entirely without foundation and must be reversed. The appellant must get the costs of this appeal and of the suit.

Mitter, J.—I agree.

R.K.

Appeal allowed.

A. I. R. 1933 Calcutta 316

MUKERJI AND GUHA, JJ.

Asharam Agarwalla—Plaintiff—Appellant.

v.

Umesh Chandra Bhowmik—Defendant—Respondent.

Appeal No. 392 of 1928, Decided on 17th March 1932, against original decree of Sub-Judge, Dinajpur, D/- 31st July 1928.

Civil P. C. (1908), O. 34, Rr. 4 and 5 (2)—Suit on mortgage—Court holding mortgage lien proportionately to property in possession of mortgagee discharged—Decree directing account due to plaintiff and in default of payment sufficient property to be sold—Decree held to be one under O. 34, R. 4.

During the pendency of the suit of enforcement of a mortgage the mortgage lien proportionate to the values of the jotes which came to be in the plaintiff's possession was regarded by the Court as discharged and he held that it remained attached to the other jotes only proportionately to their values. A decree was in a form which directed an account to be taken of what would be due to the plaintiff and ordered that in default of payment of the amount so due on a day within six months from the date of declaring in Court the amount so due, the mortgaged property or a sufficient part thereof be sold.

Held: that the decree was clearly a preliminary decree for sale in accordance with R. 4, O. 34, and hence appeal lay from such decree, although an application under sub-R. (2), R. 5 would be necessary and a final decree for sale will have to be made under that sub-rule before a sale takes place. [P 318 C 1]

Girija Prosanna Sanyal and Bijali Bhusan Sanyal—for Appellant.

Bireswar Bagchi and Satindra Mohan Chaudhuri—for Respondent.

Judgment.—This is an appeal by the plaintiff from a decree for sale passed in a suit for enforcement of a mortgage the amount secured by which was payable in instalments. The bond was for a principal amount of Rs. 7,500 and was dated 30th Aswin 1327=16th October 1920. The first instalment was payable in Chaitra 1327 and in default of payment thereof the whole amount was to

fall due on 1st Baisakh 1328=14th April 1921. On 28th March 1922 the suit was instituted, the claim being laid at Rs. 7,500 as principal, and Rs. 862-8-0 as interest. The defendants filed a written statement challenging the bond as fraudulent and void for want of consideration and upon other grounds, and also setting up a part payment of Rs. 92. A decree was passed *ex parte* against defendant 1. On the same day the claim against the other defendants was given up on compromise and as against them the suit was dismissed. On 8th January 1924, defendant 1 applied for setting that decree aside under O. 9, R. 13, Civil P. C. This application was dismissed for default on 14th June 1924, but was eventually restored and ultimately dismissed on the merits on 27th June 1925. On appeal to the High Court this dismissal was, by an order made on 12th April 1927, set aside and the suit was restored to hearing on condition that defendant 1, appellant, paid to the plaintiff all costs incurred by him in the restoration proceedings in the trial Court as also in the appeal within a given time. The condition was complied with and on 11th August 1928, defendant 1, who was now the sole defendant in the suit and will hereafter be referred to as the defendant, filed an additional written statement in which it was alleged:

(1) That the plaintiff had in execution of the *ex parte* decree got the mortgaged properties (34 items of jotes) put up to sale and purchased some of them in his own name and others in the benami of other persons; (2) that thereafter the landlord of jotes Nos. 1, 2, 3, 4, 5, 6, 7 and 21 got the said jotes sold up for arrears of rent and the plaintiff deposited the decretal amount and damages, that the landlord raised objection as to the plaintiff's *locus standi* to make the deposit, and a date was fixed for the hearing of the objection, but the plaintiff in the meantime secretly entered into an arrangement with the result that the sale was not set aside and the plaintiff himself took settlement of the said jotes from the landlord; and (3) that the plaintiff, without the knowledge of the defendant collusively put up jotes Nos. 29 and 32 to auction and purchased the same himself and was in possession and making large profits out of them.

The Subordinate Judge found that 13

of the jotes had been sold for arrears of rent, that all of them were sold in execution of decrees for rent obtained by the landlord and shortly thereafter the plaintiff obtained settlements of them from the landlord. He held that in those circumstances it could not be said that the plaintiff was in possession of the jotes as mortgagee and so he overruled the defendant's contention that the plaintiff was bound to render account of the profits that he had taken. He found that the rent sales had taken place on 2nd September 1924 and the plaintiff thereafter purchased the mortgaged property in execution of his *ex parte* decree on 19th September 1924, and that therefore at the time of the rent sales the mortgage lien was in force. The *ex parte* decree as well as the sale thereunder were subsequently set aside and with those we are no longer concerned. He held that if the landlord desired to annul the incumbrance it was incumbent on him to issue notices under S. 167, Ben. Ten. Act, but such notices were never issued. He found that the plaintiff fraudulently and in collusion with the landlord gave up his efforts to set aside the rent sales and withdrew the deposit he had made only with a view to get settlement of the jotes from the landlord, which he did in fact obtain thereafter. In these circumstances he held that

"the most equitable course would be to split up the mortgage and to hold it satisfied to the extent of the properties so taken leases of by the plaintiff."

As neither party had adduced any evidence to prove the values of the several jotes it was not possible to apportion the mortgage dues amongst the jotes. He directed an inquiry by a Commissioner as regards their values and in the meantime made a decree the terms of which will hereafter be set out. On the question of interest the Subordinate Judge held that the plaintiff was primarily responsible for the protraction of the suit, his view being that the constitution of the suit itself was unwarranted, and that the *ex parte* decree was not properly obtained, and that therefore for the four years that it took the defendant to get that decree set aside no interest should be allowed. The relevant portion of the decree, in the light of the contentions urged before us, is as follows:

"The suit is decreed in part for that portion of the claim which may be found due on apportionment between the 13 jotes sold for arrears of rent and taken leases of by the plaintiff. The portion of the principal amount so decreed would carry interest at the bond rate from institution of the suit up to the period of grace minus such interest for four years defendant 1 is given six months time for payment of the amount found due on apportionment and after the amount is declared. If no such payment is made by the defendant within the period of grace the jotes Nos. 10 to 15 and 17 to 20 and Nos. 22 to 28 and 31 to 34 or a sufficient part thereof would be sold."

A preliminary objection was taken on behalf of the respondent as regards the competency of the appeal, it being said that the decree is not a final decree for sale but is merely a decision embodying certain conclusions and directions under which the Commissioner is to hold "an investigation," and that a final decree can only be passed after the Commissioner has ascertained the values of the properties and on such valuation the defendant's liability has been fixed. We are not prepared to uphold this objection. A final decree for sale would, no doubt, ordinarily contain the ascertained amount of the mortgagor's liability. But in view of the events that had happened during the pendency of the suit the mortgage lien proportionate to the values of the jotes which came to be in the plaintiffs' possession was regarded by the Subordinate Judge as discharged and he held that it remained attached to the other jotes only proportionately to their values. In such circumstances a decree passed in a form which directs an account to be taken of what would be due to the plaintiff and orders that in default of payment of the amount so due on a day within six months from the date of declaring in Court the amount so due, the mortgaged property or a sufficient part thereof be sold, is clearly a preliminary decree for sale in accordance with R. 4, O. 34. It may be that an application under sub-R. (2), R. 5 would be necessary and a final decree for sale will have to be made under that sub-rule before a sale takes place. But a decree under R. 4 is none the less a decree from which an appeal lies. On the merits of the appeal two questions arise: First whether the order as to interest made by the Judge is right; and second whether the order as to the splitting up of the security and a proportionate mortgage lien to attach

to the remaining jotes in proportion to their value is proper.

The second question may be dealt with first. (His Lordship then dealt with the second question and concluded that the decree made by the Court below splitting up the mortgage lien, is just and fair.) As regards the other question, namely, whether the order as regards interest made by the learned Judge is right, we are of opinion that such an order was not justifiable and should not have been made. We cannot see how the plaintiff could be held liable for the protraction of the litigation for the period taken in setting the ex parte decree aside. We do not see why the learned Judge took the view that the suit was intentionally framed with unnecessary parties as defendants or that the ex parte decree was improperly obtained. His remarks in this connexion seem to us entirely unsupportable. Indeed, there was enough said in the judgment of this Court dated 12th April 1927 which would indicate that it was more as a matter of indulgence than anything else that the ex parte decree was set aside. As therefore we must hold that this appeal which the plaintiff has preferred was not altogether without justification, we cannot with propriety make an order disallowing him interest for the period during which it has been pending. We cannot therefore find any reason on which we can support a deduction of interest for four years as the Subordinate Judge has made or for any period at all.

The result is that the appeal should be allowed in part, the decree of the Court below being varied by deleting the order as to deduction of interest for four years contained therein. With that variation the said decree will stand. On a careful consideration of the facts and circumstances of the case we think we should make no order for costs in the appeal.

R.K.

Order accordingly.

A. I. R. 1933 Calcutta 318

JACK AND M. C. GHOSH, JJ.

Shamji Tricumdas Bhatia and others
—Petitioners.

v.

Ram Moye—Opposite Party.

Criminal Revn. No. 277 of 1932, Decided on 10th August 1932.

(a) Criminal P. C. (1898), Ss. 133, 135 and 139-A—Inquiry under S. 139-A — Still inquiry by jury under S. 135 can be claimed.

Even after an inquiry under S. 139-A it is open to a person against whom an order under S. 133 is made absolute to elect to have the matter tried by a jury after it has been decided by the Magistrate that there is no reliable evidence in support of the denial of the existence of the public way. [P 319 C 1]

(b) Criminal P. C. (1898), Ss. 133 and 138 — Civil suit pending does not bar continuance of proceedings under S. 138.

The fact that a civil suit has been instituted is no bar to the proceedings under S. 133 and it is within the jurisdiction of the Magistrate to continue the proceedings under S. 135.

[P 319 C 2]

Satindra Nath Mukerji and Baidya Nath Banerji—for Petitioners.

Probodh Ch. Chatterji and Purna Ch. Chatterji—for Opposite Parties.

Judgment.—This is a rule against an order of the Subdivisional Magistrate of Suri making absolute an order passed under S. 133, Criminal P. C., directing the petitioner to remove an unlawful obstruction on the alleged public road, on the ground that the learned Magistrate acted illegally in refusing to appoint a jury under S. 138, Criminal P. C. The learned Magistrate made an inquiry under S. 139-A on the denial of the petitioner that the road in question was a public road; and the Magistrate finding that there was no reliable evidence in support of the denial of the petitioner, was bound to proceed as laid down in S. 137 or S. 138. It is urged before us that before the Magistrate makes an inquiry as to whether there is evidence in support of the denial of the existence of a public way, the petitioner must have elected to have the matter tried by a jury under S. 135. But we think that it is still open to the petitioner to elect to have the matter tried by a jury after it has been decided by the Magistrate that there is no reliable evidence in support of the denial of the existence of the public way. We therefore set aside the order of the Magistrate directing the petitioner to remove the obstruction and send the case back to him for action under S. 138, Criminal P. C., according to law.

The other ground was that in view of the civil suit instituted, the proceedings before the learned Magistrate were without jurisdiction and the orders should be set aside or stayed pending the disposal

of the civil suits. The fact that the civil suit has been instituted is no bar to the proceedings and it is within the jurisdiction of the Magistrate to continue the proceedings under S. 138, Criminal P. C. The civil suit may take a long time, in the meantime it is quite competent to the Magistrate to decide the matter summarily under the Civil Procedure Code.

R.K.

Order accordingly.

A. I. R. 1933 Calcutta 319

JACK, J.

Mahommed Wasir—Plaintiff—Appellant.

v.

Sk. Majid and another—Defendants—Respondents.

Appeals Nos. 648 and 649 of 1930, Decided on 24th May 1932, against appellate decrees of Addl. Sub-Judge, Third Court, Sylhet, D/- 31st July 1929.

(a) Civil P. C. (1908), O. 41, R. 27 — Reasons must be recorded but opportunity to rebut need not be given.

Under O. 41, R. 27, wherever additional evidence is allowed to be produced by an appellate Court, the Court must record the reason for its admission. The Court need not however give an opportunity to the other party to rebut the evidence. [P 320 C 2]

(b) Landlord and Tenant — Rent — Change to kind from money — Evidence to prove change must be given.

If the rent is changed from money rent to paddy rent, there ought to be some evidence showing when the change took place and that the tenant's predecessor agreed to pay paddy rent as it is usual for the tenants to hold over on the same terms where they continue in occupation of the same holding. [P 320 C 2]

(c) Civil P. C. (1908), S. 100 — Rent whether payable in money or kind is question of fact.

The finding that money rent and not paddy rent is payable is really a finding of fact and if supported by evidence duly considered by the appellate Court, the finding should not be interfered with. [P 320 C 2]

(d) Evidence Act (1872), S. 115—Appeal.

Where two appeals are heard together apparently with the consent of parties, no party can subsequently complain that he has been prejudiced by the appeals being heard together. [P 321 C 1]

Priyanath Dutt—for Appellant.

Hemendra Kumar Das—for Respondents.

Judgment.—These two appeals have arisen out of two suits in which the plaintiff claims paddy rent. The defendants in the suits maintain that the plaintiff is not entitled to paddy rent and that money rent only is payable.

The trial Court in both cases decreed the suits for paddy rent. But on appeal the decrees were set aside and the suits were decreed at the money rent which the defendants claimed to have been payable. In Appeal No. 648 it is urged that the Court below was wrong in taking additional evidence without assigning any sufficient reasons therefor and without giving sufficient opportunity to the plaintiff to rebut the evidence. Under O. 41, R. 27, Civil P. C., wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason for its admission. There is no provision that the Court must give an opportunity to the plaintiff to rebut the evidence. We are concerned in the present case with the admissions in evidence by the appellate Court of the kabuliyat Ex. B from which it appears that the holding in question in Suit No. 408 was held by the defendant's predecessor at a money rent of Rs. 38.0. In his judgment the learned Subordinate Judge gives his reasons for admitting it, namely, that the defendant was a minor at the time the kabuliyat was executed and that he did not know of the execution of the kabuliyat before. So that the provisions of O. 41, R. 27 have been carried out as the reason for admission has in fact been recorded.

Then it is urged that the fact that money rent was fixed in this kabuliyat for the year 1301 B. S., is not difficult to show that the rent for a period of 30 years later was not paddy rent. This of course is true. But this is not the only circumstance which the appellate Court has taken into consideration. He has considered the probabilities of the case. He says that the evidence as to payment of paddy rent is discrepant and that the story of payment of paddy rent to plaintiff in 1330 B. S. by the defendant's predecessor is evidently false, because the touji papers show that the jote stood in the name of the defendant from 1327, so that the defendant's predecessor died before 1327 B. S. Then it is urged that the documents of the years subsequent to 1301 B. S. when the kabuliyat was executed, should have been considered and particularly the touji papers put in without objection; but the touji papers have been in fact considered the Judge noting that the writer of the

touji papers was not examined; and even the Munsif who gave a decree in favour of the plaintiff did not think it worth while to refer to the touji papers. He says it is hardly necessary to refer to the toujis upon which much comment has been made by the learned pleader for the defence. So that the touji papers were considered but not relied on to rebut the evidence showing that money rent was payable. If the rent was changed from money rent to paddy rent, there ought to have been some evidence showing when the change took place and that the defendant's predecessor agreed to pay paddy rent. The plaintiff claims that the lands were held on the same terms by the defendant's father and since at one time, that is, in 1301 B. S. he was holding the land at money rent presumably in the absence of any evidence to the contrary that money rent was paid in subsequent years although the kabuliyat was only for one year. In such cases it is usual for the tenants to hold on the same terms where they continue in occupation of the same holding.

Then it is urged that the Court was wrong in holding that certain farags which were filed by the defendant applied to the lands in suit and showed that rent for 1331 to 1332 was paid. The Judge says that as these farags relate to land only, they are necessarily for the lands in suit and that the defendants do not hold any other lands under the plaintiff. The kabuliyat Ex. 2 shows that the defendant does in fact hold other lands at money rent, this kabuliyat having been given by his predecessor for such lands. It is true that holding included a homestead. However there may be some doubt as to whether these farags relate to the lands in suit. They do not affect the merits of the case otherwise inasmuch as they do not indicate whether paddy rent or money rent is payable. But I think they are not conclusive evidence showing that rent of this holding was paid for the years 1330 to 1332 B. S. The finding that money rent and not paddy rent is payable is really a finding of fact and as it seems to have been supported by evidence duly considered by the appellate Court I think this finding should not be interfered with. The result is that the decree in this suit is modified

to the extent that the plaintiff will get rent for the years 1330 to 1333 B. S. at the rate of Rs. 4-0-3. The rent being more than Rs. 3-8-0 fixed by the kabuliya of 1301 B. S. is explained by the fact that the area has increased.

In Suit No. 58 out of which Appeal No. 649 arises it has been found that the toujis are not legally proved and that the plaintiff has totally failed to prove realization of paddy rent. It is true that the learned Subordinate Judge has referred to the evidence in the other suit, namely, Ex. B which he should not have done. But apart from this his judgment shows that the plaintiff has failed to prove the realization of paddy rent at any time. This is a finding of fact which I cannot interfere with. The appeals were heard together apparently with the consent of parties, so that I think the plaintiff cannot now complain that he has been prejudiced by the appeals being heard together. The result is that Appeal No. 649 is dismissed. Each party will bear their own costs throughout. Defendants to be ejected if the rent due is not paid within one month of the arrival of the record in the trial Court if not already deposited.

R.M./R.K.

Order accordingly.

A. I. R. 1933 Calcutta 321

RANKIN, C. J. AND M. N. MUKERJI, J.

Hamiduddin Khan—Appellant.

v.

Ramani Kanta Roy—Respondent.

Appeal No. 1224 of 1927, Decided on 4th June 1929

(a) Decree—Validity—Decree valid when passed—Subsequent legal amendment does not make it invalid—Bengal Tenancy Act (as amended by Act 4 of 1928), S. 178.

Where a decree is a good and valid decree quite in accordance with law as it was at the date when it was passed, it cannot, by reason of the subsequent amendment introduced, become bad.

[P 321 C 2; P 322 C 1]

(b) Bengal Tenancy Act (as amended by Act 4 of 1928), S. 178—Amendment has no retrospective effect.

The amending Act 4 of 1928, which provides that nothing in any contract between a landlord and a tenant made before or after the passing of that Act should affect the provisions of S. 67 relating to interest payable on arrears of rent, has not a retrospective operation. [P 322 C 1]

(c) Bengal Tenancy Act (as amended by Act 4 of 1928), S. 178—Purchasers held liable to interest stipulated in kabuliya.

The defendants, on a suit for rent or their predecessors purchased the jama under certain nobilas. They acquired the tenancy, but failed

to obtain recognition from the landlord and therefore purchased the tenancy again at the auction sale:

Held: that the defendants were liable to pay the high rate of interest stipulated for in the kabuliya. [P 322 C 2]

(d) Transfer of Property Act (1882), S. 3—Notice—Vendor and purchaser—Purchaser is deemed to have knowledge of terms of lease by vendor.

In the case of a private transfer, the transferee can and should call for the title deed of the vendor and, if there is a lease providing for interest at a high rate, the purchaser shall be taken to have become aware of such a contract and, in the circumstances, he must be taken to have had full knowledge of the terms of the lease and he cannot complain that the rate of interest is exorbitant. [P 322 C 2]

Hemendra Chunder Sen and Satyendra Chunder Sen—for Appellant.

Girija Prasanna Sanyal, Indu Prokash Chatterji and Bijali Bhusan Sanyal—for Respondent.

M. N. Mukerji, J. — This appeal has arisen out of a suit for rent. Defendants 2, 3 and 4 are the appellants. Rent was claimed in the suit for the years 1327 to 1330 B. S. and the whole controversy in this appeal is with regard to the interest that has been awarded by the Courts below. The said Courts have decreed interest at the rate of 6 per cent per mensem which was the rate agreed to be paid and mentioned in an unregistered kabuliya dated 1861. The defendants challenge the validity of the decrees passed by the Courts below as regards interest upon two grounds. The first contention that has been advanced on behalf of the appellants is to the effect that the decree as to interest should be set aside, inasmuch as, by reason of the amendment of S. 178, Ben. Ten. Act, introduced by Act 4 of 1928, the plaintiff is no longer entitled to recover interest at anything more than that allowed by S. 67 of the Act. It is conceded that, at the date on which the suit was instituted, there was nothing in the Act which would stand in the way of the plaintiff recovering interest at the kabuliya rate and it is further conceded that, even at the date when the decree of the lower appellate Court was passed, the law would not disentitle him to recover interest at that rate. The decree therefore according to the appellants' contention, was a good and valid decree quite in accordance with law as it was at the date when it was passed, but it is said that, by reason of the subsequent

amendment introduced by Act 4 of 1928, the decree has become bad.

This is a contention which I am not prepared to accept as well founded. The change made in the law by Act 4 of 1928 is to the effect that, while under the law as it stood before the amendment it was provided that nothing in any contract made between a landlord and a tenant after the passing of the Act should affect the provisions of S. 67 relating to interest payable on arrears of rent, by the amending Act it was provided that nothing in any contract between a landlord and a tenant made before or after the passing of that Act should affect the provisions of S. 67 relating to interest payable on arrears of rent. It is contended that this amendment should have retrospective effect. I do not find any word either in S. 178 or anywhere else in the amending Act which gives this amendment a retrospective operation; and, so long as it cannot be said that the decree was not in accordance with the law as it stood at the date when it was passed, the appellants, in my opinion, are not entitled to succeed in the present appeal so far as this contention is concerned.

The next ground upon which the decree as regards interest is challenged is to the effect that, as the defendants in the present case are auction-purchasers in respect of the tenancy and inasmuch as the terms of the kabuliyat and the rate of interest specified therein were not mentioned in the sale proclamation, they had no knowledge as regards the rate of interest and that therefore such a heavy rate of interest which is not one of the ordinary incidents of the tenancy is not a rate of interest which the defendant should be held liable to pay on the arrears. Now, there is some conflict of judicial opinion on the question as to whether in a case in which the defendants who are purchasers of a tenancy at an auction sale are or are not liable to pay the high rate of interest stipulated for in the kabuliyat when, in point of fact, the same was not brought to their notice either by the sale proclamation or in some other way. But, in the present case, the finding of the learned Subordinate Judge, as I read it, amounts to this: that the defendants or their predecessors purchased the jama under certain *kobalas*.

They thus acquired the tenancy, but

they failed to obtain recognition from the landlord and therefore they purchased the tenancy again at the auction sale. This being the position, the case comes directly within the purview of those rulings in which it has been held that, in the case of a private transfer, the transferee can and should call for the title deed of the vendor; and, if there is a lease providing for interest at a high rate the purchaser shall be taken to have become aware of such a contract and, in the circumstances he must be taken to have had full knowledge of the terms of the lease and he cannot complain that the rate of interest is exorbitant. It is true that, in the present case, the defendants subsequently made an auction purchase of the tenancy. That however cannot alter their liability. In point of fact, they had come in, as it has been found by the learned Subordinate Judge, that they did under a private purchase from the previous tenants. This contention also, in my opinion, has no substance. The appeal accordingly, in my opinion, fails and is dismissed with costs.

Rankin, C. J.—I agree.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 322

GUHA AND M. C. GHOSE, JJ.

Bejoy Kumar Addy—Appellant.

v.

Corporation of Calcutta—Respondent.

Appeal No. 809 of 1930, Decided on 7th July 1932.

(a) Calcutta Municipal Act (1923), S. 3 (5)—Meaning of bazar in Act is same as ordinary meaning—But though held on particular days with no right to sellers to occupy particular place can be bazar.

In Bengal generally *bats* are held on a particular day or days in a week, while *bazars* are held daily. The *bats* and *bazars* consist of a number of shops, large and small—these shops are places in which goods are sold by retail. The meaning given to a bazar by the Calcutta Municipal Act does not therefore militate against the ordinary meaning of the word, and a bazar which is known as a *bat*, for the reason that it is held on a particular day or days in the week, would not cease to be a bazar. That the sellers of commodities assemble only one day at a bazar, and have no sort of right of occupying any particular place for the sale of their commodities cannot have the effect of taking the place occupied by them, out of the category of shops—a collection of which would ordinarily be denominated a bazar, and a bazar within the meaning of the Calcutta Municipal Act.

[P 323 C 2; P 324 C 1]

(b) Interpretation of Statutes—Meaning of language must be determined.

It may sometimes be difficult to ascertain what the legislature exactly meant, but the Court must determine what its language means: *Palmer v. Thatcher*, (1878) 3 Q. B. D. 316 and *Rothschild v. Inland Revenue*, (1894) 2 Q. B. 142, *Ref.* [P 224 C 1]

(c) Calcutta Municipal Act (1923), Ss 389 and 400—Power to define limits includes power to extend—Defining and extending can be done together.

The power to define limits must include the power to extend the limits according to the facts and circumstances of a particular case. There need not be a previous resolution passed, before action could be taken under S. 400 of the Act, for the purpose of defining the limits of a bazar, with a view either to extend the limits or curtail the same, as the necessity of a case might require. Both the things could be done at the one and the same time. [P 321 C 2]

Surat Chandra Rai Chaudhuri and *Gour Mohan Dutt*—for Appellants.

Brojo Lal Chuckerbutty and *Gopendra Krishna Banerji*—for Respondent.

Guha, J.—The plaintiffs in the suit out of which this appeal has arisen prayed for a declaration that the Corporation of Calcutta had illegally declared premises No. 56, Chetla Road, a bazar, and for a further declaration that the action of the Corporation in extending the limits of the bazar to premises Nos. 56-1, 56-2, 56-3 and 58, Chetla Road, was ultra vires and without jurisdiction. The plaintiffs also prayed for permanent injunction in the matter of the prosecution of the plaintiffs before the Municipal Magistrate on failure to comply with the Corporation's requisition to make improvements of the area comprised in the premises mentioned above. The plaintiffs' claim in the suit was resisted by the Corporation of Calcutta, who claimed that the action of the Corporation to which reference had been made in the plaint was legal and intra vires, and that the premises mentioned above in regard to which the plaintiffs were served with requisition for making improvement constituted a bazar as defined by the Calcutta Municipal Act. The Courts below have agreed in holding that premises No. 56 Chetla Road was a bazar, but that the act of the Corporation in including premises Nos. 56-1, 56-2, 56-3 and 58 Chetla Road within the limits of the bazar at No. 56 Chetla Road, was ultra vires. The Courts below have agreed in granting consequential reliefs following upon their decision as mentioned above. The plain-

tiffs have appealed to this Court from the decision of the Courts below, so far as it went against them in regard to premises No. 56 Chetla Road; and cross-objections have been preferred by the Corporation of Calcutta, respondent in this appeal, challenging the decision of the Courts below holding that the action of the Corporation, so far as it concerned the other premises Nos. 56-1, 56-2, 56-3 and 58 Chetla Road was ultra vires.

The first question requiring consideration in this appeal is whether premises No. 56 Chetla Road was legally declared to be a bazar. If that question be decided against the plaintiffs-appellants questions relating to the action of the Corporation of Calcutta in regard to the other four premises mentioned above would have to be considered in disposing of the cross-objections by the respondent in appeal. The premises No. 56 Chetla Road is the khas property of the plaintiffs, and is known as Jamahata or Darjihata, where on every Wednesday a hat is held for the sale of ready made clothes, such as shirts, coats and other wearing apparel; and many hundreds of sellers with their goods congregate there. The Munsif made a local inspection of the place, and in his opinion, as recorded in his judgment, the place "was of enormous dimensions." According to the plaintiffs themselves, the sellers congregate under a structure made of corrugated iron sheets, once a week, and the sellers pay tolls to the plaintiffs. The question then is whether or not No. 56 Chetla Road is a "bazar" which under the Calcutta Municipal Act, 1923, means "any place of trade (other than a market) where there is a collection of shops." It has been pointed out that a shop according to the Oxford Dictionary is "a building or room set apart for the sale of merchandise." In Bouvier's Law Dictionary we find "a place kept and used for sale of goods" is a shop. The real meaning of the word "shop" as used in the Calcutta Municipal Act must however be ascertained according to the meaning which the word has acquired in the country or the locality where the statute is applicable, and that must be taken to be the ordinary meaning of the word. In Bengal generally, hats are held on a particular day or days in a week, while bazars are held daily. The hats and bazars consist of a number

of shops, large and small—these shops are places in which goods are sold by retail. The meaning given to a bazar by the Calcutta Municipal Act does not therefore militate against the ordinary meaning of the word, and a bazar which is known as a hat for the reason that it is held on a particular day or days in the week, would not cease to be a bazar. That the sellers of commodities assemble only on one day at a bazar, and have no sort of right of occupying any particular place for the sale of their commodities cannot have the effect of taking the place occupied by them, out of the category of shops a collection of which would ordinarily be denominated a bazar and is a bazar within the meaning of the Calcutta Municipal Act. It would appear that S. 336, Bengal Municipal Act, defining a market to be a number of shops, stalls, or standings erected for the sale of goods, is more in accordance with state of things prevalent in this country than the somewhat artificial distinction made by the Calcutta Municipal Act which cannot be overlooked, as between a market and bazar and a stall and a shop, by provisions contained in Ss. 3 (5), 3 (39), 399 and 400 of the Act. It may sometimes be difficult to ascertain what the legislature exactly meant but we must determine what its language means: see *Palmer v. Thatcher* (1) at p. 353; *Rothschild v. Inland Revenue* (2) at p. 145. On giving a plain meaning to the language used in S. 3 (5), we have no hesitation in coming to the conclusion that premises No. 56 Chetla Road, described as a Jamahata or Darji-hata is a place of trade where there is a collection of shops, and as such the act of the Corporation of Calcutta in declaring the same to be a bazar was not ultra vires or illegal in any way. This disposes of the appeal by the plaintiffs in the suit; the declaration prayed for by the plaintiffs that the premises No. 56 Chetla Road was not a bazar must be refused.

As indicated already the respondent in this appeal has preferred cross-objections directed against the decision arrived at by the Courts below that the act of the Corporation of Calcutta in extending the limits of the bazar to premises Nos. 56/1 56/2 56/3 and 58

Chetla Road, was ultra vires. The position so far as this part of the case before us is concerned, appears to be this: the four premises mentioned above are the front portion of premises No. 56 Chitla Road, and they abut on the public road; they are held by tenants settled by the plaintiffs as the owners; the tenants so settled have their permanent shops there, which have been separately assessed and numbered by the Corporation, and in respect of which separate licenses are granted by the Corporation, license taxes being paid by the shopkeepers themselves. As held by us, premises No. 56 is a bazar and the question is whether the Corporation had the power vested in it under the law to determine the limits of that bazar by the inclusion of the four other premises mentioned above. The provisions contained in S. 400 of the Calcutta Municipal Act, under which the Corporation acted in this behalf give power to define the limits of any bazar. The power to define limits must, in our judgment include the power to extend the limits according to the facts and circumstances of a particular case. If in the opinion of the Corporation, it was expedient or necessary to include premises Nos. 56/1, 56/2, 56/3 and 58 Chetla Road within the limits of the bazar at No. 56, the action taken by the Corporation in this behalf could not be characterized as ultra vires or illegal.

The Resolution of the Calcutta Corporation, Ex. a (3), passed on 12th May 1926, shows clearly that these four premises along with premises No. 56 were declared to be a bazar and the previous Resolution of the Corporation dated 16th September 1925, defining the limit of the said bazar under S. 400, Calcutta Municipal Act, was adhered to. It would be doing violence to the language of the statute if we were to hold that there must be a previous Resolution passed, before action could be taken under S. 400 of the Act, for the purpose of defining the limits of a bazar; with a view either to extend the limits or curtail the same as the necessity of a case might require. Both the things could, under the law, as it stands, be done at the one and the same time as it appears to have been done in the case before us. The fact that the shops in the four premises in

1. (1878) 3 Q B D 316=47 T J M C 51.

2. (1894) 2 Q B 142=54 J P 399.

question were occupied by tenants under the plaintiffs, could not affect the operation of S. 400 in any way. The provisions of the law as contained in Ss. 399 and 400, speak of both the owner and the occupier, and it may be open to the owner or the occupier to raise any objection that he may be entitled to raise, when the Corporation takes action under any of those sections. It is somewhat difficult to appreciate how in the face of definite provisions of law, the "strong and valid" reasons, mentioned in the judgment of the trial Court and upon which stress was laid in the course of argument before us, could weigh in favour of the plaintiffs in the suit nor is it possible to hold that there was any equity in favour of the plaintiffs which could make the action of the Corporation ultra vires.

The position that the shopkeepers occupying the premises in question as tenants of the plaintiffs, had been granted separate licenses could not possibly stand in the way of amalgamation of these shops with the bazar at No. 56 Chetla Road and there was no question of unfairness on the part of the Corporation in its having taken action under S. 400, Calcutta Municipal Act. Our conclusion therefore is that the Courts below were not justified in granting a declaration to the plaintiffs in the suit that the act of the defendant Corporation in including premises Nos. 56/1, 56/2, 56/3 and 58 Chetla Road within the declared bazar at No. 56 Chetla Road, was ultra vires. It may be open to the plaintiffs on a prosecution being started by the Corporation against them to raise in defence, any objection that may be raised under the law, as the owners and not the occupiers of these premises, which in our judgment have legally been included within the limits of the bazar at No. 56 Chetla Road.

In the result the appeal by the plaintiffs is dismissed, and the cross-objections preferred by the defendant-respondent are allowed; the plaintiffs' suit is dismissed. The parties are to bear their own costs in all the Courts.

M. C. Ghose, J.—I agree.

M.N./R.K.

Suit dismissed.

A. I. R. 1933 Calcutta 325

GUHA AND M. C. GHOSE, JJ.

Umesh Chandra Mendal—Appellant.

v.

Hemanga Chandra Maity—Respondent.

Appeal No. 2720 of 1930, Decided on 13th May 1932.

(a) Limitation Act (1908)—Applicability—Provisions of Act applicable—English decisions need not be referred to.

The Indian Limitation Act has to be followed by Courts in India in considering the rules of limitation applicable to a case; where there is sufficient guidance given by the provisions contained in the Limitation Act there is no justification for borrowing rules of limitation from decisions by Courts in England, based upon a statute altogether different in language from the statutory provisions contained in the Limitation Act. [P 327 C 1]

(b) Limitation Act (1908), S. 20—Payment of principal by mortgagor after transferring portion of mortgaged property extends limitation against transferees.

A mortgagor after transferring a portion of the mortgage properties made payments towards the mortgage debt. Mortgagee brought the suit after 12 years from the date when the mortgage debt became payable but within 12 years from the repayments.

Held: that the suit against transferees also was not barred: 1 U L J 337, Dist. [P 327 C 2]

(c) Civil P. C. (1908), O. 34, R. 1—Non-compliance is not fatal—Suit against all defendants—On death of one some representatives brought on record—Suit does not fail even partially—Civil P. C. (1908), O. 1, R. 9 and O. 22, Rr. 4 and 5.

Non-compliance with the provisions of O. 34, R. 1 is not fatal to a suit for enforcing a mortgage and the provisions of O. 1, R. 9, are applicable to a mortgage suit.

Where after the death of one of the defendants who was a subsequent purchaser some but not all representatives were brought on record after notice, the suit does not fail for non-joinder whether partially or wholly: A I R 1925 Cal 152, Ref; 1 Pat L J 468, Foll. [P 328 C 1]

(d) Civil P. C. (1908), O. 22, Rr. 4 and 5—Suit by mortgagee—Legal representatives of one of defendants substituted after notice to all—Objection as to proper representation must be brought at earliest opportunity.

The question of representation of the interest of a defendant in a suit for enforcement of a mortgage cannot be allowed to be raised after the legal representatives of the deceased defendant have been substituted by the Court under O. 22, Rr. 4 and 5, on notice to all the parties concerned. Failure to object to the substitution at the earliest opportunity precludes the defendants to reopen the question of representation. [P 328 C 2]

(e) Civil P. C. (1908), S. 11—Mortgage suit—Question of paramount title raised but not decided—Question does not become res judicata.

Question of paramount title raised by the defendants if expressly left open by the Courts

in a mortgage suit will not operate as *res judicata* in a subsequent suit by the defendants.

[P 829 C 1]

Hari Charan Ganguly and Indu Prakash Chatterjee—for Appellant.

Sarat Chandra Bose and Sarat Chandra Janah—for Respondent.

Judgment.—The plaintiffs in the suit out of which this appeal has arisen prayed for a decree for sale of properties mortgaged by defendant 1 in the suit. The mortgage was executed in favour of Srinath Maity on 14th Chaitra 1314 A. S. and all the plaintiffs are interested in the same as members of a Hindu joint family. The properties mortgaged consisted of several plots of land, and we are only concerned with plots 6, 7 and 8 mentioned in the plaint. The plaintiffs' claim in suit was resisted by the defendants. The mortgagor, defendant 1, raised all possible defences available to him, including the satisfaction of the mortgage debt. It may be mentioned that all the pleas raised by defendant 1 have been overruled by the Courts below, and the appeal before us does not relate to the case sought to be made out by defendant 1. Defendants 4 to 9, 11 and 12, appellants in this Court, contested the suit as persons claiming through one Baidyanath Mondal, the purchaser of plots 6, 7 and 8 from defendant 1 and his brother Chaitanya Charan Sow, by two different *kabalas* executed on 10th Agrahayan and 14th Agrahayan 1316 B. S. It was alleged that after the purchase by Baidyanath, there was recognition of the transfer by the plaintiffs, who were co-sharer landlords in respect of the properties purchased from defendant 1 and his brother. A question of estoppel was raised by the defendants so far as this part of the case was concerned. The defendants pleaded limitation, and contended that the suit instituted after the expiry of twelve years from the date fixed for payment of the mortgage money was barred by time.

A question of marshalling also appears to have been attempted to be raised by the defendants. The position sought to be taken up by them in this part of the case was this: that their predecessor-in-interest was a bona fide purchaser of a portion of the mortgaged properties without notice of the plaintiffs' mortgage, and they were therefore entitled to the benefit of the doctrine of marshalling,

and that at any rate the properties 6, 7 and 8 of which they were purchasers should be sold, if necessary, after the other mortgaged properties had been sold. Another aspect of the case for defendants 4 to 9, 11 and 12 arising out of events that happened in the course of the suit, and during its pendency in the trial Court, requires notice. One of the defendants No. 10 died on 10th August 1927. The two brothers of that defendant already on the record were substituted in his place as the legal representatives of the deceased defendant; but the mother of defendant 10 was not brought on the record. On this state of facts it was sought to be made out that the suit should have been dismissed on the ground of non-joinder of necessary party.

The trial Court totally negatived the defence of the contesting defendants in the suit, and passed a mortgage decree in favour of the plaintiffs in usual terms, directing the sale of the mortgaged properties in default of payment of the mortgage debt in terms of the decree. On appeal by defendants 4 to 9, 11 and 12 the learned Additional District Judge modified the decision and decree passed by the trial Court on the ground that the suit had abated so far as the mother of the deceased defendant 10 was concerned, and reduced the amount of the mortgage debt recoverable by the plaintiffs in the suit by the amount of Rs. 65. Defendants 4 to 9, 11 and 12 have appealed to this Court, and cross-objections have been preferred by the plaintiffs in regard to the reduction of the mortgage debt recoverable by them by Rs. 65 as mentioned above. (The question of estoppel was held against the defendants on facts and the judgment proceeded). The plea of limitation raised by the defendants rested, as indicated above upon the fact that payments made towards the satisfaction of mortgage debt after the purchase of Baidyanath Mondal in 1316, could not be of any avail to the plaintiffs, seeing that the suit was instituted more than 12 years after the date fixed for repayment of the mortgage money. Reliance was placed on *Newbould v. Smith* (1), in support of this position. That case no doubt is an authority for the proposition that payment of interest by the mortgagor who

remained liable, ex contractu to pay the debt, though he had previously assigned the mortgaged property to a third person was in a suit to enforce the mortgage security, held to be insufficient to keep alive the mortgagee's claim against the assignee and the mortgaged property. The decision in *Newbould v. Smith* (1) is in conflict with the view expressed on the subject by the Privy Council in *Lewin v. Wilson* (2), and the correctness of the decision was questioned before the House of Lords [see *Newbould v. Smith* (3) at pp. 426 and 428]; but their Lordships did not express any opinion on the decision one way or the other. So far as this Court is concerned *Newbould v. Smith* (1) has not been followed, and *Lewin v. Wilson* (2) was given the preference in a suit for possession under Art. 146, Sch. 2, Lim. Act, 1877, *Domi Lal v. Roshan Doley* (4). The Limitation Act has to be followed by Courts in India in considering the rules of limitation applicable to a case; and whereas in a case—so the one before us, there is sufficient guidance given by the provisions contained in Ss. 19 and 20, Lim. Act, there would be no justification in our borrowing rules of limitation from decisions by Courts in England, based upon a statute altogether different in language from the statutory provisions contained in Ss. 19 and 20, Lim. Act. Furthermore, in the case before us, the purchaser-defendants were transferees from the mortgagor in respect of a portion only of the mortgaged property, consisting of several items; and in such a case, there can be no doubt that the rule laid down by the House of Lords in *Chinnery v. Evans* (5) at p. 135, namely, that where estates A, B and C are included in one mortgage, and the owner of A pays interest, the mortgagee's remedy against B and C is preserved, is the rule that must be applied.

The mortgagor, in the case before us, had in him the title to 9 bighas 10 cottahs of land after the sale to Baidyanath Mondal, the predecessor-in-interest of defendants 4 to 9, 11 and 12 in 1316, of the plots 6, 7 and 8 out of the several items of the mortgaged properties; and as such there is no substance in the

contention advanced by the defendants that payments by the mortgagor towards the satisfaction of the mortgage debt after 1316, could not keep the mortgagees right alive, so far as the enforcement of the mortgage security was concerned. It may be mentioned that the decision of this Court in the case of *Surjiram Marwari v. Berhamdeo Persad* (6), which has been cited before us in support of the appellants' contention on the question of limitation does not appear to throw any light on the point arising for consideration in the present case, in view of the facts and circumstances mentioned above. In that case Mookerjee, J., based his views as expressed at pp. 314 to 316 on the decision in *Holding v. Lane* (7) and quoted from Lord Westbury's judgment which contained amongst other things, observations like these: The mortgagor or his representatives who have no interest whatever in the lands, should not be enabled to charge the estate anew with any amount of arrears of interest against second and subsequent mortgagees, and that a departure from such a course would involve consequences inconsistent with natural justice. The learned Judge Mookerjee, J., also referred to *Chinnery v. Evans* (5) in dealing with the facts of the particular case before him. It is difficult to make out how the decision in *Surjiram Marwari's* case (6) or any of the observations made by Mookerjee, J., in that case could support the appellants' position so far as the question of limitation was concerned, in view of the fact that the mortgagor-defendant 1, in the suit, had an interest left in him in a portion of the mortgaged properties; when payments were made by him towards the satisfaction of the mortgage debt in 1322, 1327, 1329 and 1332, well within 12 years before the institution of the suit out of which the appeal has arisen. The contentions raised on behalf of the appellants leaning upon the question of limitation must, in our judgment, be overruled.

It has been urged on behalf of the appellants that the suit brought by the plaintiffs had abated as a whole, on the failure on the part of the plaintiffs to bring all the heirs of defendant 10 on the record within the time allowed by

2. (1866) 11 A C 639=55 L J P C 75.

3. (1889) 14 A C 423=C1 L T 814.

4. (1907) 33 Cal 1278=11 C W N 107.

5. (1864) 11 H L C 115=10 Jur (n s) 855.

6. (1906) 1 C L J 937.

7. (1863) 1 Deg J & S 112=32 L J Ch 219.

law. With reference to the question of abatement thus raised, mention has already been made of the fact that two of the brothers of that defendant 10 were substituted by the plaintiffs in proper time; no objection as to non-representation or want of complete representation of the interest of defendant 10, was raised when the other defendants had notice of the application for substitution made by the plaintiffs in the suit. The order for substitution was duly made by the trial Court, on 3rd September 1927. The fact that defendant 1 had a mother living, came out at that stage of the suit when witnesses were being examined by the defendants, after examination of the witnesses for the plaintiffs in Court. One of the witnesses for the defendants stated in his deposition that defendant 10 who had died, had his mother living at the time of his death. The point made by the defendants-appellants comes to this. There was no complete representation of the interest of defendant 10 in the suit after that defendant's demise. There was a fatal defect on account of non-joinder of a necessary party in the mortgage suit, and the suit must therefore fail. So far as non-joinder of parties is concerned, the suit could not be defeated in its entirety on that ground.

It is well settled now, so far as this Court is concerned, that non-compliance with the provisions of O. 34, R. 1, Civil P.C., was not fatal to a suit for enforcing a mortgage and that the provisions of O. 1, R. 9 were applicable to a mortgage suit: see *Khirdamoyee v. Habib Shuh* (8) and the cases referred to there. The decision of the Patna High Court in *Girwar Narayan v. Mt. Mahbunnessa* (9), on which reliance has been placed on behalf of the appellants cannot be accepted, in so far as it goes against the decisions of this Court, on the question under consideration. Furthermore, the case before the Patna High Court related to the non-joinder of the mortgagee as a plaintiff in a mortgage suit, and cannot be accepted as laying down the rule that O. 1, R. 9 was controlled by O. 34, R. 1, Civil P.C., even in the case of subsequent purchasers in the position of defendants-appellants before us. So far as non-representation of the com-

plete interest of defendant 10 was concerned, the question has to be decided on the basis of the facts of the case before us. The question of representation of the interest of defendant 10 in the suit, could not be allowed to be raised after the legal representative of the deceased defendant had been substituted by the Court under O. 22, Rr. 4 and 5, Civil P.C., on notice to all the parties concerned. Failure to object to the substitution of defendants 8 and 9 in the place of defendant 10 at the earliest opportunity precluded the defendants-appellants to reopen the question of representation of the interest of defendant 10 in the suit: see *Meenatchi Achi v. Anantha Narayana Ayyar* (10); and *Balabai v. Ganes Shankar* (11). The mere fact that there was a mother living at the time of the death of defendant 10 elicited during the examination of a witness in Court, long after the order for substitution of the legal representatives of that defendant had been made, would not, in our judgment, enable the defendants-appellants to succeed on the question of abatement of the mortgage suit as a whole; or for the matter of that in respect of the interest of defendant 10 with interest, if any, of the mother of defendant. In the above view of the case we have no hesitation in coming to the conclusion that no question of abatement in any shape, could arise in the case before us; and that the plaintiffs were entitled to a decree for the entire amount due on the mortgage bond, on the basis of which the plaintiffs had instituted their suit.

The question of marshalling attempted to be raised by the defendants-appellants, cannot properly be gone into in the case before us, where the rights of subsequent purchasers in the position of those defendants are concerned in view of the definite provisions contained in S. 81, T. P. Act. So far as the point pressed before us that the Court should direct the sale of mortgaged properties other than those conveyed to the defendants-appellants in the first instance, for the satisfaction of the mortgage debt was concerned, we need only observe that we are unable to find any such equity in favour of the appellants which might enable them to get a relief of that des-

8. A I R 1925 Cal 152=32 I C 688.

9. (1916) 1 Pat L J 468=36 I C 542.

10. (1903) 26 Mad 224=12 M L J 830.

11. (1903) 27 Bom 162.

cription. The question of paramount title as raised by the defendants-appellants, has been expressly left open by the Courts below. In our judgment the Courts below have, in accordance with the trend of judicial decisions, rightly—held that the title of Chaitanya Charan Sow, the brother of defendant 1, as pleaded by the contesting defendants, could not be decided in the present case; and as mentioned by the learned Additional District Judge in the Court of appeal below, the rule of *res judicata* will not operate against the appellants in any way, if they desire to agitate that question of title hereafter in any Court of justice.

The learned advocate for the plaintiffs-respondents has urged before us, that according to a stipulation contained in the mortgage bond, on the basis of which the suit out of which the appeal has arisen, was instituted, the right of alienation in any form was expressly prohibited, so far as the mortgagor was concerned and as such the purchasers (defendants 4 to 12) were not necessary parties at all, that the mortgagors were entitled to a decree against the properties in the hands of the purchasers by virtue of unauthorized transfers. The point raised in this behalf was not considered in any form, by the Courts below; and we are not prepared to go into the matter in second appeal. Furthermore, it is not at all necessary for us, to decide the question raised for the first time before us in view of the conclusions we have arrived at in favour of the plaintiffs-respondents, on other points arising for determination in this appeal. In the result the appeal is dismissed and the cross-objections preferred by the plaintiffs-respondents are allowed. The decree of the Court of appeal below so far as it modified the decrees of the trial Court is set aside, and the decree of the trial Court is restored. The plaintiffs-respondents are entitled to their costs in this Court and the costs in the Court of appeal below. We make no separate order as to costs in the cross-objections.

M.N.

*Appeal dismissed.***A. I. R. 1933 Calcutta 329**

MITTER AND M. C. GHOSE, JJ.

Taraprasanna Ganguly and others—
Decree-holders—Appellants.

v.

Naresh Chandra Chakrabarty and others—
Judgment-debtors—Respondents.

Appeal No. 211 of 1932, Decided on 25th January 1933.

(a) Decree—Construction—Reasonable construction should be put.

A reasonable construction must always be put on a decree and the Court should always lean against a construction which renders a decree inexecutable. [P 331 C 2]

(b) Decree—Liability under—Decree against managing committee of school is binding on school and can be executed against assets of school—Members paying debt are entitled to be indemnified out of assets of school—Civil P. C., O. 1, R. 8.

A decree against the managing committee of an unincorporated association, for example a school, with a direction that the managing committee are not personally liable must be reasonably construed to mean a decree against them in their representative capacity and binds the school even if the members of the managing committee change after the decree; such a decree can be executed against the assets of the school at the time of execution; it is enough if all the members of the present managing committee are on the record before execution is to proceed with and the members of the managing committee if they pay the debt due by the school are liable to be indemnified out of the assets of the institution. [P 331 C 2; P 332 C 1]

(c) Civil P. C. (1908), O. 1, R. 8—Suit against all members of managing committee of school—Addition of another member due to change in personnel of committee long after time in appeal does not make representation ineffective.

In a suit against a school, all the members of the managing committee on date of suit were impleaded. A member who came into the committee subsequently owing to a change in the personnel of the committee was added as a party only long after the time in the appeal.

Held: that O. 1, R. 8, did not apply to the case and that as the committee stood in law for the school, the decree against them binds the school irrespective of the change in the personnel of the committee. [P 332 C 1]*Atul Chandra Gupta and Amarendra Mohan Mitra—*for Appellants.*S. C. Basak, Jitendra K. Sen Gupta and Satindra N. Roy Chowdhury—*for Respondents.*Mitter, J.*—This is an appeal on behalf of the decree-holders and is directed against an order dismissing their application for execution of a money decree obtained in their favour. The circumstances which have led to the order appealed against may be briefly stated thus: The appellants instituted a suit

against the Secretary, Ex-Officio President and the then members of the Madaripur Donovan Girls' School Committee, (who were all named in the plaint) for recovery of Rs. 5,728 due on bills on account of a contract entered into on 7th March 1925 between the appellants and the then school committee for the construction of the school premises. Various defences were taken in the suit amongst which it is necessary to notice only one, namely, that the suit was not maintainable as the personnel of the managing committee had changed since the date of the agreement. On 9th February 1931 the appellants' suit was decreed in part for Rs. 1,561-12-0 with interest Rs. 699-8-0 and costs and it was directed that the decree shall not be executed personally against the defendants. Against this decree the plaintiffs-appellants preferred an appeal to the High Court (F. A. No. 148 of 1931) in which the defendants to the suit preferred cross-objections. Both the appeal and the cross-objections are pending determination in this Court. It may be mentioned here that on the issue as to the maintainability of the suit in the form in which it was laid was decided in favour of the plaintiff and the Subordinate Judge was of opinion that:

"there is no reason why the suit could not be legally instituted against the institution although its members were changed."

The appellants applied for the execution of the decree in execution case No. 59 of 1931; and as after the decree in the suit three members of the managing committee went out of office and three new members were substituted in their place, the appellants brought the new members on the record and subsequently another member Miss Kiranbala De, was added as a party to the execution proceedings as another new member of the school committee. The plaintiffs-appellants prayed for attachment and sale of the moveables of the judgment-debtor which were lying in the Donovan Girls' School and Boarding premises and of the money lying in certain Madaripur Banks in the name of the Secretary and Joint Secretary as also of other moneys held by the Secretary on behalf of the School Committee either with himself or in the Madaripur Post Office. The plaintiffs prayed that if necessary the attachment and the sale of the immova-

ble properties of the judgment-debtor might also be effected. Various objections were raised in three petitions of objections (1) by 8 members of the old school committee, (2) by the three new members, (3) by another new member in three miscellaneous cases. The principal objections need only be noticed. They are: (a) that the decree cannot be executed against the assets of the school, (b) that the decree was not against the committee or at all events not against the present committee as the personnel of the committee has since changed. These objections have prevailed with the Subordinate Judge below. Hence the present appeal by the plaintiffs' decree-holders. The Subordinate Judge is of opinion that as there is no decree against some of the present members of the school committee the petition for execution can only be executed against what the present members and the outgoing members held or owned as the managing committee of the school and

"as the petition for execution was not on that footing as the former body was not on the petition."

the petition must be dismissed. The lower Court recognizes that this position sounds startling and absurd, but nevertheless gives effect to the objection as he considers that his duty is to construe the decree as he finds it. His reasoning is that the school committee is not a Corporation which remains constant though its members change; that it is not a firm, that it was not sued as a fluctuating class by a representation under O. 1, R. 8, Civil P. C., and that on no conceivable theory he could call the new members judgment-debtors. Mr. Atul Chandra Gupta who appears for the appellants has attacked this reasoning of the Subordinate Judge with great force. He contends that beyond a Corporation and a firm there are certain things as holders of office and that the members of the school committee really formed a body of trustees which does not change with the change of its personnel and refers to a passage in Lewin on Trusts (Edn. 13 at p. 235) and to the provisions of the Trusts Act (2 of 1832), Ss. 75 and 76, as embodying the rules of equity, justice and good conscience in support of his contention. The Trusts Act, it may be mentioned, does not apply to Bengal. He contends that the managing com-

mittee hold the property or the assets of the institution and that the present execution can be levied against the assets of the institution in the hands of the managing committee for the time being. He argues that if the view taken by the Subordinate Judge is upheld, no school committee in this province can get anything done except on the cash system.

In reply for the respondent Dr. Basak argues that the decree is really a decree against certain members of the committee and points out that there is no trust deed in this case and in the absence of such a deed the property of the institution cannot be regarded as having vested in the members of the committee on behalf of the school. It is also said for the respondent that the committee is not a legal entity and its legal position is that it is not a person at all. It is argued that the Court never intended to pass a decree against the committee much less against the school properties and refers to the circumstance that the prayer "Kha" of the plaint was struck off by an order dated 19th January 1931. The prayer "Kha" was to the effect that a decree should be given for realization of the decretal amount from the school fund of the Madaripur Donovan Girls' school and if the decretal amount be not realized from the said fund then a decree should be passed for realization of the decretal amount by the sale of the moveable and immovable properties of the Donovan Girls' School. In support of the contention that an unincorporated institution is not an association which is legally recognized reference has been made to Halsbury's Laws of England Vol. 4, p. 420, para. 903.

It is true that an unincorporated members' club is not a partnership and questions frequently arise as to who are the persons liable for goods supplied to such a club or on contracts professedly made on its behalf; it has been held that trustees of committee of management of such clubs have only such authority to contract on behalf of the members generally as may be given to them expressly or by necessary implications by the rules. An ordinary club is formed upon the tacit understanding, judicially recognized, that no member as such becomes liable to pay its funds or otherwise any money beyond the subscriptions

required by its rules : see: *Wise v. Perpetual Trustee Co. Ltd.* (1). In the same case their Lordships of the Judicial Committee laid down that trustees of a club who have incurred liability under onerous covenants contained in a lease accepted by them on its behalf are entitled to indemnity out of any property of the club to which their lien as trustees extends. The analogy of clubs does not really apply to the present case. The only decree that could be passed in the present case is a decree against those who represent the public in their affairs of the school and all such members for the time being were made parties to the suit, and in passing the decree the Court was careful enough to state that the members of the managing committee were not to be personally liable. The intention of the Court was that they are to be liable in a representative capacity.

The decree might have been more explicit but a reasonable construction must always be put on a decree and the Court should always lean against a construction which would render a decree inexecutable. The only reasonable construction seems to be that the decree was passed against persons representing the institution and must bind the institution even if at the time of execution of the decree there has been some change in the personnel of the representatives. In this view it is not necessary to consider the preliminary objection taken that Dharendra Nath Das, one of the present members of the committee was added as a party long after time in this appeal, for where several persons were sued in a representative capacity the addition of one of such representatives on the record of the appeal after time does not really make the representation any the less effective. I am therefore of opinion that this appeal should be allowed. The order of the Subordinate Judge must be set aside and he is directed to proceed with the execution of the decree in the manner asked for by the decree-holders appellants. In all the circumstances there will be no order as to costs.

My conclusions may be summarized as follows: The decree against the managing committee of an unincorporated association for example, a school like the Donovan Girls' School with a direction that the managing com-

mittee are not personally liable must be reasonably construed to mean a decree against them in their representative capacity and binds the school even if the members of the managing committee change after the decree, such a decree can be executed against the assets of the school at the time of execution; it is enough if all the members of the present managing committee are on the record before execution is proceeded with; the members of the managing committee if they pay the debt due by the school are liable to be indemnified out of the assets of the institution; that O. 1, R. 8, Civil P. C., has no application to the present case as all the members of the managing committee at the date of the suit were sued; that the managing committee stood in law for the school and therefore the decree against them binds the school. In the present suit which is against the managing committee of the school in their representative capacity if there is a change in the members of the representative body there is really a devolution of interest within the meaning of O. 22, R. 10, Civil P. C., and the preliminary objection raised by one of the respondents must fail although properly speaking the new member ought to have been added as a party on notice. We have however heard his learned advocate, and the objection by him is not of substance.

M. C. Ghose, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1933 Calcutta 332

MITTER, J.

Rabindra Nath Dhar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 735 of 1932, Decided on 22nd November 1932.

(a) Penal Code (1860), S. 294-A — Irish Sweep Stake ticket containing proposals for payment of different sums to holders of tickets—Publishing such report held came within S. 294-A.

The ticket contained a proposal for the payment of different sums for the benefit of the holders of such tickets. A circular of the Irish Sweep Stake which was referred to in one of the letters written by or found in possession of the accused showed that the Irish Hospital Sweep Stake was expected to reach the huge total of £5,000,000 or seven crores of rupees. The letter stated that applications should be made with Rs. 7-8-0 per ticket to the petitioner. The money was stated to be divided on each unit of £100,000 as follows: 50 first prizes of £30,000 or over four

lacs of rupees each, 50 second prizes of £15,000 or over two lacs of rupees each, 50 third prizes of £10,000 or over 1½ lacs of rupees each, 1200 prizes of Rs. 12,000 to Rs. 15,000 each and 5,000 cash prizes of £200 or Rs. 2,750 each.

Held: that the case did come within the mischief of S. 294-A. [P 333 C 1]

(b) Criminal Trial—Sentence.

It is true that the ignorance of law is no excuse, but it should be, in awarding sentence, taken into consideration. [P 333 C 1, 2]

A. K. Fazlul Huq and *Nanibhusan Mukherji*—for Petitioner.

D. N. Bhattacharji—for the Crown.

Judgment.—This rule was issued on the Chief Presidency Magistrate to show cause why the conviction of and the sentence passed on the petitioner Rabindra Nath Dhar under S. 294-A, I. P. C., should not be set aside. The first ground on which this Rule is supported is that the sanction of the Local Government was not obtained as it was necessary to have been obtained under S. 196, Criminal P. C., before cognizance could be taken of an offence under S. 294-A, I. P. C. The point which is made by Mr. Fazlul Huq who appears for the petitioner is that this sanction was not exhibited in Court till 10th June 1932, whereas the cognizance was taken of the case on the complaint of the Police Inspector on 26th May 1932. If he had been able to substantiate this point the Rule would have been made absolute. Unfortunately for his client it appears that this sanction of the Local Government which was signed by Mr. Reid, Officiating Chief Secretary to the Government of Bengal, is dated 18th May 1932 and was annexed to the petition of complaint and was marked as Ex. B. The complainant was examined and processes were directed to be issued on 27th May 1932, so that cognizance was taken of the case after the complaint was lodged and the complaint was made by the order of or under the authority from the Local Government within the meaning of S. 196, Criminal P. C. There is therefore really no substance in this point taken by Mr. Huq.

The next ground on which this conviction is attacked is that the entire evidence even if believed does not bring the case within para. 2, S. 294-A, I. P. C. It appears that the present petitioner was charged for publishing a proposal to pay a sum of money or to deliver any goods on an event or contingency relative or applicable to the drawing of a

ticket, lot, number or figure in a lottery not authorized by Government. So far as the Chindernigore Sweep Stake is concerned of which the petitioner claims to be the head organizer there is no question that he has not been able to produce any paper to show that this lottery was authorized. It is argued by Mr. Huq that no evidence was adduced by the Crown that the Irish Sweep Stake was not authorized by the Government. It appears however that evidence has been given in this case that this is an unauthorized lottery by the Police Inspector who was examined in the case. So far as the Irish Sweep Stake is concerned it is not even authorized in England, far less is it authorized by the Government of India. The ticket itself contains a proposal for the payment of different sums for the benefit of the holders of such tickets. It appears from a circular of the Irish Sweep Stake which is referred to in one of the letters written by or found in the possession of the present petitioner that the Irish Hospital Sweep Stake is expected to reach the huge total of £5,000,000 or seven crores of rupees. The said letter states that applications should be made with Rs. 7.8.0 per ticket to R. N. Dhar. The above money it is stated in that circular will be divided on each unit of £100,000 as follows: 50 first prizes of £10,000 or over four lacs of rupees each, 50 second prizes of £15,000 or over two lacs of rupees each, 50 third prizes of £10,000 or over 1½ lacs of rupees each, 1200 prizes of Rs. 12,000 to Rs. 15,000 each and 5000 cash prizes of £200 or Rs. 2,750 each. It is difficult to hold having regard to the correspondence which has been disclosed in this case that the case of the petitioner does not come within the mischief of S. 291-A, I. P. C. I am of opinion that the conviction is justified by the provisions of this section.

A question that may however arise is whether the sentence of fine of Rs. 200 is too severe. This is the first offence of the kind so far as the petitioner is concerned and some consideration may be given to the circumstance that the petitioner says that he did not know that the Irish Hospitals' Sweep Stake was an unauthorized lottery. It is true that ignorance of law is no excuse, but one may in awarding sentence take into

consideration the fact that the accused was not cognizant of the fact that the Irish Hospitals Sweep Stake was an unauthorized lottery. My attention has been drawn by Mr. Bhattacharjee to a letter addressed to the petitioner by the Irish Hospitals Trust Ltd., Dublin, to the effect that:

"wholesale distribution by the means suggested, viz., advertisement, circularizing, &c., is almost certain to bring you into conflict with the authorities."

It may be that the petitioner might not have understood the full import of this statement. I think the ends of justice will be met in this case by reducing the sentence to a fine of Rs. 50 (rupees fifty only). Mr. Bhattacharjee who appears for the Crown rightly says that according to the practice which is followed by Crown counsel he leaves the question of sentence to the Court. The result is that the fine imposed on the petitioner is reduced to Rs. 50. If the fine has already been realized, the portion of the fine remitted, i. e., Rs. 150, will be refunded to the petitioner.

R.K.

Sentence reduced.

A. I. R. 1933 Calcutta 333

PEARSON AND PATTERSON, JJ.

Devendra Nath Mazumdar

v.

Emperor

Criminal Revn. No. 481 of 1932, Decided on 14th February 1933.

(a) Prevention of Molestation and Boycotting Ordinance (5 of 1932), S. 4—Picketing illustrated.

A person who loiters around foreign shops and intentionally interferes and obstructs customers in their legitimate rights is guilty under S. 4.

[P 334 (12)]

(b) Prevention of Molestation and Boycotting Ordinance (5 of 1932), S. 4—Conviction under—Sentence of fine is necessary.

The principle that where a substantial term of imprisonment has been inflicted it is inappropriate to add a fine is inapplicable to a conviction under S. 4, Ordinance 5 of 1932, as it is specifically provided that fine should be separately imposed or along with a substantial term of imprisonment.

[P 335 (12)]

Narendra Kumar Bose and Pares Lal Shome—for Petitioner.

Khundkar and Anil Chandra Ray Choudhury—for the Crown.

Pearson, J.—This Rule was issued on the Deputy Commissioner of Sylhet calling on him to show cause why the conviction and sentence passed on the petitioner's daughter and the other accused should not be set aside. It appears that

the two accused in the case were two ladies, named Probhabati Dhar and Surobala Dey, and that they were convicted and sentenced under S. 4, Ordinance 5 of 1932 to undergo six months' rigorous imprisonment each and a fine of Rs. 150 each. In default of the payment of the fine they were to undergo one month's rigorous imprisonment in each case. The decision of the Magistrate was given on 16th February 1932. Neither of the accused appealed against the decision, but an application was made on 1st March 1932 by the present applicant, the father of one of the accused, to the Sessions Judge of Sylhet. That Judge decided that he should not go into the merits and that it was not open to him to entertain an application of that nature made by a third person.

The present Rule was issued on 6th June 1932 at which time the accused had served some three and a half months out of the sentence. At the time of the issue of the Rule an order was made staying the payment of the fine and permitting the two accused persons to be released on bail to the satisfaction of the Deputy Commissioner. The term of imprisonment has however now been served out due to the fact that neither of the accused thought fit to avail themselves of the bail order. So far as the application before us is concerned it has not been contended by the Crown, for the purposes of the present application, that this Court has no jurisdiction or no right to deal with the matter although it is presented to the Court by some person other than the accused themselves. But the contention of the Crown is that upon the facts it is not such a case in which this Court should interfere in the exercise of its powers. The learned advocate for the applicant, the father of one of the accused, has argued before us that once we assume the right to deal with the matter we ought to interfere in the case, because the matter is one in which it appears that the Magistrate in passing his order has not in fact come to sufficient findings to bring the matter within the provisions of S. 3, Ordinance 5 of 1932, and also on the ground that the evidence on which he does rely amounted to evidence of confession to a Police Officer: it therefore ought to be rejected, or at any rate no conviction should be based upon it.

The allegation in the case was that the accused were picketing in front of foreign cloth shops in that locality on this particular day, and that in so doing they were guilty of an offence under S. 4 of the Ordinance. It appears that the accused declined to cross examine and when asked at the trial whether they had anything to say to the evidence against them they both said they have nothing to say. In these circumstances, as the Magistrate points out, the allegations on the side of the prosecution were uncontradicted, and after a reference to the evidence in the case he found them guilty under S. 4 of the Ordinance, because he says that by loitering around foreign cloth shops they were intentionally interfering with and obstructing customers in their legitimate rights. In dealing with the evidence, he in the main insists upon the evidence of the Sub-Inspector, P. W. 3, and that part of the evidence in particular in which he deposed that he explained to the accused that picketing was illegal under the Ordinance and tried to persuade them to move off, but on finding it useless and receiving replies from one of them that she was not recognizing any authority, but that of the Congress and from the other that she was going to picket, he ordered their arrest.

It is said that so far as that part of the Magistrate's judgment is concerned, he was not relying on the evidence that picketing had already taken place, but that they were going to picket. It is quite clear from a reference to the evidence which has been placed before us that there was evidence on the record of more than one witness to the effect that both of the accused were in fact picketing in front of the foreign cloth shops in the bazar, and that they were preventing purchasers from buying English cloths. It appears to me clear enough, having regard to that evidence, that it is not a matter in which we ought to interfere in revision, and that the evidence as it stands is quite sufficient to bring the matter within the terms of the Ordinance referred to. More than that, I would say that a proper appreciation of the Magistrate's judgment does in fact show that he was relying upon that evidence, because he found them guilty under S. 4 of the Ordinance on the ground that by loitering around foreign cloth

shops they were intentionally interfering and obstructing customers in their legitimate rights. It is quite clear that he does accept that part of the evidence though he does also rely upon portions to which he has referred in greater detail, namely, as regards the immediate reasons for ordering the arrest of those two accused.

Mr. Basu has also contended that seeing that it is now a matter of fine it is not one that ought to be now brought against the accused. In certain cases it is correct to say no doubt that where a substantial term of imprisonment has been inflicted it may be inappropriate to add a fine, but it is difficult to see how we can apply a principle of that kind to the present case, in particular to this class of offence, and more especially when the Ordinance specifically provides for the imposition of a fine either separately or along with a substantial term of imprisonment. I am quite satisfied that this is a case in which we ought not to interfere in any particular in favour of the accused persons. I accordingly discharge this Rule.

Patterson, J.—I agree.

K.S.

Rule discharged.

A I. R. 1933 Calcutta 335

RANKIN, C.J. AND COSTELLO, J.

Ahidhar Ghosh—Petitioner.

v.

Secretary of State—Opposite Party.

P. C. Appeal No. 35 of 1927, Decided on 18th April 1932.

Practice—Decree—Amendment—Mistake in High Court decree found after confirmation by Privy Council—Mistake was corrected by High Court.

After the Privy Council had affirmed the High Court judgment, the appellant before their Lordships for the first time discovered that an item of court-fees paid by the opposite party on the memorandum of appeal was twice included in the High Court decree. On an application by the appellant to their Lordships, the High Court amended the decree by correcting the mistake: *P. C. Appeals Nos. 23 and 21 of 1927, decided on 31st August 1931, Foll.*

[P 336 C 2]

Balaram Basu—for Petitioner.

Sarat Chandra Basak and Nasim Ali
—for Opposite Party.

Facts of the case appear from the following application to amend the decree:

1. That the learned Collector of Calcutta awarded Rs. 69,778 to your petitioner as the value of his land in premi-

ses No. 10, Michael Datta Street, Khidderpur, but your petitioner claimed Rs. 85,107 as the value of the same and at the instance of your petitioner a reference was made under S. 18, Act 1 of 1894 (Land Acquisition Act) to the learned Land Acquisition Judge at Alipore.

2. That the learned Special Land Acquisition Judge at Alipore enhanced the award of the learned Collector by Rs. 11,995 together with Rs. 1,799-4-0 statutory allowance on the said sum making a total of Rs. 13,794-4-0 to be paid by the opposite party to the claimant.

3. That the above named opposite party being dissatisfied with the judgment and decree passed by S. K. Ghosh, Esq., Special Land Acquisition Judge, 24-Pargannas in Land Acquisition Case No. 89 of 1920 (valuation) on 3rd April 1925, preferred the above mentioned appeal from the original decree against the above named objector to this Hon'ble Court valuing the above named appeal at Rs. 13,794-4-0, and for the Memorandum of the said appeal, the sum of Rs. 15, had been paid as court-fees under Art. 17 (iv), Court-fees Act.

4. That on 20th May 1927, when the above named appeal came up for hearing before their Lordships B. B. Ghosh and G. N. Roy, JJ., their Lordships directed the appellant opposite party to pay ad valorem court-fees on the value of the said appeal and the deficit court-fees of the sum of Rs. 915 was paid by the appellant opposite party on 24th May 1927.

5. That on 23rd May 1927, their Lordships B. B. Ghosh and G. N. Roy, JJ., were pleased to allow the above mentioned first appeal with costs and set aside the judgment and decree of the learned Special Land Acquisition Judge at Alipore and thus confirmed the award of the learned Land Acquisition Collector, Calcutta.

6. That in the decree which was drawn up in the said appeal and signed by the Hon'ble Judges, the sum of Rs. 915 the additional court-fees paid by the appellant opposite party as stated above was included twice in the schedule of costs on account of clerical mistake of the officer who drew up the said decree.

7. That the above mistake escaped the notice of your petitioners' advocate in the High Court.

8. That your petitioner being dissatisfied with the judgment and decree of this Hon'ble Court preferred an appeal to His Majesty in Privy Council being Privy Council Appeal No. 35 of 1927 but on 15th May 1930, their Lordships of the Judicial Committee dismissed the said appeal with costs. That in the grounds of appeal as presented to His Majesty in Council no ground was taken about the aforesaid mistake in the decree for costs as passed by this Hon'ble Court.

9. That on 9th June 1931, the opposite party filed an application for execution of the said decrees against your petitioner in the Court of the Land Acquisition Judge at Alipore, 24-Pargannas being execution case No. 6 of 1931 and the prayer in the execution petition included costs of learned Acquisition Judge's Court Rs. 181-11-2 with interest at six per cent, per annum from 18th August 1925, costs of the High Court appeal Rs. 2,444-9-5, with interest at six per cent per annum from 23rd May 1927; Privy Council appeal costs £ 316-4-11.

10. That the said sum of Rs. 2,444-9-5, stated to be Rs. 2,444-9-5, stated to be costs awarded by this Hon'ble Court include Rs. 915 twice, as stated above.

11. That the opposite party was informed by your petitioners' pleader at Alipore to withdraw the security deposited by your petitioner in this Hon'ble Court for the costs of the appeal in the Privy Council.

12. That the opposite party having taken steps to realize the balance for which the execution was originally prayed for from your petitioner, your petitioner's pleader at Alipore, Mr. Krishna Nath Basu B.L., discovered for the first time on 22nd February 1932 that by mistake, the decree for costs passed by this Hon'ble Court included the sum of Rs. 915 twice over.

13. That your petitioner has, accordingly been advised to move this Hon'ble Court for amendment of the decree in the aforesaid appeal dated 23rd May 1927, by debiting from the costs decreed against your petitioner the sum of Rs. 915 which has been included therein with.

[The matter came up before Mukerji and Guha, J.J., who called for office report by their order dated 23rd March 1932. The report was submitted by

Mr. B. D. Ahmad, Offg. Dy. Registrar, dated 6th April 1932:]

Report.—With reference to the Court's order, dated 23rd March 1932. Attention is respectfully invited to an order dated 31st August 1931 passed by the Bench presided over by the Hon'ble the Acting Chief Justice in P. C. A. Nos. 23 and 24/27, permitting the amendment of a decree of this Court after the final disposal of the appeals by the Privy Council. The decrees, however, in those cases were reversed and not affirmed.

Lay before the Bench presided over by the Hon'ble Mukerji, J.

[The order referred to in the report above was as follows:]

"In the circumstances stated, it being quite clear that the omission to file a vakalatnama on behalf of the plaintiff in F.A. 70 of 1924 in this Court was due to inadvertence, the appearance of the learned advocate for the plaintiff in the said appeal may be recognized and regularised, i.e., the plaintiff will be allowed to file a vakalatnama in the said appeal and thereafter the necessary corrections will be made in the decree of this Court in F. A. No. 70 of 1924 and after that a certificate of costs incurred by the plaintiff in the said appeal in this Court will be prepared. Inasmuch as this application has been rendered necessary because of the carelessness and negligence of the said plaintiff, he must pay to the other side the costs of this hearing which we assess at 6 gold mohurs. The payment of such costs namely of six gold mohurs is a condition precedent to the preparation of this certificate of costs."

[On receipt of this report Mukerji and Guha, J.J., passed an order dated 8th April 1932 to the following effect:]

Order.—In view of the precedent which the office has referred to in its note dated 6th April 1932, this petition is sent to the Privy Council Department so that it may be placed before the Bench presided over by the Hon'ble the Chief Justice and taking Privy Council matters.

[The matter then came up for hearing before Rankin, C. J. and Costello, J., who passed the final order by amending the decree as prayed for in the petition.]

Final order.—Let the decree of this Court be amended by correcting the mistake as prayed for in the petition.

A. I. R. 1933 Calcutta 337

GUHA AND M. C. GHOSE, JJ.

Bhagwandas Madanlal—Decree-holder—Appellants.

v.

Nabin Chandra Chowdhury — Surety—Respondent.

Appeal No. 51 of 1932, Decided on 24th June 1932, against order of Sub-Judge, 4th Class, 24 Parganas, D/- 6th October 1931.

Principal and Surety—Surety for appearance of judgment-debtor—Appearance by judgment-debtor and payment of part of decree debt and acceptance of such amount by decree-holder's pleader — Surety is discharged—Contract Act (1872), S. 135.

A surety bond was executed for appearance of judgment-debtor. The judgment-debtor himself surrendered and paid a part of the decree debt which was accepted by the pleader of the decree-holder. For subsequent non-appearance of the judgment-debtor the surety was sought to be proceeded against.

Held: under the above circumstances the surety was discharged.

Held further: that though rule laid down in S. 135, Contract Act, was not strictly applicable to the case, there was some sort of similarity in the provisions of the section: *A I R 1932 Cal 853, Dist.* [P 338 C 1, 2]

Rupendra Kumar Mitra, Ratnendra Nath Ghose and Rabindra Nath Ghose—for Appellants.

Guha, J.—The decree-holder, appellant in this appeal, obtained a decree against the firm Kailas Chandra Sashi Bhusan Roy on 13th August 1929. The application for execution of the decree so passed in favour of the decree-holder was made on 15th November 1930. On 19th December 1930, the judgment-debtor Sashi Bhusan Roy was brought under arrest. Sashi Bhusan Roy and he filed a petition of objection under S. 47, Civil P. C.

It appears from the order recorded in the order sheet of the Execution case on 19th December 1930, that the judgment-debtor Sashi Bhusan Roy was released on his furnishing security "to the extent of the dues, for surrendering himself to Court if this S. 47 petition fails." The security was in due course furnished, and on 20th December 1930, the security bond filed by the respondent in this appeal, Nabin Chandra Chowdhury, was accepted, and the judgment-debtor Sashi Bhusan Roy was released. The application under S. 47 of the Code came to be

dismissed by the Executing Court on 21st April 1931. In the intervening period, i. e. the period from 20th December 1930 to 21st April 1931, an attempt was made by the judgment-debtor Sashi Bhusan Roy to pay up the decretal dues in instalments. An attempt was also made with the consent of the decree-holder for production of a surety, so far as the satisfaction of the decretal dues by instalments was concerned. These attempts on the part of the judgment-debtor however failed. On 28th April 1930, after the dismissal of the application under S. 47 of the Code, there was an application filed in Court by the judgment-debtor containing the definite statement that he was surrendering himself and was going to make a payment of Rs. 50 towards the decretal dues. This amount of Rs. 50 was received by the pleader for the decree-holder on that very date.

It appears also from the order recorded on that date, 28th April 1930, that the payment of Rs. 50 was brought to the notice of the Court and the Court also took notice of the fact that the judgment-debtor was trying to pay off the decretal debt in instalments. The prayer for instalments however could not be allowed in the execution case. The order recorded by the Court further shows that an opportunity was given to the judgment-debtor for payment of Rs. 100 within 20th May 1931: the execution case was to be put on the said date for orders. The pleader for the judgment-debtor Sashi Bhusan Roy undertook to produce the judgment-debtor in Court on that date, viz., 20th May 1931, on his failure to pay the money. What happened on 28th April was this: On 23rd May 1931 notice was issued on Nabin Chandra Chowdhury, the surety respondent in this appeal, to produce the judgment-debtor by 30th May 1931, or to deposit the decretal dues in Court, in terms of the bond executed by this surety Nabin Chandra Chowdhury, on 19th December 1930. The surety showed cause before the Court executing the decree, and raised objections to the decree-holder being permitted to proceed against him as surety, in the matter of the satisfaction of the decretal dues. The objections were in due course heard and disposed of by the Court executing the decree and according to the learned

Munsif, there were no grounds on which the objections raised by the surety could be allowed. According to the Munsif, the judgment-debtor's production in Court on 28th April 1931 did not appear to have been caused by the surety and therefore the surety's liability continued under the surety bond.

On appeal by the surety, the respondent in this Court, the decision of the Munsif, disallowing the objections raised by the surety was set aside. According to the learned Subordinate Judge, the judgment-debtor Sashi Bhusan Roy surrendered himself after the disposal of the case under S. 47 of the Code, and in that view of the matter it was held that the liability of the surety in the matter of the satisfaction of the decree as mentioned in the surety bond ceased after the judgment-debtor had surrendered on 28th April 1931. The facts and circumstances of the case have been set out in some detail in the previous part of our judgment, and it appears to us that in view of the fact and in the circumstance that the judgment-debtor had on 28th April 1931, that is, after the disposal of the application under S. 47 of the Code on 21st April 1931, surrendered before the Court, there was no further liability attaching to the surety in the matter of the satisfaction of the decretal debt. The material portion of the surety bond is to this effect:

"I stand as surety for the said Sashi Bhusan Roy and promise and agree that if the said objection case under S. 47, Civil P. C., be not admitted, I shall remain bound to make the said Sashi Bhusan Roy appear in Court, when called upon by the Court. If I do not make the said Sashi Bhusan Roy appear in Court when directed by it, the decree-holder will in pursuance of the order of the Court, be able to realize the said amount from me. If I do not pay easily, he will be able to realize the same by the execution of this decree from my moveable and immovable properties and person."

Regard being had to the definite finding arrived at by the Courts below that the judgment-debtor did in point of fact surrender himself after the disposal of the case under S. 47 of the Code, and in view of the circumstance to which reference has been made already, that there was payment by the judgment-debtor of the amount of Rs. 50 which was received by the decree-holder, and of which payment notice was taken by the executing Court, and regard being also had to the

fact that on 28th April 1931, the responsibility of the appearance of the judgment-debtor in Court was allowed to be taken by the pleader representing the judgment-debtor and no responsibility whatsoever on the part of the surety was thought of on that date by the Court or by the decree-holder, we are wholly in agreement with the order passed by the Court of appeal below, that there was no liability attaching to the surety after what happened in Court on 28th April 1931. Some reliance has been placed by the learned advocate for the decree-holder appellant on the decision of the learned Chief Justice in the case of *Jia Bai v. Joharmull Bothra* (1), holding that there was no broad rule of law that a surety who had guaranteed payment of an amount decreed against the judgment-debtor was discharged from liability by reason of any arrangement for postponed payment or payment by instalments. The facts and circumstances of the case before us do not call for the application of the rule laid down by the learned Chief Justice in the case above referred to. It appears to us that the nearest application of any rule of law to the facts of the case before us is that of the rule contained in S. 135, Contract Act, relating to the discharge of a surety when the creditor makes a composition with or promises to give time to the principal debtor without the assent of the surety. It cannot be said that the rule laid down in that section of the Contract Act can have any strict application to the case before us. But as we have said there would be some sort of similarity to the provisions of the section in view of the facts and circumstances of this case, to which reference has been made in our judgment. In the result the appeal fails and is dismissed. As there is no appearance on behalf of the respondent we make no order as to costs in this appeal.

M. C. Ghose, J.—I agree.

K.S.

Appeal dismissed.

1. A I R 1932 Cal 858=139 I O 815=59 Cal 1450.

A. I. R. 1933 Calcutta 339

MITTER, J.

Ramizaddin Basar and others—Petitioners.

v.

Naimaddi Basar and others—Opposite Parties.

Civil Rule No. 778 of 1931, Decided on 4th February 1932, against order of Dist. Judge, Dacca, D/- 20th March 1931.

(a) Civil P. C. (1908), O. 21, R. 90—Great discrepancy between value stated in proclamation and real value is valuable evidence of fraud.

Where the discrepancy between the value stated in proclamation and the real value is so great as to shock the conscience, this by itself is valuable evidence of the fraud on the part of the decree-holder and sufficient to have the sale set aside: *A I R 1929 Cal 736, Ref.*

[P 340 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Application for setting aside sale beyond 30 days of sale—Fraud on part of decree-holder established—Burden is on decree-holder to prove date of knowledge of such fraud.

Where once fraud is established the burden of proof is on the decree-holder or the auction-purchaser as the case may be of establishing that the person injured by his fraud and suing to recover property has had clear and definite knowledge of those facts which constitute fraud at a time which is too remote to allow him to make the application. [P 340 C 2]

Ramendra Chandra Roy—for Petitioners.

Manmatha Nath Das Gupta—for Opposite Parties.

Judgment.—This Rule is directed against the appellate order of the District Judge of Dacca dated 20th March 1931 refusing to set aside the sale of the petitioners' properties held on 19th April 1927. The petitioners applied under O. 21, R. 90, Civil P. C., for setting aside the sale in question on 19th May 1930. The petitioners rested their application on several grounds: (1) that the sale processes were suppressed and there was irregularity in publishing and conducting the sale and; (2) owing to suppression of the sale processes the properties were sold at an inadequate price. They allege that they came to know of the sale on 5th Baisakh 1337 from Gani Munshi of their village. On the evidence it transpires that they took some time to verify this information obtained from Gani Munshi and they have applied

within 30 days of the date of their knowledge which the Munsif found to be 7th Baisakh to set aside the sale. It is a somewhat significant circumstance in this case that the decree-holders who sold this property in execution of a rent decree themselves applied to set aside the sale and it transpires in the course of the evidence that the auction-purchaser opposite party did pay to the decree-holders a sum of about Rs. 300 in order that the decree-holders might withdraw their application for setting aside the sale. The property has been sold for a grossly inadequate price of Rs. 39, the value according to the Munsif who dealt with the matter in the first instance being at least Rs. 1,000 at the lowest calculation, and it appears from the evidence on behalf of the auction-purchaser opposite party that its value would be at least Rs. 700. The Munsif came to the conclusion that the sale was vitiated by the fraudulent suppression of the sale processes and that the sale being a fraudulent one the burden of proof lay on the opposite party to show that the petitioners had knowledge of the sale at a time beyond the period of limitation. This according to the Munsif the opposite party failed to prove. The Munsif came to the further conclusion that the property was sold at an excessively inadequate price and the petitioners were highly prejudiced by the sale of their valuable property for the very insignificant sum of Rs. 39. The sale was accordingly set aside.

An appeal was taken by the auction-purchaser to the Court of the District Judge and the learned Judge has disposed of the appeal on the ground of limitation after reaching the conclusion that there has not been fraudulent suppression of the sale proclamation by the decree-holders. The learned Judge however refers to the fact that the auction-purchaser settled the matter with the decree-holders by the payment of Rs. 300 to them. The decree-holders, as has already been stated, filed an application before the confirmation of the sale to the effect that they were no parties to the execution proceedings and that the execution proceedings were really conducted by one Tamijuddi who signed the petition for execution without their authority. The learned Judge is of opinion that in his judgment it cannot

he inferred from this circumstance that the appellant had taken part in the fraud.

To my mind it seems that this is a very significant circumstance, and it is quite clear that the auction-purchaser was trying to secure this property anyhow—a property which she knew had been purchased for an extremely inadequate value. I do not agree with the learned District Judge when he says that this payment was made by a bona fide purchaser to buy off an objection. One does not see any sufficient reason why the auction-purchaser should pay the decree-holders the sum of Rs. 300 unless the auction-purchaser was apprehensive that the sale was one which was surrounded with circumstances of suspicion as to the fraudulent part taken by the decree-holders in bringing about the sale. In considering as to whether there has been fraud in this case or not the learned District Judge did not consider a very important circumstance which is apparent on the face of the record. In the sale proclamation which was issued under S. 163, Cl. 2 (b), Ben. Ten. Act of 1885, the value of the property was stated to be only Rs. 10, while on the auction-purchaser's own evidence the value of the property is 70 times the value of what is stated there. The discrepancy between the value as stated in the sale proclamation and the real value of the property even judged by the evidence of the auction-purchaser is so great that this circumstance must be regarded as something more than the kind of irregularity which is commonly alleged, for it is a misstatement of the value of the property which is so glaring in amount that it could hardly have been made in good faith and which, however it came to be made, was calculated to mislead possible bidders and to prevent them from offering adequate price or from bidding at all. This is of a class of cases where the statement of the inadequate value is so great, as has been said by a distinguished English Judge, as to shock the conscience. This itself, as I have pointed out in another case, namely *Bhairab Chandra Sinha v. Kali Dhan Roy* (1), is valuable evidence of fraud, and no Court would be justified in circumstances like these to uphold a sale which offers clear evidence of fraud on

the part of the decree-holders. If the learned Judge had considered this aspect of the case he would not have felt any difficulty in arriving at a decision on the question of limitation.

The learned District Judge is of opinion that the petitioners have not been able to establish that they came to know of the sale within 30 days of their application and he commented on the evidence that Gani Munshi had not been examined. But once fraud is established, as it is in the present case, the burden of proof is on the decree-holder or the auction-purchaser, as the case may be, of establishing that the person injured by his fraud and suing to recover property has had clear and definite knowledge of those facts which constitute fraud at a time which is too remote to allow him to make the application. This is sought to be attempted by the auction-purchaser by relying on the evidence of one of the petitioners to the effect that he came to know of the sale on the 4th Baisakh which was certainly beyond the period of limitation for making the application. But in that attempt in my opinion she has failed. All that the evidence points to is this: that some clues and hints about the happening of this sale reached one of the petitioners, who has deposed in the present case on the 4th Baisakh. He took time to verify the correctness of that vague report or information and he came to know of it as he states in his petition a few days after, the petitioner having stated the date, 7th Baisakh, which was accepted by the Munsif to be the date of the knowledge of the petitioner. The vague report which he obtained was actually followed up and that led one of the petitioners to have complete knowledge of the fraud and he was informed of the circumstance in the sense of having definite knowledge of fraud about the 7th Baisakh which was within the period of limitation.

Under these circumstances I think that the judgment of the District Judge confirming the sale must be set aside. The sale is set aside and the Munsif's judgment is restored. It transpires that two of the several persons interested in the property have subsequent to the sale sold the property to the auction-purchaser. This decision will not affect any right which the auction-purchaser had acquired subsequent to the sale on this

basis. There will be no order for costs in this Rule.

K.S.

Petition allowed.

A. I. R. 1933 Calcutta 341

JACK AND M. C. GHOSH, JJ.

I. N. Silas and another—Petitioners.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. Potn. No. 325 of 1932, Decided on 12th August 1932.

(a) Calcutta Municipal Act (3 of 1923), S. 364—Danger to public not necessary for use of S. 364—Magistrate has discretion.

It is not correct to say that it is only in cases of emergency where there is danger to the public that S. 364 should be used. The Magistrate has got a discretion to make an order under the section: 10 C W N 182, *Inf.* [P 341 C 2]

(b) Calcutta Municipal Act (3 of 1923), Sch. 16, R. 2 (6)—Road not vested in Corporation—Encroachment fees cannot be demanded.

Under Sch. 16, R. 2 (6), Calcutta Municipal Act, the Corporation is not entitled to demand fees where the road has not vested in the Corporation. [P 342 C 2]

Probodh Chandra Chatterjee and Bireswar Chatterjee—for Petitioners.

N. N. Sircar and Satindra Nath Mukherji—for Opposite Party.

Jack, J.—In this case a rule was issued upon the Municipal Magistrate and on the Chief Executive Officer of the Calcutta Corporation to show cause why the order, directing the Corporation to entirely demolish and remove portions of a certain building at the expense of the petitioner, should not be set aside or such further order made as to this Court may seem fit on the ground that the learned Magistrate misconceived the scope of S. 364, Calcutta Municipal Act; secondly that the learned Magistrate erred in law in holding the view that in the present case he had no alternative other than to pass an order of demolition inasmuch as the service of a valid notice under S. 299, Calcutta Municipal Act, upon the petitioner had been proved and admitted by the petitioners; thirdly, that upon a proper construction and consideration of Exs. 16 and 18, and upon a consideration of the provisions of law

relating thereto the learned Magistrate should have held that the Corporation failed to prove that Chittaranjan Avenue had vested in the Corporation; fourthly, that upon a proper consideration and construction of S. 65, Calcutta Improvement Act, and Sch. 16, R. 2 (6), Calcutta Municipal Act, the learned Magistrate ought to have held that the conditions to the sanction (viz., payment of encroachment fees) imposed by the resolution of the Building Standing Committee dated 20th June 1927, was illegal and ultra vires; fifthly, that the learned Magistrate erred in holding that no question of unauthorized work or of sanction therefor arises in the present case, whereas from the notice under S. 299, which clearly mentions the constructions as unauthorized, the learned Magistrate should have held that in the present case this question did arise, and sixthly, that assuming that the notices under S. 299 of the Act were valid and that the said notices had been properly served the learned Magistrate should not have passed an order for demolition in the present case and should have dismissed the application for demolition.

As regards the first ground, it is suggested that it is only in cases of emergency, where there is danger to the public that S. 364 should be used. That question may at once be dismissed inasmuch as no authority has been shown for holding that this section can only be used in such cases. On the second point, I think that the learned advocate is correct in contending that there was a discretion in the Magistrate under S. 364, the wording of the section being that such Magistrate "may" make an order directing the removal of the structure. The learned advocate for the Municipality has suggested that in this case "may" must be interpreted as meaning, "must" and he has referred to Maxwell's Interpretation of Statutes, p. 208. But there are authorities for holding that in this case there is a discretion with the Magistrate and that "may" cannot here be interpreted as meaning "must." The case of *Abdul Samad v. Corporation of Calcutta* (1), and other authorities may be referred to. We hold accordingly that the Magistrate was not right in holding that he had no alternative other

than to pass an order of demolition. However in the circumstances of the present case we think that on that ground alone, we should not refer it back to him for reconsideration.

The next ground was that the Magistrate should have held that the Corporation failed to prove that Chittaranjan Avenue had vested in the Corporation. Referring to the facts of the present case, by a resolution in 1927, Ex. 2, it was resolved by the Corporation that the plan with alterations and additions be sanctioned under R. 2, Sch. 16 on payment of the usual fees. Subsequently, in July, the Corporation wrote to the petitioner a letter Ex. 3 demanding Rs. 2,682-8-0 as encroachment fees when formal sanction would issue. Then, on 26th September 1927, after examination of the building, the Corporation wrote a letter Ex. 4 demanding Rs. 2,954-1-8 as encroachment fees which was found to be the amount due on exact measurement. They made the demand as encroachment over the public street had been made without sanction.

Then in October 1927 the letter Ex. 5, was written by the petitioner to the Encroachment Officer, Calcutta Corporation, promising to pay encroachment fees in full on receipt of a complete statement. The Encroachment Inspector in November sent him the particulars and asked him to pay the fees. In March 1928 there was some further correspondence about the calculation and the Encroachment Inspector sent a detailed calculation and requested early action in the matter by the petitioner. Then in April 1928 the petitioner wrote to the Corporation stating that the Corporation could not claim any encroachment fees as encroachment was made on Improvement Trust land and not on Corporation land. In May 1929 it was resolved at a meeting of the Corporation under S. 65, Calcutta Improvement Act, that this particular road should be, on certain conditions, taken over by the Corporation and then in June 1929, by Ex. 18, a notice was issued by the Chief Executive Officer of the Corporation taking over the road.

The contention of the petitioner is that, in the first place, at the time when the notice demanding the fees issued and the conditional sanction was given, the road had not been taken over by the

Corporation and further that the Chief Executive Officer was not entitled under S. 65, Calcutta Improvement Act to take over the road. That should have been done by the Corporation and not by one of its officers. On the other hand we have been referred to S. 12 of the Act which empowers the Corporation to delegate its powers under the Act to the Executive Officer. It has been further pointed out to us that no specific ground was taken in the application to the effect that the Corporation had failed to prove that this road had vested in them because it had been taken over not by the Corporation but by the Chief Executive Officer. Had that ground been specifically taken it would have been open to the opposite party to show that this particular power had been delegated to the Executive Officer. We also find that the Magistrate said that it was not disputed before him that the road in fact vested in the Corporation, and it was obvious that the petitioner must have known that the road would eventually vest in the Corporation.

As regards the next ground that the learned Magistrate ought to have held that the condition attached to the sanction, namely, the payment of encroachment fees, was illegal and ultra vires. No doubt under Sch. 16, R. 2 (6), Calcutta Municipal Act, the Corporation was not entitled to demand fees where the road had not vested in the Corporation so that they were not entitled to make the initial demand for fees; and this no doubt accounts for the fact that the Corporation instead of proceeding further under the special provisions took refuge in S. 299 of the Act on which they are entitled to order the removal of any structure projecting or encroaching on the public street, whether erected before or after the commencement of the Act. So that before the notification under S. 299 issued the road had already vested in the Corporation and that the Corporation were entitled under this section to order its removal; and it follows that the Magistrate was entitled under S. 364 on a reference made to him by the Corporation also to order its removal. It is suggested to us in the circumstances of the case, since the demand of fees in the first place was illegal that the Magistrate should have used his discretion and not to have

ordered the demolition of the structure. But we find from the record that in the first instance, the sanction was only given on condition that the usual fees were payable and after the petitioner had been informed of the amount of the fees he was quite willing to pay them; he said he would pay on full particulars of the fees being furnished to him. This would tend to show that there was nothing unjust or unreasonable in the demand of the Corporation for the fees. Finding subsequently that owing to a technical error at the time the demand for fee was made, the road had not actually vested in the Corporation the petitioner sought to take advantage of Cl. (6), R. 2, Sch. 16. He was of course entitled to do so, but in considering all the circumstances we think that the Corporation was justified in having recourse to the provisions of Ss. 299 and 364. The Corporation are obviously entitled to the usual fees and if the petitioner takes advantage of the technicality in endeavouring to avoid it, the Municipality are entitled to take any legal steps open to them for enforcing payment. Consequently, the action they have taken seems to be perfectly reasonable and bona fide. It is a pity that they made an unusual delay in giving the notice, the sanction having been given in 1927 and the notice being given in 1929. But in the circumstances of the case we think that the delay has been sufficiently explained. No doubt the Corporation could have stopped the building, but the petitioner having agreed to the payment of the fees they thought that he was acting entirely bona fide. But that does not justify the petitioner's now avoiding payment of the fees.

It is suggested in this connexion that the Magistrate should not have taken action under S. 364 in a case in which the civil Court would not pass a mandatory injunction. But, as I have said before, in all the circumstances of the present case, the order which he made was justified inasmuch as we understand that the Corporation would not insist upon the demolition of the structure if their fees and costs are paid. This rule is, accordingly, discharged.

M. C. Ghose, J.—I agree.

K.S.

Rule discharged.

A. I. R. 1933 Calcutta 343

GUHA AND M. C. GHOSE, JJ.

Ram Dass Goswami—Appellant.

v.

Sudha Krishna Laik and others—Respondents.

Appeal No. 150 of 1932, with Rule No. 391-M of 1932, Decided on 6th June 1932, against appellant order of Sub-Judge, Burdwan, D/- 22nd February 1932.

Bengal Tenancy Act (1885), S. 153—Munsif accepting surety bond instead of deposit under S. 153 acts erroneously in law, is not without jurisdiction.

An application to set aside an ex parte rent decree was admitted on the appellant standing surety for the judgment-debtor-tenants. The application was dismissed for want of prosecution and the decree-holder executed the decree against the surety. Objection was raised on behalf of surety under S. 47, Civil P. C., that the Munsif had no jurisdiction to accept the surety bond instead of deposit :

Held : that although the order of the Munsif accepting a surety bond was an erroneous order under the law, so far as the provisions of S. 154, Ben. Ten. Act, went, it could not be said that the error in law committed by the Munsif, in the matter of the acceptance of the surety bond, in compliance with the provisions of S. 153(a) was without jurisdiction and that execution can be levied against the surety.

[P 344 C 1]

Purna Chandra Chatterjee—for Appellant.

Gopendra Krishna Banerjee—for Respondents.

Guha, J.—The respondent in this appeal as a landlord succeeded in obtaining an ex parte decree in the Rent Suit No. 956 of 1929 in the Court of the Munsif at Asansole, against his tenants, the defendants in the suit, for a sum of Rs. 422-1-9, with costs and interest. After the ex parte decree was passed the tenants, the defendants in the suit for rent, filed an application under S. 153 (a), Ben. Ten. Act, for an order to set aside the ex parte decree passed against them. The application so made by the tenants, was, in due course, admitted and registered, on the appellant before us standing surety on behalf of the tenants defendants, against whom the decree for rent was passed. The application was ultimately dismissed for want of prosecution. The decree-holder landlord, the respondent in this appeal, thereupon filed an application for execution of his decree, by means of attachment of move-

ables, and in the alternative by arrest. So far as this application for execution was concerned, it was made against the surety, that is, the appellant before us. An objection was preferred on behalf of the surety, under S. 47, Civil P. C. It was stated that the Munsif had no jurisdiction under the law, to accept a surety bond in lieu of deposit, as contemplated by S. 153 (a), Ben. Ten Act, and the surety objector was not therefore liable as such. The objection so raised under S. 47 of the Code was allowed by the Munsif. On appeal by the decree-holder, the respondent in this Court, the decision of the Munsif was reversed, and the execution has been allowed to be proceeded with so far as the surety, appellant in this Court, was concerned. The grounds that were raised by the surety, before the Munsif, have been pressed before us in support of the appeal. It appears to us that although the order of the Munsif accepting a surety bond from the appellant was an erroneous order under the law, so far as the provisions of S. 153, Ben. Ten. Act, went, it could not be said that the error in law committed by the Munsif, in the matter of the acceptance of the surety bond, in compliance with the provisions of S. 153 (a) was without jurisdiction and it could not therefore be held that the appellant, as surety, was not a person against whom the execution could be levied by the decree-holder. In this view of the case the appeal must be dismissed, and we direct accordingly. We make no order as to costs in this appeal. The rule which was granted by this Court in connexion with this appeal stands discharged. Let the record be sent down as early as possible.

M. C. Ghose, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 344

COSTELLO AND JACK, JJ.

Mr. H. Pleader, In re.

Civil Ref. No. 8 of 1932, Decided on 24th November 1932, made by Dist. Judge, Jalpaiguri, on 22nd July 1933.

(a) Legal Practitioners Act (1879), S. 14—S. 14 is material even in proceedings in revenue office.

Section 14 is material even when any pleader is acting in his professional capacity on behalf of his client in a proceeding in a revenue office and therefore if he is guilty of any grossly unprofessional or improper conduct, he would bring

himself within the disciplinary jurisdiction of the High Court. [P 346 C 2]

(b) Legal Practitioners Act (1879), S. 14—**Irritation or disappointment is no justification for casting imputations on integrity of officer of Court.**

No amount of irritation or disappointment would be any justification for any legal practitioner casting imputations upon the honesty and integrity of one of the officers of the Court before which he was appearing. [P 346 C 2]

(c) Practice—Process fee—It is function of judicial officer only to deal with travelling allowances.

The question of the payment of travelling allowances entirely a matter to be dealt with by the judicial officer who functions as a Magistrate such dealing being something incidental to judicial proceedings. It is in no sense a matter with which any executive officer is concerned.

[P 345 C 2]

Amulya Chandra Chatterjee, Prokas Chandra Pakrashi and Biswanath Nasikar—for the Pleader.

Costello, J.—This matter comes before us on a reference by the District Judge of Jalpaiguri, under Section 14, of the Legal Practitioners Act of 1879. It appears that *H* who is a pleader practising at Alipurduar, while acting on behalf of a man named Bhojai Christian of that place in connexion with an application for remission of what is described as a jotedari donation, made a statement in the presence of the Tahasil Officer of Alipurduar who was dealing with the matter, as it appears in a judicial or a quasi judicial capacity, as a revenue officer, which statement was to the effect that if Rs. 5 had been paid to the Peshkar of the tahsil office, the remission would have been granted. The Peshkar concerned not unnaturally took exception to that remark and construed it, as indeed it might well have been, an imputation against his honesty and integrity in the execution of his office. The Peshkar instituted a case in the criminal Court against *H* under the provisions of S. 500, Penal Code, which is the section dealing with defamation as a criminal offence. It appears that the complainant, the Peshkar and the accused in that criminal proceeding, that is to say, the pleader with whom we are now concerned, arrived at some kind of compromise on the basis of which the criminal proceeding terminated.

As a part of that compromise *H* expressed his regret for what he had said and he further undertook to pay the expenses of Babu Asoke Ray who was the Tahsil

Officer before whom the offensive observation had been made. He had been summoned as a witness for the prosecution in the criminal proceeding. The criminal proceeding terminated in the manner as I have described on 30th November 1931. On 15th January 1932 Babu Asoke Ray submitted a travelling allowance bill in which he claimed a sum of Rs. 40-1-0; but upon *H* being asked to pay this amount he endorsed upon the bill a note in these terms:

"I think Sarat Babu, the Peshkar, ought to pay Asoke Babu's expenses, if any, as it was to his interest that the case was compromised; otherwise the result of the case would have been most serious against him. It was he who compromised the case."

It appears that the real terms of the compromise with regard to the question of this travelling allowance, were that *H* would pay to Babu Asoke Ray his expenses if the latter insisted upon payment, whether he was disposed either to forgo it in entirety or in part. Subsequently through the intervention of the Subdivisional Officer of Alipurdwar *H* agreed to pay to Babu Asoke Ray a sum of Rs. 27-3-0 in six monthly instalments; and thereupon the Subdivisional Officer made an order in these terms:

"As *H* agrees to pay the reduced amount of Rs. 27-3-0 in six instalments commencing from this month at Rs. 5 a month for five months and balance in the sixth month, and as he writes that his remarks of 18th January 1932 do not arise, Sarat Babu need not take any steps now as the money will not be recovered from him. *H* will deposit the money with me every month, with necessary money order fee."

That order was dated 6th February 1932. We are of opinion that it must be taken that that order was made by the Subdivisional Officer acting in a judicial capacity, inasmuch as he was the Magistrate who was dealing with the criminal case to which I have referred and who would have tried *H* upon the charge under S. 500, I. P. C., had that case been proceeded with. The position therefore was that on 6th February 1932 there was a definite order by a Court upon *H* to pay the sum of Rs. 27-3-0.

The next thing that happened however was that the person who was entitled to the travelling allowance, Babu Asoke Roy, did not agree to accept the sum of Rs. 27-3-0 in discharge of the bill which he had put forward which bill,

as I have already said, was for the sum of Rs. 40-1-0 and it is clear that he—who was himself a Subdivisional Officer,—caused a letter to be sent to the Deputy Commissioner of Jalpaiguri in which he claimed the full amount. The Deputy Commissioner thereupon noted on the letter which he had received from Babu Asoke Roy a memorandum in these terms:

"S. D. O. Babu A. C. Ray has submitted this letter for my perusal. I agree that he should receive the travelling allowance to which he is entitled as a Government servant and that it should be paid in full by 15th March 1932 without fail. It is obvious that *H* requires firm handling."

Upon receipt of that memorandum the Subdivisional Officer concerned made a note to this effect: "Inform *H* and ask him to pay Rs. 40-1-0 by 15th March 1932 without fail." The information was conveyed to *H* in what is described, a notice on him to pay the amount, dated 24th February 1932. It is in these terms:

"To Babu *H*., Pleader.

As directed by the Deputy Commissioner you are informed that you will have to pay Rs. 40-1-0 as travelling allowance of Babu Asoke Chandra Ray in the case under S. 500, I. P. C., against you by 15th March 1932 without fail in full. I request you therefore to deposit the money with me, with eight annas as money order commission by that date positively."

Now, in passing, I would point out quite emphatically, that the question of the payment of this travelling allowance was entirely a matter to be dealt with by the Subdivisional Officer who had functioned as the Magistrate dealing with the case under S. 500, I. P. C. It was essentially a matter to be dealt with by a judicial officer, as something incidental to judicial proceedings and it was in no sense a matter with which any executive officer should have concerned himself as such. Therefore if the memorandum endorsed on a letter from Babu Asoke Ray, dated 19th February 1932 by the Deputy Commissioner was intended to be anything in the nature of an order or even a direction to the Subdivisional Officer, on the question of the amount which should be paid by *H* to Babu Asoke Ray or as to the conditions on which it should be paid, then in our view that was something which ought not to have been done.

We are of opinion that the Subdivisional Officer ought not, in any event, to have treated the memorandum made by the

Deputy Commissioner, as if it was something in the nature of an order which he, as a judicial officer, could properly take notice of. The Subdivisional Officer ought to have dealt with the matter solely upon the footing that he was a Magistrate in charge of the criminal case. Therefore we are of opinion that the real and effective order with regard to the payment of the travelling allowance to Babu Asoke Ray was the order made by the Subdivisional Officer himself, in the first instance and dated 6th February 1932. That, in outline, is the substance of the case out of which the present proceedings before us arise. The conduct of *H* in connexion with this matter both as regards the observations which he made before the Tahsil officer and in connexion with the payment or rather with the non-payment of the travelling allowance to Babu Asoke Ray, was called in question and was inquired by the District Judge of Jalpaiguri and four charges were laid against *H*. The first was concerned with the allegation or imputation which *H* made against the Peshkar. The second had reference to the endorsement which he put on the travelling allowance Bill of Babu Asoke Ray to the effect that Sarat Babu ought to pay the expenses as it was to his interest that the criminal case was compromised.

I have already quoted the remark in question. The third charge related to *H*'s non-payment of the promised and indeed the ordered instalments of the amount due from him to Babu Asoke Ray under the terms of the compromise in connexion with the travelling expenses. And the fourth charge was a general allegation that *H* had procured the case, brought against him under S. 500, Penal Code, to be compromised by means of false inducements and false promises. (After considering all the charges in seriatim, the judgment proceeded.) Looking at the matter as a whole, it seems to us that the question really resolves itself into this: as to what view we ought to take concerning this pleader's conduct in making the observations as he did and the implied insinuation against the character of the tahsil officer's Peshkar.

We are of opinion that it cannot be argued that this pleader was doing other-

wise than in acting in his professional capacity, when he appeared on behalf of Bhojai Christian before the tahsil officer in Alipurduar. Therefore we have to ask ourselves whether we ought to come to the opinion that he has brought himself within the terms of S. 14, Legal Practitioners Act, read with S. 13, Cls. (b) and (f) of that Act; in other words, whether he was guilty of grossly improper conduct in the discharge of his professional duties. S. 14 is material even when any pleader is acting in his professional capacity on behalf of his client in a proceeding in a revenue office. Therefore there can be no question whatever that this pleader at the time when he made the remarks about the Peshkar, was acting professionally and therefore if he was guilty of any grossly unprofessional or improper conduct, he would bring himself within the disciplinary jurisdiction of this Court.

We are inclined to take a lenient view in this case however having regard to the fact that the aggrieved Peshkar thought fit to seek his own remedy for the insult which had been put upon him and for the injury which he suffered, by taking proceedings in a criminal Court for defamation. The Peshkar chose to compromise those proceedings accepting the apology which was offered to him by the pleader concerned. At the same time however we should not be doing our duty if we do not condemn in the strongest possible manner the action of the pleader in making an observation of the kind complained of. No doubt it was made in the heat of the moment and possibly when the pleader was irritated at having failed to secure what he was seeking on behalf of his client. At the same time no amount of irritation or disappointment would be any justification for any legal practitioner casting imputations upon the honesty and integrity of one of the officers of the Court before which he was appearing. Had the observation been made actually when the proceedings before the tahsil officer were taking place, he might have dealt with the matter on the footing that it was a gross contempt of Court. In this case so far as the actual hearing before the tahsil officer was concerned that had been concluded. Mr. Chatterjee on behalf of the pleader *H* has very ably and

forcibly said all that could be said in extenuation of the offence which the pleader committed and has in effect apologized once more on behalf of his client. In all the circumstances of this case we are disposed to accept that apology, believing that this pleader will take notice of what I have said with regard to the impropriety of his conduct and that he will take good care to avoid any recurrence of an offence of a like nature. As regards the other charges all of which in one way or other were concerned with the payment of the travelling allowance, we are of opinion for the reasons which I have given as to the validity of the order of 24th February 1932, that *H* must obey the order of the Sub-divisional Officer made on 6th February 1932, and pay to Babu Asoke Ray the sum of Rs. 27-3-0, which was directed to be paid by him. No other order is necessary and the Reference is disposed of accordingly.

Jack, J.—I agree.

K.S. *Reference disposed of.*

A. I. R. 1933 Calcutta 347

S. K. GHOSE, J.

Hooghly - Chinsura Municipality — Complainant.

v.

Keshab Chandra Pal—Accused.

Criminal Ref. No. 106 of 1931, Decided on 12th August 1931, made by Sess. Judge, Hooghly.

(a) Bengal Municipal Act (3 of 1884), Ss. 261 and 273—Making tiles without license—No publication of prohibition by Municipality proved—Accused is not guilty.

Unless the Municipality proves that the publication against making tiles was published under S. 234, Municipal Act, a person making tiles without license under S. 261, Act 3 of 1884, is not guilty under S. 273 (2). [P 347 C 2]

(b) Evidence Act (1872), S. 114, III. (e)—Official acts—Presumption cannot supply deficiency in proof.

Though official acts may be presumed to have been regularly performed such presumption cannot supply deficiency in the proof: 18 I C 651, *Ref.* [P 347 C 2]

(c) Criminal P. C. (1898), Ss. 342 and 540—Failure to follow provisions of S. 342 vitiates trial.

Where long after the closing of the case a Magistrate examines a witness under S. 540, but does not further examine the accused under S. 342 failure to follow provisions of S. 342 vitiates the trial and S. 540 cannot cure the irregularities committed thereby. [P 348 C 1]

Order of Reference.—One Keshab Ch. Pal was charged under S. 273 (2), Bengal Municipal Act (3 of 1884) for having used a place as a kiln for making tiles within the Municipality of Hooghly-Chinsura without a license from the Commissioners as contemplated by S. 261 of the Act. The case was tried summarily and the accused was convicted and sentenced to pay a fine of Rs. 30 in default simple imprisonment for 30 days. It appears that the Municipality is in existence from the year 1864. There is a resolution of the Municipality dated 12th February 1867 by which under S. 77, Municipal Act of 1864 (B. C. Act 3 of 1864), the whole of the municipal area was declared to be a prohibited area within which bricks, &c., could not be manufactured without a licence. Ex. 6 (1) is the resolution. In 1868 by Ex. 6 (2), a resolution dated 27th July 1868, the prohibition was extended to tiles under the same section. The Act of 1864 was repealed by B. C. Act 5 of 1876. S. 285 of the latter Act corresponds to S. 77 of the Act of 1864. This section finds a place in Part 7 of the Act of 1876. Ss. 233 and 234 of the Act lay down the procedure by which the provisions of this part are extended and published. The present Act (of 1884) provides by S. 220 that such a provision of the Act of 1876 if once extended will be deemed to have been in force without further express extension thereof under the new Act. In this case the Municipality has not proved that any publication was made under S. 234 of the Act of 1876 and as such it cannot be said that the prohibition for making tiles is in force legally. The learned Magistrate in his explanation says that official acts may be presumed to have been regularly performed, but such presumption cannot supply deficiency in the proof: vide *Mookram Ali v. Cuttack Municipality* (1).

It further appears that the provisions of S. 342, Criminal P. C., have not been followed. It appears from the summary form that the accused was examined once during the trial but the date of such examination does not appear from the form or from the order sheet. It however appears that on 23rd February 1931 long after the closing of the case

I. (1913) 14 Cr L J 91=18 I C 651.

and hearing of arguments the learned Magistrate examined: "One witness for the Municipality under S. 540, Criminal P. C." He also admitted into evidence several documents for prosecution on the same date and proceeded to pass orders in the case. Without examining the accused further under S. 342, Criminal P. C., or giving him an opportunity if he so desires to rebut all this evidence. The procedure in my opinion was highly irregular and prejudicial to the interest of the accused person. S. 540, Criminal P. C., was not meant to justify such a procedure and cannot cure the irregularities thereof. The whole trial was vitiated by the failure to follow the provisions of S. 342, Criminal P. C. I accordingly recommend on the above grounds the setting aside of the conviction and sentence on the accused person.

Order.—This Reference must be accepted for the reasons stated in the letter of the learned Sessions Judge of Hooghly. The conviction of the petitioner Keshab Chandra Pal under S. 273 (2) read with S. 261, Bengal Municipal Act (3 of 1881) and the sentence passed on him are set aside. The fine if paid must be refunded.

K.S. *Conviction set aside.*

A. I. R. 1933 Calcutta 348

MUKERJI AND PATTERSON, JJ.

Francis Duke Cobridge Sumner, Offg. Deputy Secretary, Port Commissioners, Calcutta, and others—Petitioners.

v.

Jogendra Kumar Roy and another—Opposite Parties.

Criminal Revns. Nos. 907 and 908 of 1932, Decided on 30th September 1932, against the order of Subdivl. Magistrates Howrah.

(a) Criminal P. C. (1898), S. 144—Magistrates should be cautious in exercising power under S. 144.

The Legislature by S. 144 of the Code has conferred very large powers upon Magistrates who have to deal with urgent cases of nuisance or apprehended danger. The larger is the power, the greater is the necessity to be cautious about its exercise. And the exercise of the power should be guided by having the following principles in view viz: (1) Courts, civil as well as criminal, exist for the protection of rights and therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression; (2) when an order in suppression of lawful rights have to be made

it ought not to be made unless the Magistrate considers that other action that he is competent to take is not likely to be effective; and (3) the order, if made, should never be disproportionate to but should, always be, as far as possible, commensurate with the exigencies of any particular situation. [P 350 C 2; P 351 C 1]

(b) Criminal P. C. (as amended by Act 18 of 1923), Ss. 144 and 435—Order of Magistrate under S. 144 is open to revision.

Under S. 435 as amended by Act 18 of 1923 the High Court can revise an order of a Magistrate under S. 144, Criminal P. C., and in revision it has to consider not merely the legality of the order but their propriety as well. [P 351 C 1]

(c) Easements Act (1882), S. 18—Market franchise—No such right exists in Bengal.

In Bengal there is no such thing as market franchise or the right to hold a market conferred by grant from the Crown, nor can such right be acquired by prescription, and the proprietor of an old haat therefore has no monopoly or privilege which is entitled to protection and no immunity for competition: *A I L 1920 Cal 255, Ref.* [P 351 C 1, 2]

(d) Criminal P. C. (1898), S. 144—Magistrate can depute another Magistrate to hold inquiry but he should come to his own conclusion on the materials.

It is competent for a Magistrate who has to make an order under S. 144 of the Code to depute another Magistrate to make an inquiry and submit a report and then to act on the report so submitted. But only so long as he applies his mind to the materials which are before him or which he may care to gather and come to his own conclusion as to their sufficiency or otherwise, his action cannot be open to objection. [P 351 C 2; P 352 C 1]

(e) Criminal P. C. (1898), S. 144—Opinion of Magistrate visiting the place.

The opinion of a Magistrate who has visited the spot is not a thing to be lightly passed over. [P 353 C 1]

*N. Barwell, Sidheshwar Chakrabarti, J. P. Mitra, B. C. Chatterji, P. C. Chatterji, Bireswar Chatterji and J. C. Sett—*for Petitioners.

*Khundkar—*for the Crown.

*N. K. Bose, Satindranath Mukherji and S. K. Sen—*for Opposite Parties.

Mukerji, J.—These two Rules are directed against certain orders which have been passed by the Subdivisional Magistrate of Howrah under S. 144, Criminal P. C., in connexion with the starting of a haat in the town of Howrah.

The facts shortly put are the following: The employers of the opposite party in these Rules, who, for the sake of brevity, will be called the Chamarias, are the owners of a haat which goes by the name of Mangla haat and which has been in existence for about ten years and holds its sittings on Tuesdays at a

site on the Chandmari Road, close to the Buckland Bridge. Kanhai Lal Memani and Lun Karan Das Memani, the petitioners in Revision Case No. 908 are partners of a firm styled Jewan Ram Ganga Ram and Co. This firm, presumably with the object of starting another hut in the locality, obtained a transfer of a lease of a plot of about 14 bighas of land which was held under the Commissioners for the Port of Calcutta by one Srilal Chamarla. This plot of land abuts on Grierson Road and is situate quite close to the site of the hut belonging to the Chamarlas, being at a distance of only 600 ft. or so therefrom. On the plot of land so acquired there are, it is said, a number of permanent stalls, and on the remainder thereof the petitioners constructed a very large number of sheds and made arrangements for the sitting of a hut on Tuesday, 6th September 1932. On 2nd September 1932 two petitions were filed by the two persons who are the opposite party in these Rules—the said petitions being the exact replica of each other praying for an injunction against the two petitioners in Revision Case No. 908 and some other persons restraining them from starting the hut. These petitions were filed before the District Magistrate, who made them over to the Subdivisional Magistrate for disposal. Later on, a petition was filed by some persons alleged to be stall-holders in the Chamarlas hut, asking for action being taken against the Chamarlas under S. 107, Criminal P. C. The Subdivisional Magistrate made over all these petitions to a Deputy Magistrate Mr. Baruah for inquiry and report. On 5th September 1932, Mr. Baruah held an inquiry, examined the witnesses produced by the parties and submitted a report. On that on the same day the Subdivisional Magistrate heard the parties and made an order which concluded with these words:

"Having regard to the facts stated above I order an injunction under S. 144, Criminal P. C., issued against"

the two petitioners in Revision Case No. 908 and some other persons to be their men being named here

"restraining them from opening the proposed new hut on Tuesday, 6th September 1932, or on any subsequent Tuesday within the period of two months from this date. I consider any action under S. 107, Criminal P. C., against

Radha Kisson Chamarla and others as prayed for unnecessary, as no case has been made out for such an action and it seems to be unnecessary in view of the order under S. 144, Criminal P. C., passed by me."

The District Magistrate was moved to rescind or alter this order under S. 144, Cl. (4), Criminal P. C., but on 12th September 1932 he declined to interfere. An application was made to the Sessions Judge for a reference to this Court for revision, but it was dismissed on 23rd September 1932. It is this order under S. 144, Criminal P. C., which forms the subject-matter of Revision Case No. 908.

The order under S. 144, Criminal P. C., spoken of above, as drawn up, described the plot of land, on which the proposed new hut was not to be held, as lying within certain boundaries given in the schedule, the eastern boundary mentioned therein being the river Ganges. In the body of the order however the boundaries were qualified in the following way: "Bounded as below, of which you have taken a sub-lease." As a matter of fact Jewan Ram Ganga Ram and Co.'s sub-lease did not include a plot of land which lay immediately on the bank of the river. Treating the order as being confined to only such land as was included within the sublease, it appears to have been decided to hold a hut on Tuesday, 6th September 1932, notwithstanding the order under S. 144, Criminal P. C., mentioned above. This plot of land lying outside the sublease was fixed upon as the site and a lease thereof for a day is said to have been taken from the Commissioners for the Port of Calcutta with the object of holding a hut thereon on that day. The police, on getting information of this intention, submitted a report to the Subdivisional Magistrate who on the same day made an order under S. 144, Criminal P. C., ex parte against one Haji Fazlul Huq and others, who had taken the lease and were moving for the holding of the hut as aforesaid. Before the order was completed, advocates for the parties intervened, and at their request the order was kept in abeyance and it was decided to hold a local inspection. The Subdivisional Magistrate, accompanied by the same Police Officers and the advocates, went to the place where the new hut was being held. What the Subdivisional Magistrate saw on the spot may better be des-

cribed in his own words used in an order that he subsequently passed. He says there:

"I found that a haut had been going on under a shed of the Port Commissioners on a site close to the site of the proposed rival haut (only a road intervening between them). I met an officer of the Port Commissioners there. I now find that he was Mr. Sumner, the Officiating Deputy Secretary of the Port Commissioners. He told me that the tin shed was in the khas possession of the Port Commissioners and had been leased out for that day only."

With the strong police force that was on the spot there was little chance of any breach of the peace; and being of opinion that an attempt to stop the haut at that stage might lead to trouble the Subdivisional Magistrate considered it better to let the haut go on, and left the place ordering the police to keep a watch. At the end of the day he received a report from the officer in charge of the Golabari P. S., that he had been present there with his force all day and there was no disturbance; and he therefore cancelled the order which he had made under S. 144, Criminal P. C., ex parte earlier in the day as aforesaid and which was meant for that day only. It appears that on 6th September 1932, after the Subdivisional Magistrate came back from the spot, a petition was filed before him by one of the members of the opposite party, in para. 5 of which it was stated that after the Subdivisional Magistrate had left the spot one of the stall-holders of Chamaria haut was roughly handled in the presence of the Police constables and that the matter had been brought to the notice of the Sub-Inspector who was there. It was prayed that an order under Cl. (3), S. 144, Criminal P. C., might be issued. The Subdivisional Magistrate sent this petition to the officer in charge of the Golabari Police Station for inquiry and report with special reference to the allegation aforesaid.

On 10th September 1932 the said Police Officer, Mr. C. C. Majumdar submitted a report. On that date also a petition was filed on behalf of the opposite party repeating their prayer for an order under S. 144, Cl. (3), Criminal P. C. This petition was also sent to the police for inquiry and report, and the police reported that they had already made a report on 10th September 1932. Those reports were taken up for consideration by the Subdivisional Magistrate on 12th

September 1932, on which date he made an ex parte order under S. 144, Criminal P. C., against the two petitioners in Revision Case No. 907 and certain other persons and the public generally—the two petitioners being Mr. Sumner, Officiating Deputy Secretary to the Port Commissioners and K. C. Das Gupta, Assistant Estates Superintendent of that body. The terms of this order were the following:

"I hereby direct the persons" (names given) "to abstain from allowing any land in their occupation or charge to be used for or otherwise assist in the holding of a haut and the public generally from frequenting or visiting any such haut within the boundaries noted below on Tuesday 13th September 1932, or any subsequent Tuesday within the period of two months from to-day."

Of the proceedings that subsequently took place no details need be given and it would be sufficient to say only this: that the Subdivisional Magistrate, on cause being shown, on 23rd September 1932, refused to rescind the ex parte order, made as aforesaid, under Cl. (4), S. 144, Criminal P. C. It is necessary to state only two more facts; that when cause was shown as aforesaid the officer in charge of Golabari Police Station, Mr. C. C. Majumdar, was examined as a witness, and the opposite party declined to call any other witness on their behalf; and that as a result of the application made to him under Cl. (4), S. 144, Criminal P. C., the Subdivisional Magistrate ordered the injunction issued by him on 12th September 1932 to run as from 5th September 1932, treating it as only supplementary to the injunction issued by him on the last mentioned date. It is the order of 12th September 1932 issuing the injunction under S. 144, Criminal P. C., and that of 23rd September 1932 by which the Subdivisional Magistrate refused to rescind it, that form the subject-matter of Revision Case No. 907. Now there can be no doubt or dispute that the legislature by S. 144 of the Code has conferred very large powers upon Magistrates who have to deal with urgent cases of nuisance or apprehended danger. That section enables a Magistrate to make temporary orders, irrespective of the rights of the parties concerned, provided that, to quote the words of the section:

"In his opinion . . . there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable."

The larger is the power, the greater is the necessity to be cautious about its exercise. The statute itself has provided a safeguard in the shape of a time limit. Judicial decisions have also laid down certain principles which have to be borne in mind, and of these only a few may be mentioned here : Courts, civil as well as criminal, exist for the protection of rights, and therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression ; when an order in suppression of lawful rights has to be made it ought not to be made unless the Magistrate considers that other action that he is competent to take is not likely to be effective ; and the order, if made, should never be disproportionate to but should always be, as far as possible, commensurate with the exigencies of any particular situation. I am far from suggesting that there may not be cases when the Magistrate may feel called upon to restrain a person from the lawful exercise of his legal rights ; he is perfectly competent to take such a course under this section if, to quote the words of the section again :

"in his opinion there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable."

The amendment introduced by the Act of 1923, by deleting sub-S. (3) from S. 435 which till then existed, has made the order of the Magistrate open to revision. This Court therefore on the present rules has to consider whether the power which the Sub-divisional Magistrate undoubtedly has in this respect has been rightly exercised ; or, in other words, whether there were sufficient materials which would justify him in making the orders that he did. As a Court of revision this Court has to consider not merely the legality of the orders but their propriety as well : vide S. 435, Criminal P. C. As already stated, the Magistrate was not bound to maintain the rights of the parties, if the situation was such that such rights required to be suppressed or their exercise restrained for the time being.

So far as the rights are concerned the law is perfectly well settled. In Bengal there is no such thing as a market franchise or the right to hold a market conferred by grant from the Crown, nor can such right be acquired by prescription,

and the proprietor of an old *haut* therefore has no monopoly or privilege which is entitled to protection and no immunity from competition : see *Hem Chandra Roy v. Kristo Chandra* (1). In England, notwithstanding the repeal of the Combination Laws the idea of regarding a conspiracy to impede the free course of trade as a criminal offence at Common law, which to some extent prevailed in the 18th century, continued to hold its ground, being regarded as a part of the more general principle that a conspiracy to injure, aimed at a specific person, could give rise to an action at the suit of the injured party, even though the acts of the individual conspirators were neither criminal nor tortious : see *Quinn v. Leatham* (2) at p. 510 and the cases cited in the judgment of Lord Macnaghten in that case. In the more recent decision of the House of Lords in the case of *Sorrel v. Smith* (3) which aimed at reconciling or explaining all the earlier decisions the following proposition has been enunciated :

"A combination of two or more persons for the purpose of injuring a man in his trade is unlawful, and if it results in damage to him, is actionable. If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues, provided the purpose is not effected by illegal means. A threat to effect a purpose which is in itself lawful gives no right to the person injured thereby."

The question to be considered is, do the materials on which the learned Magistrate acted afford sufficient grounds within the meaning of the expression as used in S. 144 of the Code. So far as the order of 5th September 1932 is concerned these materials are the petitions of the two parties and the report of the Deputy Magistrate Mr. Barua, that he had then before him. In this connexion a question has arisen as to whether it is competent for a Magistrate, who has to make an order under S. 144 of the Code to depute another Magistrate to make an inquiry and submit a report and then to act on the report so submitted. The legislature not having defined the materials on which the Magistrate may take action under S. 144 of the Code I think it must be held that the Magistrate

1. A I R 1920 Cal 255=58 I C 879=47 Cal 1079.

2. (1901) A C 495.

3. (1925) A C 700=94 L J Ch 347=133 L T 370=41 T L R 529=69 S J 641.

would be competent to act on any credible information that may be available or which he may consider it proper to collect in any manner he chooses. So long as he applies his mind to the materials which are before him or which he may care to gather and comes to his own conclusion as to their sufficiency or otherwise, I do not think his action can be open to objection. It is true that so far as an order under Ch. 11 of the Code is concerned the legislature has not made any express provision for an inquiry by any other Magistrate, and it is also true that S. 148 of the Code makes the report of an inquiry, held for the purposes of Ch. 12 only, usable as evidence in the case.

The provision in S. 148 evidently has been made in view of the inquiry contemplated by sub-S. (4), S. 145 of the Code; and an omission of an express provision as to inquiry for the purposes of Ch. 11 can, in my opinion, hardly be regarded as forbidding the Magistrate from having one made for the collection of materials, in order to enable him to form his own conclusions. I am prepared to agree with the contention that the Magistrate who is to make the order is not competent to delegate his functions to some other Magistrate; but so long as the inquiry is limited to the purpose indicated above it cannot be said that there is any delegation in the real sense of the word. So far as the materials themselves are concerned, I am clearly of opinion that they were not sufficient. (After considering the evidence, the judgment proceeded). They cannot, in my opinion, suffice, in view of the circumstances of this particular case, to justify an order of the kind that was made on 6th September 1932. It is true that there were allegations before the Subdivisional Magistrate, as also before Mr. Barua, that there was apprehension of a breach of the peace proceeding from the side of the Chamarias. But such allegations evidently were not established. The Subdivisional Magistrate, as would appear from the portion of his order quoted above, held that no case had been made out for action against them under S. 107. He added:

"And it (i. e., action under S. 107) seems to be unnecessary in view of the order under S. 141, Criminal P. O., passed by me."

Of course if anything had been proved showing that it was the Chamarias or their men who were guilty of any unlawful acts, it is hardly likely that the Magistrate would have thought of stopping the holding of the proposed haut, and not any action against them under S. 107 of the Code as the remedy. So far as the order of 12th September 1932 is concerned, in addition to the materials to which reference has already been made, there was the allegation about a stall-holder of Chamaria's haut having been roughly handled by somebody interested in the setting up of the new haut. As already stated this matter was referred to the Officer in charge of the Golabari Police Station for inquiry and report. This officer submitted his report on 10th September 1910, and his endorsement on the petition forwarded to him shows that he held the necessary inquiry. Curiously enough his report of that date does not refer to this incident at all, and in his evidence he says:

"I never saw the man who made the complaint. I heard of the incident of the 6th."

The entry which is said to have been made in the police diary as regards this incident was not proved before the Court, nor was the officer who recorded it produced for examination. Before us it is said that the complainant stall-holder has been gained over, and no reliance is any longer placed on this incident. The only other material which has any bearing on the order of 12th September 1932 is the police report of 10th September 1932 which contains no facts beyond a statement of the circumstances which had weighed with the Subdivisional Magistrate in making his order of 6th September 1932. I should not omit to refer to the fact, upon which very great reliance has been placed in support of the order, namely, that the Subdivisional Magistrate had himself visited the new haut when it was being held on the 6th. No doubt his opinion formed on the spot is not a thing to be lightly passed over. But it should be remembered that it was the new haut that he visited where any disturbance of it was to take place at all, could take place only at the instance of the men of the Chamarias, and further that in point of fact there was no disturbance in that haut at all. Nor should it be forgotten that in the order that he recorded on

that day, no facts were mentioned which could form the basis of an order under S. 144, Criminal P.C., and on the other hand he cancelled the injunction he had ordered for the day, and waited for a police report to see whether any further action should be taken. I am unable to hold that there were any materials sufficient for the purposes of the order of 12th September 1932.

In the view that I take of the merits I do not consider it necessary to deal in detail with the other grounds that have been urged against the latter order. But I think I should content myself with observing that if action under S. 144 of the Code was justified, it was quite open to the Magistrate to make the order upon the two petitioners in revision, Case No. 507, notwithstanding anything contained in the Calcutta Port Act, if in point of fact it was found, as it has been found, that they were persons who were aiding in the setting up of the hut. In my opinion the materials on the record were not sufficient to justify the orders complained of and the orders therefore must be set aside. The rules are accordingly made absolute and the orders against which they are directed are hereby set aside. It will be open to the learned Subdivisional Magistrate to take such other preventive action against the parties or any of them, should he consider such action necessary and justified upon the materials that he may have before him. And in this connexion we desire to invite his attention to the suggestion made by the learned Sessions Judge in this matter in his order of 23rd September 1932.

Patterson, J.—I agree.

K.S. *Rules made absolute.*

* A. I. R. 1933 Calcutta 353

PANCKRIDGE AND PATTERSON, JJ.

Boymkesh Chatterji and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 408 of 1932, Decided on 29th November 1932, from order of 1st Class Magistrate, Barrackpur.

* (a) Police Act (1861), S. 30 (2)—Notice requiring conveners to apply for license whether valid (*Quære*).

Quære—Whether a notice under S. 30, sub-S. (2) requiring conveners, collectors, directors, promoters of assemblies or processions of five or more men in the jurisdiction of a particular

police station to apply to Assistant Superintendent of Police for a license for such assemblies or processions is valid? [P 353 C 2]

* (b) Police Act (1861), Ss. 34 and 30 (2)—Ordinary members of procession cannot be convicted under S. 30 (2)—Mere fact that they headed procession and were garlanded is not sufficient.

Persons can only be properly convicted under S. 32 if it is established that they were directors or promoters of a procession and were as such under an obligation to apply for a license for it. If they were merely ordinary members of the processions, S. 30, sub-S. (2) does not apply to them. The mere fact that they were at the head of the procession and wearing garlands is not sufficient. [P 354 C 1]

P. C. Chatterjee and Uma Sankar Sarkar—for Petitioners.

D. N. Bhattacharji—for the Crown.

Order.—It appears to us that this rule must be made absolute upon at least one of the grounds on which it was issued. That ground is ground No. 1 and is to the effect that in the absence of a finding by the Magistrate that the petitioners were convening or collecting the assembly, or directing or promoting the procession, the conviction is fit to be set aside. By S. 32, Police Act of 1861, a person opposing or not obeying orders issued under various sections of which S. 30 is one is liable on conviction to a fine not exceeding Rs. 200. By S. 30, the District Superintendent of Police may, if certain preliminary conditions are satisfied, require by general or special notice that the persons convening or collecting certain assemblies or directing or promoting certain processions shall apply for a license. It is obvious that the purpose of the section is to give the police control of persons who organize or take charge of processions by requiring them to apply for a license. No punishment is prescribed by the Act for those taking part in a procession for which no license has been granted or applied for. It is clear on the evidence that in this case there was a procession in Baranagore on 20th October 1931. On 14th October 1931 the Assistant Superintendent of Police, Barrackpore, had issued a notice under S. 30, sub-S. (2) requiring conveners, collectors, directors, promoters of assemblies or processions of five or more men in the jurisdiction of the Baranagore Police Station to apply to him for a license for such assemblies or processions.

We assume, though it is by no means free from doubt, that the notice in the

form in which it was given is a valid notice and within the powers of the Assistant Superintendent of Police as conferred by sub-S. (2). It is clear to us that the petitioners can only be properly convicted if it is established that they were directors or promoters of the procession of 20th October and were as such under an obligation to apply for a license for it. If they were merely ordinary members of the processions, S. 30, sub-S. (2) does not apply to them. There is no finding by the Magistrate that they were such directors or promoters.

The only evidence on the record which by a stretch of imagination can be said to bear on this point is that the petitioners were at the head of the procession and were wearing garlands. It does not appear that they alone among the processionists were garlanded. But even if there were evidence to that effect we are of opinion that there was not sufficient evidence to justify the Magistrate in arriving at the finding that the petitioners were directors or promoters of the procession in question. As I have pointed out he has in fact come to no finding upon the point. The evidence being such as I have described we do not think that any useful purpose will be served by ordering a retrial. We make the rule absolute, set aside the conviction and sentence and direct that the fines, if paid, be refunded.

R.K. *Conviction set aside.*

A. I. R. 1933 Calcutta 354

RANKIN, C.J. AND COSTELLO, J.

Sudhindra Kumar Roy and another—
Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 439 of 1932, Decided on 9th December 1932.

(a) Ordinance (11 of 1931), S. 34—Scope.

It is reasonably clear that the commitment stage is not included by the phrase "for which he was being tried at the promulgation of this Ordinance." In a case tried by the Sessions Judge the trial does not begin until after the order of commitment has been made.

[P 355 C 2]

(b) Ordinance (11 of 1931), S. 34 — "For which he was being tried," meaning explained.

Trials which were begun after the Ordinance had been passed are not put in the same position as the trials mentioned in the opening language of S. 34. There would be no point in making a special exception for the trials proceeding at the time of the promulgation of this Ordinance, if

no trial once commenced could be interfered with by operation of any order made under S. 30. The correct way of applying the phrase "for which he was being tried" would be to ask oneself whether, the proceedings indicated by S. 271, Criminal P. C., had been commenced or not.

[P 357 C 1, 2]
(c) Penal Code (1860), S. 307 — Persons pursued by constables turning round and firing at them — Offence under S. 307 is committed.

Where certain persons who are clearly in fear of being apprehended by the police and find that they are being followed, turn round and fire at the constables, they commit an offence under S. 307. The circumstance that they did not succeed in hitting anybody is no reason for supposing that the cartridges were blank. Nor is the fact that they did not hit anybody or that the bullets were not found is material

[P 358 C 1]

Santosh Kumar Basu, Radhica Ranjan Guha and Ramendra Chandra Roy
—for Appellants.

Khundkar and Anil Chandra Roy Chowdhury—for the Crown.

Rankin, C. J.—In this case the two appellants before us were put on their trial before a Special Magistrate appointed under Ordinance 11 of 1931 on charges under S. 307, I. P. C., and Cl (e), S. 19, Arms Act. The case against the two accused is this: On 13th October 1930 at a certain ferry ghat in Jamalpur the complainant with another constable saw four men getting into a boat. They went down there and endeavoured to follow them. Thereupon the four men went up. Each of the two accused was among those four and each of them when he got to the top of the ferry ghat and saw that they were being followed by the complainant and his companion fired a revolver—one shot each from the top of the ferry ghat at their pursuers. The other two men ran away and these two men ran off after firing and were followed. They again fired in the course of the chase and the firing is said to have been made by putting their hands behind them—whatever it may mean. It appears also that the complainant had a revolver and fired some shots. No bullets were however found and nobody was hit. The Magistrate came to the conclusion that both the charges had been proved against both the accused and he convicted them and sentenced each of them to four years' rigorous imprisonment under S. 307, I. P. C., and to a further year's rigorous imprisonment under S. 19 (e), Arms Act. On this appeal, Mr. S. K. Basu for both the appellants has

contended before us, first, that there is an objection to the jurisdiction of the trying Magistrate; and, secondly, that the identification of the two accused before us as the persons who had fired is unsatisfactory. He has taken a third point also to the effect that, if the evidence against the accused is believed, the elements necessary to make out an offence under S. 307, I. P. C., are not sufficiently proved.

We have, first of all, to examine the objection as to jurisdiction. The form in which that objection was first taken before us was this: By S. 34, Ordinance 11 of 1931, it is provided that:

"No direction shall be made under S. 30 for the trial of any person by a Special Magistrate for an offence for which he was being tried at the promulgation of this Ordinance before any Court."

The date of the promulgation of this Ordinance was the last day of November 1931. It was said by Mr. S. K. Basu that in this case the accused were arrested on 14th November 1930, that they were put before a Magistrate and the usual inquiry held, and that it resulted in their commitment to the Sessions on 11th July 1931. Thereafter, certain bail applications were made and rejected by the Sessions Judge. On 19th September 1931, the case was transferred to the Fourth Additional Sessions Judge and, in November, certain applications for classification having been made to this learned Judge, and having been rejected, the case came on before him for trial on 18th January 1932. The accused were called upon to plead and they pleaded not guilty. The learned Sessions Judge began empanelling the jurors but, owing to certain challenges having exhausted the number of jurors present, the jurors were not able to be empanelled on that date. Consequently, the hearing was adjourned till 1st March 1932. On 28th April 1932 the direction of the Local Government was made purporting to be under S. 30, Ordinance 11 of 1931. In these circumstances, Mr. Basu contended, first of all, that although the case was not taken up by the Sessions Judge until 18th January 1932, for trial under S. 271, Criminal P. C., nevertheless the phrase in S. 34 of the Ordinance "for which he was being tried" was a phrase which would include the commitment proceedings, the stage of inquiry prior to the commitment, and therefore this case

could be brought directly within the opening words of S. 34. I am of opinion that it is reasonably clear that the commitment stage is not included by the phrase "for which he was being tried at the promulgation of this Ordinance." The trial had not begun until after the order of commitment had been made, the Sessions Court not having seisin of the case. In my judgment that point in that form cannot be made good.

The second, and I think the more fundamental form of objection as to jurisdiction is this: It is said that, in any event, on 18th January 1932 the accused were being tried when they were called upon to plead and their plea was recorded. The mere fact that the case had to be adjourned in order that the jury might be empanelled was an accident which does not entitle any one to say that the trial had not commenced. The Sessions Judge had commenced the proceedings by taking the steps indicated by S. 271, Criminal P. C. That being so, the argument is that there was no power under the Ordinance to direct a trial by a Special Magistrate, if at the time of that direction the accused persons were already on trial for the same offence. We have to consider carefully the meaning and effect of Ss. 30 and 34 of this Ordinance. It will be observed that, if S. 30 be taken by itself, in a case where the Local Government is of opinion that there are reasonable grounds before them to think that certain persons have committed a scheduled offence or an offence punishable under the Ordinance the section says that it "may by order in writing direct that such person shall be tried by a Special Magistrate." So far, no attention seems to be paid to the circumstance that the accused may already be on trial or that an inquiry may be in progress in connexion with the same offence. The matter is put simply as if the Local Government has come to a certain conclusion and directs a trial to be held by a Special Magistrate for a particular offence. When we come to S. 34 we see that the saving for persons who are already on their trial is a saving confined to those persons who were being tried on the date of the promulgation of the Ordinance and this provision has a marked negative value and would not seem to put such persons on the same footing as persons who later

on were on trial before an ordinary Court at the time when the direction of the Local Government was made. If we carefully study S. 34, we find that having given a direction that the existing trials are not to be interfered with—by existing trials I mean the trials that were in progress on the date of the promulgation of the Ordinance—the section goes on to say that:

"save as aforesaid, a direction under either of the said sections may be made in respect of any person accused of a scheduled offence."

If therefore it is legitimate to stop there, it would seem that that provision authorizes such direction except in the cases excluded by the opening words of the section. But the concluding phrase of the section—"whether such offence was committed before or after the promulgation of this Ordinance"—trenches upon a different matter. That is intended to make it clear that the date of the offence has nothing to do with the applicability of the present procedure. It is contended by Mr. Basu that the main feature and purpose of S. 34 is to make it clear that an offence, although committed before the promulgation of this Ordinance, may be dealt with by the special procedure. Mr. Basu suggests that, as the Local Government prior to the promulgation of the Ordinance would have had no opportunity of considering whether a special procedure was desirable or not, it might have been contended consistently with the general idea that no existing trial was at any time to be disturbed, that there was a special reason for disturbing an existing trial if it was in progress on the date of the promulgation of the Ordinance and that the opening words of S. 34 are intended "*ex abundanti cautela*" to negative such contention. For this reason he says that we are not to draw any inference from the opening words to the effect that trials which were not in existence at the promulgation of the Ordinance were not to be interfered with.

It seems to me that that is a very difficult construction to put upon S. 34. If we consider the course of legislation leading up to this section, Mr. Basu's view becomes even more difficult to maintain. By the Criminal Law Amendment Act of 1908, S. 2, a scheme was provided by which certain offences were

to be tried before a Special Bench of the High Court and the procedure was that where the Magistrate had taken cognizance of any offence specified in the schedule the Local Government could make an order which would attract the special provisions of the Act. By sub-S. (2) it was provided that:

"no order shall be made in any case in which an order of commitment to the High Court or Court of Session has been made under the Criminal Procedure Code, 1898; but save as aforesaid, an order may be made in respect of any offence whether committed before or after the commencement of this Act."

That appears to be the original of the provision which was afterwards repeated in the Ordinance of 1931. Under the Act of 1908 the making of an order of commitment whether to the High Court or to the Court of Session was to put an end to the power of the Local Government to apply the special procedure and we know that the procedure was to be applied in cases where the Magistrate had taken cognizance of the offence. It would seem therefore that unless there was an order of commitment that provision would apply even although the trial before the Magistrate was proceeding. The next time this provision was made was by the Bengal Criminal Law Amendment Act of 1925, which was made by the Governor of Bengal under the special power conferred by S. 72, Cl. (E), Government of India Act. There by S. 3 it was provided:

"(1) The Local Government may by order in writing direct that any person accused of any offence specified in Sch. 1 shall be tried by commissioners appointed under this Act; and (2) no order under sub-S. (1) shall be made in respect of or be deemed to include any person who has been committed under the Code for trial before a High Court; but save as aforesaid an order under the subsection may be made in respect of or may include any person accused of any offence specified in Sch. 1 whether such offence was committed before or after the commencement of this Act."

It is clear enough therefore that the making of an order of commitment to Sessions was not enough to prevent the Local Government under this Act from applying the special procedure, though an order of commitment for trial before the High Court would of itself bar the application of the special procedure. The reason no doubt was that it was not thought that the competency of the local legislature would extend to an interference with cases pending

before the High Court. The Ordinance with which we are now concerned however is an Ordinance made by the Governor-General exercising powers which are identical with those of the Central Legislature. It has not therefore been thought necessary to make any discrimination between trials at the Session and trials before the High Court on commitment, and the saving which is made by S. 34 is confined to trials that were in progress on the date of the promulgation of the Ordinance. But with that exception it is said that a direction may be made in respect of any person accused of any scheduled offence. It seems to me impossible therefore to say that trials which were begun after the Ordinance had been passed were put in the same position as the trials mentioned in the opening language of S. 34. There would be no point in making a special exception for the trials proceeding at the time of the promulgation of this Ordinance, if no trial once commenced could be interfered with by the operation of any order made under S. 30. The Bengal Suppression of Terrorist Outrages Act (12 of 1932) repeats in S. 29 the same language as S. 34, Ordinance 11 of 1931, which is now before us. It is indeed a very large power that is given to the Local Government in this way. If an order is to have the operation of bringing to an end a trial that is already in progress, no doubt such a power as that would be readily liable to the greatest abuse. On the other hand, so far as trials before a Magistrate are concerned, I think it was early found necessary to eliminate altogether the idea that the special procedure is inapplicable whenever the trial before the Magistrate has begun.

It is very difficult to say at what stage—apart from the very earliest stage—trial does begin before a Magistrate. There is some ground for arguing that the moment the Magistrate takes cognizance of the offence the trial commences. On the other hand, people may argue that in a warrant case not until the charge is framed can the trial be said to have begun. It has to be remembered that in many proceedings before a Magistrate the position is that the Magistrate makes up his mind at a late stage either to deal with the case himself or to make an order of commit-

ment: S. 347, Criminal P. C. When he does, in fact, make an order of commitment, then, of course, the magisterial proceedings are mere enquiry. He does not know in many cases until towards the end whether the order is to be made or not; and I think it has been found impossible to exercise the power of applying the special procedure under a limitation of that power—never to interfere with an existing trial. As each of the enactments to which I have referred, namely of 1908, 1925 and 1931, have been made, the liberty given to the Local Government seems to have been made wider and when finally, in S. 34, Ordinance 11 of 1931, we find an express saving for those trials which were in existence on 30th November 1931, I do not think it possible as a matter of construction to say that an order under S. 30 is bad merely because it interferes with a trial begun subsequent to 30th November 1931. I think were it necessary to decide the matter, that the correct way of applying the phrase "for which he was being tried" would be to ask oneself whether, the proceedings indicated by S. 271, Criminal P. C., had been commenced or not. But in the present case, the order of the Local Government was made before the trial in the narrower sense had commenced, that is to say, the jury had not been empanelled, the prosecution case had not been opened and no evidence had been taken. This second form of objection to the jurisdiction fails and should be overruled.

On the facts, I am of opinion that the Special Magistrate's judgment should be confirmed. He points out that the evidence of identification is given by no less than four persons and he points out that this has been corroborated and amply corroborated by the circumstance that the complainant mentioned the names of both the accused as his assailants immediately after the occurrence. I have no doubt therefore that on the question of identification the Special Magistrate's judgment is correct.

Upon the question whether it is sufficiently proved that all the elements of S. 307, I. P. C., are present in this case, I think there is no difficulty. Certain persons are clearly in fear of being apprehended by the police. When they find that they are being followed they

turn round and fire at the constables. In these circumstances it is a very great strain on one's imagination to suppose that they were using revolvers loaded with blank cartridges when there is no evidence to indicate that they were so doing. The circumstance that they did not succeed in hitting anybody is no reason for supposing that the cartridges were blank. The question whether there was any smoke or not is not material for the purpose of the present question. We have it that the persons turned round and deliberately fired, though they did not hit anybody. That is no reason for supposing that they were not attempting to hit; it is much more likely that they wanted to hit. I am not impressed by the argument that because the bullets have not been found we ought to assume that no case has been made out under S. 307, I. P. C. As regards the sentences, I regard them to be light and I see no reason to interfere with them. This appeal therefore must be dismissed.

Costello, J.—I am of the same opinion.
V.S. *Appeal dismissed.*

A. I. R. 1933 Calcutta 358 (1)

PEARSON AND PATTERSON, JJ.

Nutbehari Sarkar—Complainant—
Petitioner.

v.

Saroda Prosad Chowdhury and another
—Accused—Opposite Party.

Criminal Revn. No. 651 of 1932, Decided on 15th February 1933.

Criminal P. C. (1898). S. 258—Warrant case—Charges framed—Parties not appearing on adjourned date—Magistrate cannot act under S. 258.

In a warrant case, some of the witnesses were examined and charges were framed and the case was adjourned to a particular date. On that day the parties did not appear and the Magistrate thinking that the proposed compromise might have materialized dealt with the case under S. 258, Criminal P. C., and recorded an acquittal:

Held: that he had no right to do so as charges had already been framed and that the acquittal order should be set aside. [P 358 O 2]

Jitendra Mohan Banerjee and Nirmal Kumar Sen—for Petitioner.

Joy Gopal Ghose—for Opposite Parties.

Pearson, J.—This was a warrant case before the Magistrate. Summons was issued under S. 323, I. P. C. Some of the witnesses were examined and charges framed. The case was ultimately ad-

journed till 28th June 1932. In the meantime it appears that certain negotiations for settlement had been going on, which had previously been brought to the notice of the Magistrate. On that particular day 28th June, when the case was called on, the parties did not appear and the Magistrate thought that it was due to the fact that the settlement had materialized and that the parties had made up their differences. Accordingly, he dealt with the case under S. 258, Criminal P. C., and recorded an order of acquittal. Strictly speaking, there is no doubt that this order cannot be justified. The mere fact of the absence of the accused or complainant would not warrant an order of this kind to be made. The learned District Magistrate with reference to the present rule says that he is not in a position to support the order of acquittal and the trying Magistrate would fain have set aside his order at a later stage in the day had he found himself able to do so. I think it is clear that the order that he did make was wrong. He could not have acted under S. 258, Criminal P. C., because charges had already been framed.

In the events that have happened it turns out that the Magistrate had no right to pass this order in the manner that he did. The rule is accordingly, made absolute and the order complained of is set aside. The trial will be proceeded with on that footing.

K.S. *Order set aside.*

* A. I. R. 1933 Calcutta 358 (2)

RANKIN, C. J. AND AMEER ALI, J.

Soleman Bibi—Applicant.

v.

E. I. Ry.—Opposite Party.

Civil Ref. No. 9 of 1932, Decided on 7th February 1933, made by Commissioner for Workmen's Compensation, Bengal, D/- 20th July 1932.

* (a) *Workmen's Compensation Act (1923)*, S. 2 (1) (d)—"Unmarried daughter" includes "widowed daughter."

Words "unmarried daughter" in S. 2 (1) (d), *Workmen's Compensation Act*, includes a widowed daughter who was being maintained by her father during his lifetime. Meaning of word "unmarried" discussed: *A I R 1932 Lah 1, Rel on.* [P 859 O 1; P 861 O 1]

(b) *Workmen's Compensation Act (1923)*, S. 2 (1) (d)—"Dependants"—Interpretation.

As the legislature has sought to give the connotation of the word "dependants" in S. 2 (1) (d) by setting out descriptions of certain relatives,

if one of those descriptions is uncertain, it is relevant to consider who according to the ordinary notions of the people are regarded as "dependants." [P 359 C 1, 2]

(c) Interpretation of Statutes—Rules regarding construction of word stated.

Words may and normally should be construed in their popular sense; it is also necessary that they should be construed so as to advance the remedy provided by the Act. [P 360 C 2]

Phanindra Kumar Sanyal—for Applicant.

Brahmacharai and Sudhir Kumar Kastgir—for Opposite Party.

Ameer Ali, J.—This is a reference under S. 27, Workmen's Compensation Act, by the Commissioner for Bengal. The question referred is as to the meaning of the expression "unmarried daughter" in S. 2 (1) (d) of the Act. The applicant is the daughter of the deceased workman; she is a widow and it is not disputed that she lived with and was maintained by her father during widowhood for about eight years. She was at the date of the death of her father his only relative. Before the Commissioner the applicant relied upon the case of *Moti Bai v. N. W. Ry.* (1) in which it was held that the expression "unmarried sister" included widowed sister. The learned Commissioner had certain doubts as to the correctness of that decision and at the request of both parties to the proceeding he has referred the question to this Court in a careful and well-considered letter of reference dated 20th July 1932. The Commissioner's two main reasons for questioning the correctness of the decision referred to are expressed by him at the end of his letter of reference as follows:

"First I find great difficulty in holding that discussions of the construction of settlements and wills were in *pari materia*, [he refers to the English authorities which formed the basis of the decision in *Moti Bai's* case (1)]; and secondly, there being no element of *de facto* dependency in the definition in the Act, the observations at p. 232 (of 13 *Lah.*) *Moti Bai's* case (1) appear to me to introduce an extraneous factor into the discussion."

With both these observations I agree subject to this, that I do not read the remarks at p. 232 as meaning that the applicant's claim was adjudged or awarded on the basis of *de facto* dependency. I read them as meaning that where the legislature has sought to give the connotation of the word "dependants" by setting out descriptions of

certain relatives, and one of these descriptions is uncertain, it is relevant to consider who according to the ordinary notions of the people as regarded as "dependants."

With regard to the meaning of the word "unmarried" the learned Commissioner expresses his own view at the end of Cl. 3 and the beginning of Cl. 4 of the letter of reference as follows: (1) that the word "unmarried" has a primary and a secondary significance; (2) that in its primary or ordinary signification the word "unmarried means" "never having been married"; and (3) that the application of the secondary meaning of the word unmarried is entirely a matter of context and circumstances. These propositions he founds upon a reference to the dictionary and his reading of the English authorities to which he had access.

With regard to the dictionary meaning of the word I am however of opinion that the view taken by the learned Commissioner is not correct. In all the general dictionaries to which I have referred—Murray's Dictionary, Johnson's Dictionary and some of the later ones—the meaning given is as "not married" or "single" and another meaning given is as "never having been married." On the other hand in Stroude's Judicial Dictionary, which of course is based upon legal decisions, there is a definite division into primary and secondary meanings—the primary meaning being given as "never having been married."

For a discussion of the authorities and the circumstances under which the Courts have held one or other meaning to apply reference may be made to three passages in Jarman on Wills, Edn. 7, respectively, at pp. 589, 1251 and 1597. I propose to refer to certain of the cases cited in order of date.

In *Moberly v. Strode* (2), "never married" is said to be "the common and usual meaning in a will" and again as "the common acceptance of it in language." At p. 454 there is a reference to the Statute 3 Will and Mary Ch. 11, S. 7 (a Poor Law Act) where "unmarried" is used as not married at the time. In *Maugham v. Vincent* (3), at p. 331, "never married" is referred to as "the common use of the word, but not 'necessarily the meaning'; 'strictly speak-

2. (1797) 3 Ves Jr 450.

3. (1940) 9 L J Ch 329=4 Jur 452.

(1) A I R 1932 Lah 1=13 Lah 228=134 I C 103.

ing it would mean not being in a state of marriage or otherwise "discoverte." In *Clarke v. Colls* (4), (a report which was not available to the Commissioner) at p. 612 it is said that the expression "may without violence of language mean either," and at p. 615 it is referred to as "capable of two constructions" "the context must determine."

The argument in that case was based not upon primary and secondary meaning, but upon redundancy. In *Day v. Barnard* (5), at p. 221, it is said that the word "unmarried popularly and most frequently means never married," but "the popular sense is not the grammatical or dictionary sense." That it is a word therefore which has "a flexible meaning." In *Dalrymple v. Hall* (6), at p. 716, it is stated that the ordinary meaning is "never married;" and in the result the Judge decided that as there was no context to indicate the meaning of the word "unmarried" he would attribute to it the ordinary meaning "without ever having been married." In *Re. Sergeant* (7) at p. 576 it was stated that the "primary and natural sense" is "never married" and that if the instrument is colourless it would be construed in that sense. Lastly in *Blundell v. De Falbe* (8), at p. 577, it is stated that "never married" is "the first of the meanings, the more ordinary and the more usual," but that it is "a very flexible word and is constantly used in ordinary life in each of the two meanings."

I would therefore prefer to state the result of the authorities as to the meaning of the word as follows: (1) That the dictionary or grammatical sense of the word is not married; (2) that the popular and more usual sense is never having been married; (3) that the word is commonly used in either sense and is therefore a "flexible" or equivocal term; (4) that for this reason the meaning must in all cases be discovered from the context; (5) that in the case of deeds and wills where there is no context, where the document is completely colourless, the popular sense will usually be adopted.

In other words I think it is putting it too high to say that in all cases there is a primary meaning and a secondary meaning or that the first is the rule and the second is the exception. With regard to the special rules for the construction of Statutes one rule is that words may and normally should be construed in their popular sense: see Maxwell, Edn. 7, p. 47. There is however another rule that words should be construed so as to advance the remedy provided by the Act: see p. 59 and the following. The two cases illustrative of this rule which have some topical connexion with the present case are *Jones v. Davis* (9), where in a Statute, relating to another matter altogether, "single woman" was construed so as to include as a married woman living apart from her husband. In *King v. Inhabitants of Wymondham* (10), a case which arose out of the Poor Law Statute I have referred to, "single and unmarried" in an "examination" was interpreted as "never having been married," the converso case. With regard to the context of the word in the present case the view taken by the Commissioner is expressed on the last page of the letter of reference as follows in the following manner:

"The words in the definition constitute an inclusive list of all the nearer relatives; on marriage a daughter acquires a new relationship . . . and I see nothing in the definition of dependants to warrant a supposition that on the death of her husband she resumes the original relationship."

The comment which occurs to me is as follows: a daughter undoubtedly acquires a new relationship on marriage. She does not however lose the old relationship; she remains a daughter. Once a daughter always a daughter: *qua* relationship she is a daughter before, during and after marriage. On the other hand the legislature has attached a qualification or condition that in order to participate a female child must not only be a daughter, but she must be an "unmarried" daughter. The question is what is the meaning of that qualification. Does it exclude daughters once, but no longer, married? I think not. It appears to me that the important portion of the context to read in connexion with the definition is the operative part of S. 8

4. (1861) 9 H L C 601.

5. (1861) 80 L J Ch 220=1 Dr & Sm 351=9 W R 136=3 L T 597.

6. (1881) 16 Ch D 715=50 L J Ch 302=29 W R 421.

7. (1893) 26 Ch D 575=54 L J Ch 159=32 W R 987.

8. (1899) 57 L J Ch 576=58 L T 621.

9. (1901) 1 K B 118=70 L J K B 38=49 W R 136=53 L T 412=55 J P 89.

10. (1841) 2 Q B 541.

which provides for one payment to be distributed at a special time or period—the death of the employee—among particular persons. According to the English authorities and also I think in common conversation, when “unmarried” forms a qualification in the description of a person who is to receive a sum of money at a definite time or period, the meaning “not married” appears to be appropriate: see *Leshingham Trust 21 Ch. D. 703* and *Jarman on Wills* in particular at p. 1252. For these reasons I agree with the decision in 13 *Lah. 228* (1) and construe the expression “unmarried daughter” in S. 2, 1 (d) of the Act as including widowed daughter.

Rankin, C. J.—I agree and I would only add that, in my judgment, while it is quite true that the definition of dependency is made by the statute by a list of certain relatives, it is quite clear that in the case of a daughter the mere relationship to the workman was not regarded as itself a sufficient test. The statute has by speaking of “unmarried daughter” introduced an element extraneous to the mere question of relationship to the workman and I think it is legitimate in considering the effect of the word “unmarried” in such a case as that to consider it as a factor chosen by the legislature because in many cases at least it has a certain bearing upon the question of dependency in fact. I think, therefore, that there is no reason to dissent from the decision of the High Court of Lahore in *Moti Bai's* case (1); and, with all respect to the Commissioner who has put before us a very well-reasoned opinion, I am not prepared to depart from the principle laid down in that case. The applicant will have her costs before the Commissioner and before us from the employers. We assess the hearing fee in this Court at three gold mohurs.

K.S.

*Reference answered.***A. I. R. 1933 Calcutta 361**

PANCKRIDGE AND PATTERSON, JJ.

Ambika Charan De and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 564 of 1932, Decided on 10th February 1933.

(a) Penal Code (1860), S. 145—Congress processionists refusing to take different

route and refusing to disperse. Conviction under S. 145 is proper.

People in a congress procession were ordered to take a different route, but they refused to do so and sat on the ground. On being asked to disperse they refused to do that either.

Held: that the conduct of the accused coupled with the fact that the procession was animated by hostility to the established Government showed that they were determined to disregard and disobey any lawful order and that the conviction under S. 145, I. P. C. was proper.

[P 362 C 2]

(b) Criminal P. C. (1898), S. 439 (5)—High Court may reduce sentence at instance of third party in revision even though convicted person has not appealed in special circumstances.

The High Court would interfere and reduce a sentence in revision even although the convicted person fails to exercise his right of appeal and does not himself move the Court in revision, and the application is made by a third party, where the convicted person has insuperable difficulties in agitating grievances in the manner provided by law; but where the convicted persons are men of position holding university degrees and practising as lawyers and they do not appeal from the judgment convicting them, the High Court will not entertain an application for reduction of sentence at the instance of third party even though the sentences are very heavy.

[P 362 C 2]

S. K. Sen, Priya Nath Dutt and Hemendra Kumar Das—for Petitioner.

Advocate-General and Nirman Kumar Sen—for the Crown.

Order.—This is an application made by one Mr. Ambika Charan De, described as the Joint Secretary of the District Bar Association, Sylhet. He has obtained this Rule on behalf of 23 persons who were tried by the Extra Assistant Commissioner, Sylhet, and convicted of offences punishable under Ss. 145 and 151, I. P. C. They have been sentenced to various terms of imprisonment ranging from two years rigorous imprisonment under S. 145 to six months rigorous imprisonment under S. 145. They have all been in addition sentenced to six months under S. 151, but the Extra Assistant Commissioner directed that in each case the sentences should run concurrently. It appears that the accused persons on 26th January 1932, formed a procession which started from the Congress Office in the town of Sylhet. They are said to have proceeded in such a way that the traffic was not obstructed. When they reached the Government Muslim Hostel, they were met by a party of police officers under the command of the Assistant Superintendent of Police, who directed

them to proceed by a route different from that which they were hitherto following. They thereupon sat down on the ground in the public road and, it is said, caused obstruction to the traffic. The Superintendent of Police and the Additional District Magistrate, Mr. Mitra, arrived shortly after this. Mr. Mitra considering that the procession was likely to cause a breach of the public peace commanded it to disperse.

It is not suggested that at any stage, Mr. Mitra exceeded the powers which the law gives him. After five minutes as the meeting had failed to disperse, Mr. Mitra directed Mr. Jacques, the Assistant Superintendent of Police to disperse it by force. This Mr. Jacques did and arrested the accused persons. At the trial they refused to take any part in the proceedings or to make any statements. The evidence therefore proving the facts which I have set out was uncontradicted. Moreover the accused have not seen fit to prefer an appeal from their convictions and sentences as they were entitled to do under the law. I will assume however for the purposes of dealing with the case that the petitioner is entitled to move this Court in revision although by reason of the provision of S. 439, sub S. (5), Criminal P. C., this Court is precluded from entertaining any proceedings by way of revision at the instance of a party who could have appealed but has not done so.

First with regard to the convictions the petitioner admits that no exception could be taken to the conviction under S. 151. With regard to the conviction under S. 145 it was a question of fact to be dealt with and decided by the Extra Assistant Commissioner whether the assembly of which the accused persons were admittedly members had an unlawful common object. He has found as a fact that they had the common object of resisting the execution of lawful orders given by the Assistant Superintendent of Police and the Additional District Magistrate. There is ample evidence to justify him in coming to the conclusion. It appears that no general or special notice had been issued under S. 30 (2), Police Act, 1861. Therefore no exception could be taken to the procession on the ground that no license had been applied for or issued. However the conduct of the processionists in sitting on the ground

when ordered to take a different route and refusing to disperse when called upon to do so, coupled with the fact that the conduct of the accused proved that the procession was animated by hostility to the established Government, amply justified the Extra Assistant Commissioner in finding that from the very outset, or at any rate from the time Mr. Jacques gave directions to the processionists to go by another route, the processionists were determined to disregard and disobey any lawful orders that the police or the Magistrate might give him. Therefore the conclusion to which the Extra Assistant Commissioner has come, has evidence to support it, and speaking for myself, I have no doubt whatever that it is the right one.

With regard to the sentences they are undoubtedly heavy, and we are far from saying that it is not possible to imagine circumstances in which this High Court would interfere and reduce a sentence in revision even although the convicted person fails to exercise his right of appeal and does not himself move the Court in revision, and the application is made by a third party. We can conceive circumstances in which there might be insuperable difficulties in the way of the convicted person agitating his grievances in the manner provided by law. No such circumstances exist in this case. All the convicted persons are educated and it is not denied, but on the contrary emphasized, that the ring leaders who have received the heaviest sentences are men of position and that many of them hold University degrees and are practising lawyers. In our opinion in this case we cannot entertain an application for reduction of sentence at the instance of a third party, the convicted persons not having seen fit to appeal. This being so we discharge the Rule.

K.S. *Rule discharged.*

A. I. R. 1933 Calcutta 362

RANKIN, C. J. AND COSTELLO, J.

Abbas Bahara and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 427 of 1932, Decided on 19th December 1932.

Penal Code (1860), S. 366-A—Accused inducing girl between 16 or 18 years without

force or fraud to go from any place with intent to have illicit intercourse with himself is not guilty of any offence.

The person who induces a girl of an age between the years of 16 and 18 without force or fraud to go from any place with the intention that she will have illicit intercourse with himself does not commit any offence. The new section, however, makes it an offence in the case of such girl if she is induced by a person to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. [P 263 C 1, 2]

Suresh Chunder Talukdar and Joy Gopal Ghose—for Appellants.

Khundkar and Fanindra Nath Sanyal—for the Crown.

Rankin, C. J.—In this case we directed the appeal to be re-argued because it turns upon a comparatively recent amendment of the Penal Code, namely, what is now S. 366-A which was added by Act 22 of 1923. At the original hearing, Mr. Talukdar contended that, if the two accused persons were found to have induced the girl to go from her father's house to some other house, nevertheless, if the intention or knowledge was that she would be forced or seduced to illicit intercourse with themselves and not with another person, the offence under S. 366 A would not be made out. It appeared to me at the time that this state of the law was a little paradoxical and I confess I did not appreciate that so much can be said for that argument. The case before us is of a widowed girl. It is fairly evident that the jury were not prepared to find that she was under 16 years of age. It is also evident that the jury were not prepared to find that force or fraud had been used upon her. They acquitted both the accused persons therefore of the charge under S. 366, I. P. C. By a majority, however, they convicted the accused under S. 366-A; and we have to see what the learned Judge's charge was as regards that particular offence.

Now, the learned Judge told the jury that he did not agree that under S. 366-A it was necessary to show that the illicit intercourse was to be with some other person besides the accused. It appears that, as the law now stands, the person who induces a girl of an age between the years 16 and 18 without force or fraud to go from any place with the intention that she will have illicit intercourse with himself does not commit any of-

fence. The new section however makes it an offence in the case of such girl if she is induced by a person to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. We have to see what the case is as regards each of the two appellants before us. The prosecution case as against the appellant Abbas apparently is that he was ultimately minded to get married to this girl if he could. She was a Hindu girl and he was a Mahomedan. The prosecution case however was that when this girl came away from her father's house with the accused she was taken from place to place and from house to house for a certain number of nights, and the learned Judge left it to the jury as it was a question for the jury to determine whether there was any intention of illicit intercourse. On the other hand, it is clear enough according to the prosecution case that the accused Abbas was taking the girl because he wanted apparently to marry her or to have illicit intercourse with her himself and therefore he is not guilty under S. 366-A and apparently not guilty also of any other offence the girl being over 16 and under 18 years of age.

As against the other appellant Ujir, no doubt, it might be said that if the intention was that Abbas would have intercourse with her it was open to the jury to convict him under S. 366-A; but in that case it would be very necessary indeed that it should be shown that Ujir did something by way of inducing the girl. It is much more probable that Abbas did whatever was necessary to induce her to go. There is the evidence of the girl herself that she went of her own accord and there is no material on the record to show that Ujir did anything particular at the time the girl left her father's house. On the whole, it appears to me therefore having reconsidered this matter that the conviction of the appellants cannot stand. I think that there are no materials before us which would justify us in ordering that either of these two accused be retried. I would therefore direct that the appellants be acquitted and discharged.

Costello, J.—I am of the same opinion.
v.s. *Accused acquitted.*

A. I. R. 1933 Calcutta 364

RANKIN, C. J. AND AMEER ALI, J.

Amar Chand—Appellant.

v.

Emperor—Opposite Party.Criminal Appeal No. 1070 of 1932,
Decided on 7th February 1933.

(a) Ordinance (10 of 1932) — It is under Ordinance-making power of Governor-General to alter and amend Letters Patent—Government of India Act (1915), S. 106—Letters Patent (Calcutta) (1865), Cl. 22.

Section 106, Government of India Act, leaves the definition of the High Court's original criminal jurisdiction to be made by the Letters Patent and the High Court derives a particular original criminal jurisdiction from Cl. 22, Letters Patent, 1865. It is within the power of the Indian legislature to alter and amend the Letters Patent and consequently within the Ordinance-making power of the Governor-General under the Government of India Act.

[P 364 C 2]

(b) Ordinance (10 of 1932), S. 48—It is duty of Special Judge to make reference to Local Government when question is raised by defence under S. 48.

Where the Local Government acting under S. 32 is of opinion that the offence was committed in furtherance of a movement prejudicial to the public safety or peace and at the trial upon a question being raised, on behalf of the accused that the offence, it committed at all, was not committed in furtherance of a movement prejudicial to the public safety or peace the Special Judge refuses to refer the matter under S. 48 to the Local Government, he being of opinion that this course would be futile in view of the declaration contained in the order directing the form of the trial, the Special Judge fails in his duty for the duty of the Special Judge is to make a reference at the time the question is raised. It may be quite true that it would have been open to the Special Judge to raise the question himself at the beginning of the trial; it may be quite true that he was not obliged to make a reference the moment the point was taken if he had made it some time or another before he gave final judgment in the case. But in thinking it futile to make a reference the Special Judge omitted to consider whether it would not be equally futile to go on with the trial of the case without making the reference.

[P 365 C 1, 2]

(c) Ordinance (10 of 1932), S. 48 (2)—High Court cannot act under S. 48 (2)—Criminal P. C., S. 428 is not applicable—Criminal P. C. (1898), S. 428.

It is not competent for the High Court to decide upon the fact whether the offence was committed in furtherance of a movement prejudicial to the public safety or peace because the statute intends that matter to be left solely with the Local Government. It is quite true that by S. 428, Criminal P. C., the High Court has ample power to take additional evidence or to order additional evidence to be taken; but this is not a question of taking evidence. This is a question of referring a certain matter to the Local Government for administrative order.

However the High Court has, under S. 423, Criminal P. C., power to order a retrial by a Court of competent jurisdiction with power to order a commitment. [P 365 C 2; P 366 C 1]

Khitiish Chunder Chuckerbutti, Panchanan Ghosal and Benoy Krishna Bose—for Appellant.

Khundkar and Anil Chander Roy Chowdhury—for the Crown.

Rankin, C. J.—In this case the appellant together with a number of other persons was tried before a Special Judge under Ordinance 10 of 1932. The charges were really three—conspiracy to murder, abetment of attempt to murder and harbouring a person who had taken part in an attempt to murder, the latter charge being laid under S. 212, I. P. C. The appellant was acquitted by the Special Judge on the first two charges but he was convicted of the offence under S. 212 and sentenced to two years' rigorous imprisonment. The evidence upon which the appellant has been in the end convicted of the offence of harbouring is very short and simple. It consists really, as the Special Judge puts the matter of the judicial confession of the accused himself coupled with corroboration in a letter found in the room in which the accused was arrested and alleged to be in his handwriting. At the hearing of this appeal two contentions were raised upon which I shall say something first. The first contention was that in this case Ordinance 10 of 1932 was invalid and ineffective because it was contrary to the provisions of the Government of India Act which vests original criminal jurisdiction in this High Court within the limits of the town of Calcutta. In my judgment there is nothing in that contention. S. 106, Government of India Act, leaves the definition of this High Court's original criminal jurisdiction to be made by the Letters Patent and we derive a particular original criminal jurisdiction from Cl. 22, Letters Patent, 1865. It is within the power of the Indian legislature to alter and amend the Letters Patent and consequently within the Ordinance-making power of the Governor-General under the Government of India Act. In any case however the argument has little substance because it appears that this offence was committed partly at all events within the 24-Parganas and the Special Judge who tried the case was a

Special Judge for the area of 24 Parganas among other areas. That point therefore fails altogether.

The second question with which it is necessary to deal is this: The Local Government under S. 32 made a special order directing the Special Judge to try this particular case. In the special order made by the Local Government in advance of the trial it was recited that the Local Government was of opinion that the offence was committed in furtherance of a movement prejudicial to the public safety or peace. At the trial which proceeded according to the method of warrant cases the learned Judge on the fourth day proceeded to frame charges. Then for the first time a question was raised on behalf of this accused that the offence, if committed at all, was not committed in furtherance of a movement prejudicial to the public safety or peace. The learned Special Judge referring to the recitals in "the order already made by the Local Government" refused to refer the matter to the Local Government at that stage, he being of opinion that this course would be futile in view of the declaration contained in the order directing the form of the trial. In this Court it has been contended that the learned Special Judge was not justified in refusing to refer the matter as is required by sub-S. (2), S. 48 of the Ordinance. In my opinion it cannot be a good reason for refusing to obey the direction of an enactment in a matter of this kind that the Court thinks that no good purpose would be served by obeying. Assuming that the Local Government is not obliged to decide the question according to the evidence taken in the case it is at all events within the discretion of the Local Government to have some regard to that evidence, and if on the fourth day of the trial the learned Judge was to obey the Statute I think it was his duty to make a reference at the time the question was raised. It may be quite true that it would have been open to the learned Judge to raise the question himself at the beginning of the trial; it may be quite true that he was not obliged to make a reference the moment the point was taken if he had made it some time or another before he gave final judgment in the case. But in thinking it futile to make a reference the learned Special Judge omitted to con-

sider whether it would not be equally futile to go on with the trial of the case without making the reference. The Statute nowhere says that this question should be determined by the Local Government in advance and the particular provision of S. 32 under which the Government's order was made begins with the phrase "subject to the provisions of S. 48." Nothing therefore that the Local Government could do under S. 32 would escape being subject to the provisions of S. 48 and S. 48 begins by saying:

"No Court shall try any offence unless it is an offence punishable under this Ordinance or was committed in furtherance of a movement prejudicial to the public safety or peace."

Notwithstanding anything contained under S. 32 the Special Judge was *prima facie* prohibited from trying this case unless it satisfied that condition; but by Cl. 2, S. 48 it is said that:

"the question whether or not an offence is of the nature described shall not be raised in any Court other than the Court trying the offence and where such question is so raised then, if the Court is that of a Special Judge the question shall be referred to the Local Government."

It seems to me that in these circumstances in order to give himself power to deal with this case the Special Judge was under an obligation to carry out the requirements of sub-S. (2). The requirements of sub-S. (2) not having been carried out, it does not appear to me that there has been any determination so as to satisfy the Statute upon the question whether the offence was committed in furtherance of a movement prejudicial to the public safety or peace.

In these circumstances, it has been pressed upon us by the Deputy Legal Remembrancer that as the point can be raised at any time and be referred to the Local Government we ought to make such reference now. It is clearly not competent for us to decide ourselves upon the fact whether the offence was committed in furtherance of a movement prejudicial to the public safety or peace because the Statute intends that matter to be left solely with the Local Government. Upon consideration I am not prepared to make any such reference by this Court. It is quite true that by S. 428, Criminal P. C., this Court has ample power to take additional evidence or to order additional evidence to be taken; but this is not a question of taking evidence. This a question of referring a

certain matter to the Local Government for administrative order. I see nothing in the Criminal Procedure Code giving us power to deal with such a position as that and while it is very tempting to say that this Court of appeal has all the powers of the original trial Court I am not certain, looking to the history of the various editions of the Criminal Procedure Code, that that proposition in all its universality is true in our criminal law. The matter however is more difficult by reason of the provisions of the Ordinance itself which prohibits the question from being raised in any Court other than the trial Court; and it is rendered more difficult still by the consideration that the Ordinance having ceased to take effect the Court itself, if I may use the expression, is no longer functioning.

We have however under S. 423, Criminal P. C., power to order a retrial by a Court of competent jurisdiction with power if we think fit to order a commitment. In my judgment, having regard to the fact that this accused was acquitted of all charges, save the charge under S. 212, I. P. C., having regard to the fact that the local jurisdiction under S. 182 is equally good in the Presidency town and in the 24 Pargannas and having regard to the fact that the case under S. 212 is now an exceedingly simple one, the proper course for us to adopt is to allow the appeal, to set aside the conviction and the sentence and to direct that the appellant be retried by the Chief Presidency Magistrate upon a charge under S. 212, I. P. C., only in his ordinary jurisdiction. We intend to decide upon a review of all the matters which would be proper for a Magistrate to consider under S. 347, Criminal P. C., that it is not necessary and desirable that this man should be committed to the Sessions upon this charge and that the Chief Presidency Magistrate shall try the case himself.

Ameer Ali, J.—I agree.

V.S.

Retrial ordered.

A. I. R. 1933 Calcutta 366

LORT-WILLIAMS, J.

Chartered Bank of India, Australia and China—Plaintiffs.

v.

Imperial Bank of India—Defendants.

Original Civil Suit No. 1053 of 1928

Decided on 29th June 1932.

(a) Contract Act (1872), S. 178—Pawnee in possession of goods agreeing to be trustee of plaintiff—Goods pledged to defendant—Defendant acting bona fide and without knowledge of trust—Pledge is valid—Insolvency of pawnee—Plaintiff is not entitled to recover goods—Presidency Towns Insolvency Act (1908), S. 52 and Trusts Act (1882), Ss. 3 and 64.

The shippers of K. T. & Co., an importer firm used to draw bills of exchange on them for the price of goods shipped. The plaintiff used to finance shippers by discounting these bills and took as security bills of lading and other documents relating to goods and the shippers executed letters of request and hypothecation in favour of the bank. It was a term in the contract that the documents attached were not to be delivered until payment of relative bills. The bank in breach of the agreement with the shippers handed over the bills of lading and the documents to the importer firm before payment and took in return certain documents called trust receipts. Thus the firm got the documents and goods before payment. By the trust receipt it was provided that until payment the firm was to hold the goods and sale proceeds as trustees of the bank. After getting delivery of goods, the importer firm pledged them with the defendant bank who took them in good faith without knowing about the trust receipts and were having effective control over them. The defendant bank had allowed overdraft to the importers who became insolvent when they were liable to pay both the banks. The plaintiff bank claimed the goods contending that the pledge to the defendant bank was invalid.

Held: that as the importer firm was in possession of the goods and as the defendant bank had no knowledge of the trust receipts, the pledge was valid whatever might be the effect of the trust receipts, that as the importer firm was not the legal owner there was no bona fide trust that the real object of the trust receipts was to defeat the provisions of S. 52 (2) (c), Insolvency Act and that even if the pledge to the defendant bank were to be invalid, the plaintiff bank could not sue for recovery of the goods as the property in the goods would vest in the Official Assignee: *AIR 1930 Cal 171; AIR 1932 Cal 80 and Joy v. Campbell, (1894) Sch. 1 & Lef. 328, Ref.*

[P 370 C 2]

(b) Contract Act (1872), S. 17—Allegation of fraud should be made clearly and promptly.

Court will not allow allegations of fraud to be made lightly, or otherwise than with the utmost precision and particularity, and above all promptly. [P 371 C 1]

(c) Penal Code (1860), S. 415—Ingredients for offence mentioned.

To constitute the offence of cheating there must be active deception, by which the accused

must (a) fraudulently or dishonestly induce the person to deliver property etc. or (b) intentionally induce him to do or omit something which causes damage etc. to him, or there must be a dishonest concealment of facts, with the like results. [P 372 C 1]

(d) Penal Code (1860), S. 25—"Defraud."

The word "defraud" is not defined in the Code, but connotes generally an intention to deceive, coupled with the possibility of doing injury. [P 371 C 1]

(e) Contract Act (1872), S. 17—Fraud—Meaning explained—Mere silence is not fraud.

It is doubtful whether the definition in S. 17 is intended to apply to the word "fraud" in S. 178; the definition requires either an intent to deceive or to induce a contract, by a false suggestion known to be false, or the active concealment of a fact or a promise made without any intention of performing it, or any other act fitted to deceive, or any act specially declared by law to be fraudulent. Mere silence is not fraud unless there is a duty to speak, or unless it is equivalent to speech. [P 372 C 1]

S. N. Banerjee, S. M. Bose and T. Chatterjee—for Plaintiffs.

Page and S. K. Gupta—for Defendants.

Judgment.—The firm of Kerr Tarruck & Co., prior to the month of October 1927, used to carry on business in Calcutta as importers and dealers. Their shippers used to draw bills of exchange on them for the price of the goods shipped. The plaintiffs used to finance the shippers by discounting these bills, or by issuing other bills in exchange, and took, as security the bills of lading and other documents relating to the goods, and the shippers from time to time executed letters of request and hypothecation in favour of the plaintiffs. These bills of exchange were called advance bills as distinguished from other bills of exchange which were handed to the plaintiffs by the shippers for collection only. By the terms of the letters of request and hypothecation, it was agreed inter alia, that the plaintiffs should accept the shippers' bills of exchange drawn upon their indentors (in this case Messrs. Kerr Tarruck & Co.) accompanied by bills of lading, invoices and marine insurance policies purporting to represent the relative merchandise shipped. The documentary bills were to be forwarded by the plaintiffs to their agents (in this case their Calcutta Branch) and the shippers undertook that their respective drawees (in this case Kerr Tarruck & Co.) would accept the bills on presentation and pay them at maturity. It was a term of the con-

tract that the documents attached were not to be delivered until payment of the relative bills.

In consideration of the plaintiffs accepting their bills, the shippers undertook to pay the amount required to meet the acceptances in case the plaintiffs did not receive cover before maturity, or should the amounts received be insufficient, and to pay interest in case of default. Further in case of default by either the shippers or their indentors the plaintiffs were authorized to sell the goods. Kerr Tarruck & Co., had knowledge of these terms and of the terms of the contracts of sale, and in particular of the fact that the bills were D/P: that is to say, payment must be made on or before delivery of the shipping documents. The plaintiffs used to send the bills of exchange, with the bills of lading and other documents, to their branch in Calcutta and Kerr Tarruck & Co., accepted the bills. Thereupon and before obtaining payment, the Calcutta branch used habitually to hand over the bills of lading and other documents to Kerr Tarruck & Co., and take in exchange certain documents called trust receipts. This practice had been followed for 20 years prior to the year 1927, though obviously it was done in breach of the contract between the plaintiffs and the shippers contained in the letters of request and hypothecation, because it enabled Kerr Tarruck & Co. to obtain delivery of the documents and the goods before payment.

By the terms of the trust receipt it was provided that, in consideration of the plaintiffs having handed over the shipping documents in respect of goods hypothecated to them as collateral security for the due payment of the relative draft drawn upon and accepted by Kerr Tarruck & Co. the latter firm undertook to land, store and hold goods until sale as trustees for the plaintiffs, and in the event of sale by Kerr Tarruck & Co., to receive the gross proceeds as trustees for the plaintiffs, and forthwith to pay them in full to the plaintiffs. Further, Kerr Tarruck & Co. agreed, in case the goods were sold by them on credit, to obtain from the purchaser a promissory note for the price, payable on demand, and endorse it in favour of the plaintiffs forthwith, if called upon to do so, and to receive any sums paid in discharge of

the notes, on behalf of the plaintiffs to whom such sums should belong, and to hold them as trustees for the plaintiffs and to pay them to the plaintiffs as and when received.

It is clear from the evidence that neither the plaintiffs nor Kerr Tarruck & Co. ever intended that these terms, which were printed, should be adhered to either strictly or in full. This was admitted by Mr. Pollock, Mr. Warren and Mr. Warwick, sub-agents of the plaintiffs. For example, Kerr Tarruck & Co. were not expected to pay the gross proceeds of sale to the plaintiffs forthwith or at all. One of the witnesses of the plaintiffs described this term as "silly." They were to meet the relative bills of exchange at maturity and this they did invariably, over a long period of years, and until they became insolvent. Further, goods, such as corrugated iron sheets and sugar, were not stored, nor ever intended by either party to be stored in the godown but were sold ex jetty. Moreover when goods were sold on credit Kerr Tarruck & Co. did not obtain promissory notes from the purchasers, but took bazar chits instead, nor did they pay the sums received in discharge thereof to the plaintiffs, when or as received, and when the plaintiffs became aware of these departures from the terms of the contract they acquiesced rather than risk the loss of good customers of high commercial repute and good standing, such as Kerr Tarruck & Co. were recognized to be. This is confirmed by the correspondence. In fact Mr. Warwick had to admit that the terms of the trust receipts contained in the first two, which are the main clauses of the agreement, had never been adhered to in practice. Having thus obtained the shipping documents, Kerr Tarruck & Co. used to get delivery of the goods from the ship and either sell them ex jetty or store them in a godown being the top flat of "D" division of the Bengal Bonded Warehouse at No. 102/2, Clive Street, Calcutta, which they rented, and in which large quantities of other goods were stored.

For many years Kerr Tarruck & Co. were customers of the defendants and for more than 15 years had had an overdraft account on the basis of cash credit agreement, which was renewed every six months. This was secured by a pledge of all goods stored from time to time in

the godown in the Bengal Bonded Warehouse, over which the defendants at all material times exercised effective control. Control was effected by placing one of the defendants' godown sarkars in charge of the godown and the goods stored therein. This man wore upon his coat a metal badge engraved with the name of the defendants. The doors of the godown were secured by locks belonging to the defendants which also were engraved with their name. Every morning, the sarkar used to get the keys from the accountant of the defendants and open the godown. During the day, he remained in charge, and checked and passed all goods going in and out, and made a report daily to the defendants. He used to sit at a table in the entrance to the godown, and at the end of the day he locked up the godown and returned the keys to the defendants. While the godown was open the keys used to hang on the door staples. Kerr Tarruck & Co. also put their own locks on the doors, and kept their own sarkar there who, under the terms of the cash credit agreement, entered all movements of goods in a register, which was open to the inspection of the defendants, and supplied them daily with a schedule or copy of the entries in the register.

By an agreement in writing, which was renewed from time to time, Kerr Tarruck & Co. were permitted to remove from the godown as many as 30 cases per day without special reference to the defendants, and the sarkar was instructed accordingly, but for the removal of any cases in excess of that number Kerr Tarruck & Co. had to obtain a specific delivery order from the defendants, without which the sarkar would not allow the goods to pass. The maximum overdraft allowed, including interest thereon, was Rs. 7 lakhs, but at no time was it to exceed with interest 75 per cent of the market value (not being in excess of the normal value) of the goods for the time being pledged, that is to say, stored in the godown. The balance of the overdraft outstanding at any time was repayable on demand, and in default the defendants might sell the goods without notice.

It is admitted that the defendants received in good faith the goods thus stored and pledged with them. They had no knowledge of the arrangement between

Kerr Tarruck & Co. and the plaintiffs, and believed that the goods belonged to Kerr Tarruck & Co. absolutely. In fact, Kerr Tarruck & Co. gave them written assurances to this effect, from time to time. On the other hand, Kerr Tarruck & Co. never informed the plaintiffs that they were pledging the goods so obtained under the terms of the trust receipts, to the defendants.

But the plaintiffs used to send officials to inspect and check the goods in the godown from time to time, and no attempt was made either by Kerr Tarruck & Co. or the defendants to conceal the fact that the latter were in possession and control of the godown and the goods contained therein and, in my opinion, such possession and control was open and effective and ought to have been apparent to any one exercising reasonable care and intelligence. Further, the plaintiffs were aware that the godown contained large quantities of goods in which they had no interest.

On 12th October 1927, Kerr Tarruck & Co., became insolvent, and the defendants locked up the godown, and placed upon it a notice marked "Imperial Bank, mortgagees, in possession." At this date, Kerr Tarruck & Co., were liable to the plaintiffs for considerable sums of money in respect of bills of exchange so accepted, and to the Imperial Bank in respect of their overdraft. All except two of such bills fell due after the date of the insolvency. On 14th October the plaintiffs claimed the goods in which they were interested and the defendants replied giving particulars of their pledge. Subsequently all the goods in the godown were sold by arrangement between the various parties interested therein, and the proceeds are being held by the defendants pending the decisions of the Court in this and other suits. On 11th May seven months after the insolvency, the plaintiffs issued their plaint in this suit. They contended that the alleged pledge to the defendants was invalid and of no effect, because the shipping documents and/or goods had been dealt with by Kerr Tarruck & Co., fraudulently by concealing the terms and conditions on which the goods were held by them. That is to say, they contended that the alleged pledge was invalid because Kerr Tarruck & Co., had defrauded the defendants. The latter contended *inter alia*

that the plaintiffs by their actions had permitted the defendants to believe that Kerr Tarruck & Co., were the owners of the goods or entitled to deal therewith, and to act upon such belief, and that in consequence the plaintiffs were estopped from disputing the validity of the pledge.

The case came on for hearing on 17th January 1929, when counsel for the plaintiffs asked for an adjournment on the ground that the Official Assignee was about to file a plaint, asking for a declaration that the goods in question belonged to the general body of creditors of Kerr Tarruck & Co., and that it would be a waste of money to proceed with the suit in the circumstances. This application was refused and the case proceeded. The following issues were raised : (1) Are the plaintiffs entitled to maintain the suit ? (2) What, if any, was the property vested in the plaintiffs, in the goods which were the consideration for the bills of exchange mentioned in Ex. B to the plaint (a) before; and (b) after the delivery by the plaintiffs to Kerr Tarruck & Co. of the relative bills of lading ? (3) Did Kerr Tarruck & Co. hold such goods or any of them as trustees and/or as agents for the plaintiffs ? (4) Did Kerr Tarruck & Co. validly pledge such goods or any of them to the defendants ? (5) Are the plaintiffs estopped ? The hearing was adjourned from time to time and continued for several days ; a number of witnesses were called and both parties closed their cases save and except for counsel's final speeches.

Meanwhile, on 28th January 1929, the decision in the case of *Rahimbux Ashan Karim v. Central Bank of India, Ltd.* (1) was upheld on appeal. Thereupon, it became apparent, in the light of that decision, that the defendants would probably succeed in this case, on the pleadings as they then stood, their position and claim as valid pledgees within the terms of the old S. 178, Contract Act, which was then in force, being much stronger than that of the Central Bank of India, Limited, in the case cited. That being the position, the Advocate-General, on behalf of the plaintiffs, applied for leave to amend the plaint and to raise a new issue by alleging that the documents and/or goods had

1. A I R 1929 Cal 497=119 I C 23=56 Cal 367.

been obtained from the plaintiffs by Kerr Tarruck & Co., by fraud and the offence of cheating, and to rely upon proviso 2, S. 178. On 19th April 1929, judgment was given on this application, which was granted upon the terms that the plaintiffs should pay to the defendants the whole of the costs of the suit up to the date of the amendment, and the further hearing was adjourned, with leave to both parties to call further evidence. The hearing was resumed on 27th January 1932, when the plaint was further amended by adding the following particulars of fraud :

(a) Obtaining bills of lading and other documents on the representation that the terms of the trust receipts would be carried out, and that such terms had been carried out in the past, and by inducing the plaintiff bank to part with such documents on such representations. The said firm acted as it did without any intention of carrying out such representations. (b) Concealing the fact that it had a cash credit account with the Imperial Bank secured by the pledge of all goods stored and to be stored in the "D" division of the Bengal Bonded Warehouse. (c) Obtaining the goods covered by the documents with the intention of pledging the same with the Imperial Bank and by concealing the said intention from the plaintiff Bank.

Subsequently, further evidence was called. The arguments on the resumed hearing were directed largely to the question, what is the legal relation created by so-called "Trust Receipts." This question was considered in the case of *In re Nripendra Kumar Bose* (2), and my remarks therein have been explained and amplified in the judgment of Ameer Ali, J., in the case of *In re. Sumermull Surana* (3) with which I agree. So far as the present case is concerned the question can be disposed of shortly : Whatever be the relation created as between the plaintiffs and Kerr Tarruck & Co., whether the trust receipts created contracts of agency or something more, such as a trust, they cannot affect the defendants, who had no knowledge of them and who, bona fide, had given valuable consideration for the goods pledged. (S. 64, Trusts Act.)

It seems to me quite clear that, Kerr Tarruck & Co. were in possession of the goods within the meaning of the old S. 178, Contract Act, and could and did make a valid pledge of them to the de-

fendants apart from any question arising under the terms of the second proviso. Further, I am satisfied, for the reasons given in the two cases to which I have just referred and in the circumstances of this case, that no trust was or could be created by means of the trust receipt, and that the goods were not and could not have been delivered by the Chartered Bank to Kerr Tarruck & Co. or held by them upon trust. Where anyone holds property in trust, bona fide, whether the trust is express or implied, he is in possession as the legal owner: *Joy v. Cuampbell* (4): Trusts Act, S. 3. It is clear that Kerr Tarruck & Co. were not the legal owners. They knew that their contract with the shippers was that the property in the goods should not pass, and delivery should not be given, except upon payment, and they knew that the plaintiffs had given delivery to them in breach of the contract of hypothecation between the plaintiffs and the shippers. Further, the plaintiff's case is that Kerr Tarruck & Co. were not the owners of the goods.

The real object of such documents as trust receipts, in this as in many other cases, seems to be to try and defeat the provisions of S. 52 (2) (c), Presidency Towns Insolvency Act, and this Mr. Warwick was finally constrained to admit was the real object of the plaintiffs in issuing them. (Q. and A. No. 159 of his deposition, dated 28th January 1932.) In any case, such would be the effect if permitted. This would offend against the provisions of S. 4, Trust Act, as also would the involved breach of contract between the Chartered Bank and the shippers. If no trust was created and contrary to my opinion the pledge to the defendants was invalid for any reason, then the logical result of the plaintiffs' contentions would be that S. 52 (2) (c), Presidency Towns Insolvency Act would apply and the goods would form part of the property of the insolvents divisible amongst their creditors, as being goods in the order or disposition of the insolvents, in their trade or business, by the consent and permission of the true owner under such circumstances that they are the reputed owners thereof. This follows from the plaintiffs' contention that they are hypothecatees, that is to say, the true owners

2. A I R 1930 Cal 171=121 I C 745=56 Cal 1074.

8. A I R 1932 Cal 680=140 I C 594=59 Cal 819.

4. (1804) 1 Sch & Led 928.

of the goods within the meaning of the section.

Such being the case, it would appear to be unnecessary to consider that part of the plaintiffs' case which rests upon allegations of fraud, because in such a case the plaintiffs would not be entitled to maintain the suit, the property in the goods having vested in the Official Assignee. Further, the plaintiffs, as regards the shippers, were in a similar position to that which they alleged against Kerr Tarruck & Co. Admittedly, they had obtained the shipping documents from the shippers upon the representation that they would not part with them, except upon payment, when their intention was immediately to deliver them to Kerr Tarruck & Co. in exchange for the trust receipts. Thus they were guilty of fraud or the offence of cheating and their claim in this suit is founded upon such tort-feasance. The contention is that the goods in suit were obtained from the plaintiffs by Kerr Tarruck & Co. by means of an offence or fraud within the meaning of the second proviso to the old S. 178, Contract Act. The plaintiffs do not rely upon the first proviso. Seldom has a case based upon allegations of fraud started under a heavier handicap. It is perhaps unnecessary for me to repeat that the Court will not allow such allegations to be made lightly, or otherwise, than with the utmost precision and particularity, and above all promptly.

That their old and trusted customers, Kerr Tarruck & Co., had defrauded them, never entered the heads of the plaintiffs until at least 15 months after the insolvency. During this long period, when the plaintiffs, presumably, were in fairly constant communication with their legal advisers, not a word was said about fraud having been committed against the plaintiffs, and their case was launched and came to hearing without any mention of so serious an allegation. It is not contended that any new facts were disclosed during this interval, upon which this new charge could be founded, except the awkward fact which arose as the result of the decision in the case of *Rahimbux Ashan Karim v. Central Bank of India Ltd* (1) to which I have referred. In other words, this allegation of fraud is an afterthought. It has been raised upon the advice of law-

yers, and it is clear from the evidence of Mr. Pollock that the officers of the plaintiff bank have experienced great difficulty and much searching of heart before they could be induced to swear upon oath, and with any sense of decency or honesty, that Kerr Tarruck & Co. had defrauded or had intended to defraud the plaintiffs. I have been informed that this is a kind of representative suit, and is being financed by several of the banks who wished to have the question raised by the issue of trust receipts finally decided. I cannot help regretting that the plaintiffs did not pursue the original intention to the end, without introducing fresh allegations of fact which in all the circumstances of this case, I cannot help thinking are not honestly believed to be true nor honestly contended. Nevertheless, I will deal with them upon the supposition that they have been truly alleged, and that they were omitted from the original plaint either by forgetfulness and inadvertence on the part of the officers of the plaintiff bank, or by negligence on the part of their legal advisers.

The pledge to the defendants was of goods, not documents, therefore we are concerned with the second proviso to S. 178 only so far as it relates to goods. In the first place it is difficult to see how the proviso can apply in the particular circumstances of this case. The lawful owners of these goods were the shippers, not the plaintiffs. Kerr Tarruck & Co. obtained them from the shipowners who were in lawful custody of them. Assuming that the plaintiffs were the agents of the shippers for the purposes of the proviso, Kerr Tarruck & Co. obtained the documents not the goods from the plaintiffs. It may however be possible to contend that Kerr Tarruck & Co. obtained the goods from the shipowners, who were in lawful custody of them, by means of an offence or fraud committed upon a third party, namely, by getting the shipping documents, which are, in the words of Bowen, L. J., "the key to the warehouse" from the plaintiffs by means of an offence or fraud, and that this is sufficient to bring them within the terms of the proviso. The word "offence" is not defined in the Contract Act, but in the General Clauses Act, S. 3 (37), it is defined as "any act or omission made punishable by any law

for the time being in force." The offence alleged by the plaintiffs is that of cheating, within the meaning of S. 415, I. P. C., which is as follows :

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Therefore to constitute this crime, there must be active deception, by which the accused must (a) fraudulently or dishonestly induce the person to deliver property, etc., or (b) intentionally induce him to do or omit something which causes damage, etc., to him, or there must be a dishonest concealment of facts, with the like results. "Fraudulently" means doing a thing with intent to defraud (S. 25, I. P. C.). The word "defraud" is not defined in the Code, but connotes generally an intention to deceive, coupled with the possibility of doing injury. "Dishonestly" means with the intention of causing wrongful gain or loss (S. 24, I. P. C.). Wrongful gain or loss means gain or loss of property by unlawful means. (S. 23, I. P. C.).

"Fraud" is defined in S. 17, Contract Act. It is doubtful whether this definition is intended to apply to the word "fraud" in S. 178 and cogent reasons are adduced by the learned authors of Pollock and Mulla on the "Contract and Specific Relief Acts," Edn. 5 at p. 639, why it should be confined to the substantive wrong of deceit. But, whether or not these arguments are sound, the definition requires either an intent to deceive or to induce a contract, by a false suggestion known to be false, or the active concealment of a fact or a promise made without any intention of performing it, or any other act fitted to deceive, or any act specially declared by law to be fraudulent. Mere silence is not fraud unless there is a duty to speak, or unless it is equivalent to speech. There is no evidence, in this case, of active deception or concealment, and I am satisfied that there was no intention to deceive or to defraud. No one in this case, except the learned counsel appearing for the plain-

tiffs, has had the courage frankly to state otherwise, though some witnesses have been induced to say that they had suspicions, whatever that may imply.

The firm of Kerr Tarruck & Co. carried on business in Calcutta prior to its insolvency for more than 70 years, and during all that time it is admitted that it held a very high reputation for commercial integrity. At all material times Mr. B. N. Sircar acted for Kerr Tarruck & Co. of which firm he was the senior partner; no one has suggested that he has ever been known to be or act otherwise than as an upright and honest business man. I do not believe that he ever had any intention to deceive or to act fraudulently or dishonestly; nor do I believe that the plaintiffs were induced to issue the shipping documents, by any deception or active or passive concealment on his part or on the part of his firm. Throughout all this time, Kerr Tarruck & Co. never failed to meet every bill at or before maturity, generally before. I do not believe that either party ever intended the conditions of the trust receipts to be observed. They were and are devices created in an attempt to defeat the provisions of S. 52, Presidency Towns Insolvency Act, in case of insolvency. In my belief Kerr Tarruck & Co. had no more idea that, in pledging the goods to the defendants, they were acting wrongfully or in breach of any contract, than the plaintiffs had, when they disregarded the plain terms of their contract with the shippers. The plaintiffs never relied or intended to rely on the security (if any) afforded by the trust receipts. They relied upon the reputation and proved integrity of Kerr Tarruck & Co. No effort was made to conceal the pledge to the defendants. The representatives of the plaintiffs were allowed to inspect the goods and the godown, whenever they wished to do so, and the engraved locks of the defendants were on the doors, and their godown sarkar wearing conspicuously a metal badge with the name of the bank upon it, was always present. They were well aware that large quantities of goods were stored in the godown, which were not covered by the trust receipts.

In my opinion, the facts show that Kerr Tarruck & Co. honestly believed, so far as they ever directed their minds to the question, if at all, that they were

entitled to deal with the goods as they thought fit, subject to their obligation to meet the bills when they fell due, and that the property in the goods had passed to them on delivery. Just as the plaintiffs honestly believed that they were justified in issuing the shipping documents in return for trust receipts, the truth seems to be, that some, and perhaps many, business men nowadays, though of undoubted integrity, have scant regard for the sanctity of contracts, or even of trusts, or for meticulous adherence to their terms. Mr. Warwick's evidence under cross-examination is full of enlightenment upon this aspect of the case. Perhaps their cynical disregard of what was once considered to be the corner-stone of modern civilization is not surprising. There have occurred recently striking and notorious examples of breaches of contracts which had been confirmed and sanctified with all the deliberation and solemnity of Acts of the legislature itself and as deliberately broken. But it is my belief that those who treat contractual obligations with such scant respect will generally and in the long run have cause to regret their actions, and the result in this case is, that there must be judgment for the defendants with costs.

K.S.

*Suit dismissed.***A. I. R. 1933 Calcutta 373**

RANKIN, C. J. AND MITTER, J.

Jogendranath Das—Defendant —Appellant.

v.

Damodardas Khanna — Plaintiff — Respondent.

First Appeal No. 134 of 1929, Decided on 8th July 1932, against decree of Fourth Addl. Sub-Judge, 24-Pargannas, D/- 16th February 1929.

(a) **Accounts—Jama wasil baki—Interpretation which avoids errors must be preferred.**

In extracting the meaning of an account jama wasil baki the first assumption which the Court must make is that the account may be consistent and correct. An interpretation, which avoids imputing to it glaring errors, is to be preferred to an interpretation, which involves the conclusion that an error has been made and successive further errors have counter-balanced its effect. [P 375 C 1]

(b) **Accounts—Jama wasil baki—Year stated in Bengali and double figure year for purpose of rent—Period explained.**

In the jama wasil baki when the year is stated in the Bengali style the year referred to

is the year of occupation in respect of which the rent is due and when the year is stated in double figures in English dates the year meant is the financial or official year in which the Collector's duty to recover it arose and in which the Collector could reasonably expect to receive it.

[P 375 C 2]

(c) **Sale—Revenue sale—Defaulting tenant is not entitled to possession of buildings on land on payment of rent.**

At a revenue sale, the buildings do not pass with the land and the defaulting tenant is not entitled to retain possession of the buildings on the land upon the payment of an equitable rent. The tenant can either remove the building or give them to the landlord or purchaser at a reasonable valuation : A I R 1926 P C 135, Ref.

[P 375 C 1, 2]

Amarendranath Basu, Probodhchandra Chatterji and Lalitmohan Sanyal—for Appellant.

Nripendranath Sircar and Santimay Majumdar—for Respondent.

Rankin, C. J.—The defendant appeals from the decree made in a suit brought for purpose of setting aside the sale of a holding in Panchannagram. The sale was held on 21st December 1926, for the default of payment of revenue or rent, which accrued due on 23rd March 1926 and for which the latest date for payment, under the orders of the Board of Revenue was 28th July 1926. This is described as the rent or revenue for the Bengali year 1332, which corresponds to the period 14th April 1925 to 13th April 1926. Apart from a subsidiary question, which has reference to certain buildings on the land, the only question upon this appeal is the question whether there was any arrear of revenue for 1332 to justify the revenue sale.

The terms of the tenancy are to be collected from the kabuliyat executed by the plaintiff's predecessors-in-title and dated 19th April 1876, a few days after the beginning of the Bengali year 1283. The kabuliyat states that the rent is to be at the rate of Rs. 6.6.6 per year and that the tenants will deposit the said rent in the Collectorate within 28th March each year. According to the contract therefore the rent for a year was not payable in advance, but was payable about a fortnight or three weeks before the end of each year of tenancy. The year of tenancy is not stated to be the Bengali year, but if it extended from 19th April of one year to 11th April of the next, it coincided, save for a few days, with the Bengali year. The financial year or official year, for purposes of

revenue, begins on 1st April and ends on the last day of March.

In order to determine whether, in December 1926, the plaintiff had failed to pay the sum of Rs. 5-15-6, the sum to which the rent of Rs. 6-6-6 had been reduced, due in respect of his occupation of the land for the Bengali year 1332, or perhaps more accurately for the period 19th April 1925 to 18th April 1926, which is the question before us, we have to examine the jama wasil bakis of this holding. These are accounts kept by the office of the Collector of the District of 24-Pargannas and the dispute between the parties is as to their meaning. In other words, as the Judicial Committee pointed out in a case of similar character having reference to Dihi Panchannagram : *Narendra Nath Dutta v. Abdul Hakim* (1), the question before us is a question of fact: whether a certain sum was paid before a certain date or then remained unpaid, and the entries in these jama wasil bakis are to be regarded as a narrative of monetary transactions, a narrative of which the meaning is to be got at by considering what is said and the manner of saying it.

The accounts produced begin with the year 1899 and continue down to the date with which we are concerned. The first thing to be collected from them is that from 1899 down to 1910, the tenant paid a sum equivalent to the annual rent in June of each year. Thereafter down to 1924, he paid his rent in each year generally in July, once or twice in June and once or twice later. In the year 1921, for some reason, he paid twice, paying Rs. 6-6-6 in addition to the annual demand, which at that time was Rs. 6-1-9. For the first part of the period comprised in these accounts, namely, down to 1914, the last date for payment of arrear of rent for the purpose of avoiding a revenue sale was 28th June of each year. From 1914, it was 28th July each year. Now the sole question upon these accounts is this: whether they show that the payments, which were made, were payments of rent in advance, in the sense that the payments made in June or July, were made in respect of the rent due from the tenant in respect of his occupation of the land from April immediately before the payment was

made until the March of the following year, or whether they show that they were made in respect of the year of occupation which ended in the previous April, and for the rent which became due under the contract on the 28th of the previous March. This is the same question which has given trouble before in at least two cases in this Court, but on a question of fact I propose to take no notice of other cases and to examine the documents by themselves.

It appears to me to be demonstrable on the face of these accounts that the latter of the two alternatives above stated is the correct one. We are not asked to assume, nor could we assume, that any arrear or overpayment existed prior to the period dealt with in these accounts. As the entry for 1899 is defective, in that it puts no date to define the period in respect of which the payment is being made, it would have to be filled up, if at all, consistently with the subsequent entries. We must either neglect the first item altogether, or we must fill up the gap, as if the "demand" were defined by the year 1899-00—it makes no difference which we do. Taking the next three entries, the question is what is meant by "demand for 1900-01," "demand for 1901-02" and "demand for 1902-03." Does it refer to the rent which became due on the 28th March of the first of the two years mentioned—i. e., in 1900, 1901 and 1902—or does it refer to the rent which at the time of payment in June had not yet become due and would not become due until the following March? We may bear in mind on this question that we are dealing with accounts kept by a revenue officer and that 1900-01 is the financial or official year. The learned Advocate General for the plaintiff respondent, contends that each year, when the tenant paid his annual rent in June, he was paying rent which, under the contract, would not be due until the following March and for which the tenant had, until the following June, time in which to pay, for the purpose of avoiding a revenue sale. This he contends must be the meaning of the words "current rent" or "current demand."

Now, in the year 1903, the accounts as kept show a change of method. The date 1902-03 is followed by "1309 B.S." and in each June, as the tenant pays, he

1. A I R 1928 P C 243=111 I C 238=55 I A 380 (P C).

is said, for the next five years, to pay in respect of the demand for 1309, 1310, 1311, 1322 and 1313 respectively. In 1908, the former method is reverted to and the demand is defined by the year 1908-09. This goes on consistently till 1915-16. Again a change of method is introduced and the account reintroduces the Bengali year as defining the demand in respect of which the payment has been received. 1915-16 is followed by 1322 B. S. and thereafter the account continues in terms of the Bengali year.

Now, if we are to extract the meaning of an account the first assumption which we must make is that the account may be consistent and correct. An interpretation, which avoids imputing to it glaring errors, is to be preferred to an interpretation, which involves the conclusion that an error has been made and successive further errors have counter-balanced its effect. We will therefore examine the three transition periods in this account, concentrating upon the fact that the year 1902-03 is followed by 1309 B. S., that the year 1313 B. S., is followed by 1908-09 and that the year 1915-16 is followed by the year 1322 B. S. If we are not to assume that the Collector's officer is in each case making a highly serious mistake, it seems to me to follow that the payments made by the tenant in June or July had reference to the rent which was due on the previous 28th March in respect of the year of occupation which concluded on the 18th April thereafter and which was finally demandable for purpose of revenue sale in the middle of the calendar year. From 28th March till 18th April, the rent for the previous year had certainly been due under the contract. That however was a short period of three weeks and during most of these three weeks the year of occupation had itself not come to an end. April 1902, for example, to April 1903 was the Bengali year 1309. The payment made in June 1902 is put down as referable to the demand 1902-03; payment in June 1903 is defined as the demand for 1309. If, in June 1902, the tenant had paid his rent from 19th April 1902 till 18th April 1903, then when he comes next June to pay his rent in 1903, how can that rent be put down as referable to 1309 B. S.? Clearly it cannot. 1902-03 is the revenue year in which the Collector had

to see that he got his rent by the 28th June, for the year of occupation which ended in the middle of the previous April. The year "1309 B. S.," shows that a change is being made to define the demand in a more simple and more natural way by giving the Bengali year for which the rent was paid—that is the year of occupation in respect of which the rent was due. If the original method be continued after the year 1902-03 until we come again to the year 1908-09, it will be found that there has been no mistake. 1908-09 comes in in its proper place consistently with 1902-03.

Let us look then at the change from the method employed to record the payment made in June 1907 to the method employed in recording the payment made in June 1908. From 1313 B. S., we change in the following year to 1908-09. The year 1313 began on 14th April 1906, and ended on 13th April 1907. Why should it then be followed by the figures 1908-09? Are we to say that when 1902-03 was followed by 1309, the tenant is recorded as paying rent twice and that when 1313 B. S., is followed by 1908-09 a year has been allowed to drop out? Clearly not. By the rent due for 1313 B. S., we mean, or any ordinary tenant would mean, by that expression, the rent which he had to pay by June 1907 if he wanted to avoid a revenue sale. The rent for the following year 1314 B. S., that is, April 1907 to April 1908, was demandable on pain of revenue sale by June 1908. It is true that for three days before the beginning of the financial year 1908, it had been payable under the contract, though the period of occupation extended for a few days beyond the end of the Bengali year 1314. The successive entries are quite consistent, if it be remembered that when the year is stated in the Bengali style the year referred to is the year of occupation in respect of which the rent is due and that when the year is stated by double figures the year meant is the financial or official year in which the Collector's duty to recover it arose and in which the Collector could reasonably expect to receive it. The same reasoning applies to the transition from 1915-16 to 1322 B. S. In both years the payment was made in July and in the second it was made at the 11th hour. The learned Subordinate Judge, consis-

tently with the contention before us, was invited to hold that here again the same rent had been paid twice and solemnly recorded by successive entries in the books. He has accepted this contention and says "this appears to be clear."

An examination of the jama-wasil baki will show that the change of method which had been introduced in 1903 and abandoned in 1908 was again being introduced, but that it was introduced more carefully with an explicit statement as to what was being done. As the learned Advocate-General's contention involves that the payment made in June 1903 as being for 1309 B. S. was a second payment for the same period as had been covered by the payment in the previous year, it may well be that simple-minded tenants had been attracted by the same argument and that the reversion to the old system in 1908 was not unconnected with a certain amount of confusion which the change of 1903 had caused. Be that as it may, we see that after 1916 the Bengali year is deliberately adopted to define the demand in respect of which the payments are received; and we find further that in the transition year the demand is carefully defined.

The payment received in July 1916 is stated to be current for 1322 up to 28th July 1916. This can only have reference to the rent which, on 28th March 1916, became due under the contract in respect of the year of occupation which ended on 18th April 1916, and which was finally demandable under the orders of the Board of Revenue on 28th July 1916. This entry, like the entry of 1309, shows one that the previous entry had reference to the financial year which began a fortnight before the end of the period of occupation in respect of which the rent was due. 1322 B. S. is not a financial year at all. The change is not merely from what may be called the English style to the Bengali style. The Bengali style tells one that the demand is being more simply defined by a reference to the Bengali year, which in everybody's mind is the year during which the tenant has enjoyed the land and for which the sum is due. The period of occupation could not naturally be defined by the financial year which for purposes of collection and account is of primary interest to the revenue.

If this be right, the controversy is really at an end. There was no double payment in respect of the year of occupation 1322. The rent for 1323 was timeously paid in July 1917. In 1924, the rent had dropped from Rs. 6-6-6 to Rs. 6-1-9 and this was timeously paid in July 1918. In July 1919 rent was paid for 1325 at the old figure of Rs. 6-6-6, which was an overpayment of four annas nine pies. Taking this overpayment into account, the rent for 1326 was paid in September 1920. For 1327, there was for some reason a double payment, one of Rs. 6-6-6 and another of Rs. 6-1-9 so that the account was Rs. 6-6-6 in credit. The rents for 1328 to 1330 were at the reduced figure of Rs. 5-15-6 and were duly paid, though in the last case not until December. In 1331 nothing was paid, but the account being Rs. 6-6-6 in credit, there was no arrear, seven annas still standing to the credit of the tenant's account. For 1332 nothing was paid in 1926, and then in December 1926, the holding was sold for arrears of revenue. The Collector was quite within his rights.

When the case of *Narendra Nath Dutta v. Abdul Hakim* (1) was decided in this Court by Chatterjea and Graham, JJ., they came to a conclusion of fact upon jama-wasil-bakis, in which the entries may have been of the same character as those before us, though the contractual date for payment was 28th June and the year of occupation ended 6th July, dates which make a good deal of difference. I do not propose to discuss the facts of another case upon a question of fact. But it may be worthwhile to notice that the decision in this Court in *Narendra's* case (1) was given in August 1924 and that on 4th June 1925 the same matter of these holdings in Panchannagram came before Walmsley and B. B. Ghose, JJ., in an unreported case *Ramlal Chaudhuri v. Bijaygopal Mukherji* (2). In that case, as in the previous case and in this case, the parties had taken copies of these technical accounts and had proceeded in the trial Court to dispute about their meaning without taking the trouble to call any evidence from the Collectorate by a person familiar with these accounts who might be qualified to explain them. Walmsley and B. B. Ghose, JJ., thought

fit in this Court to receive the evidence of a clerk from the Collector's office. They appear to have come to the conclusion that the

"demand each year is shown as being for the period ending 28th July, that is to say, in the account for the Bengali year 1325 or the financial year ending 31st March 1919, the demand is shown as being for the year ending 28th July 1919."

I cannot take into account the evidence in another case, even if I had the record of it. Proceeding entirely upon the internal evidence of the accounts before me, which are quite explicit after 1916, I conclude that the accounts are consistent throughout, no years being dropped out and no payments being recorded twice in respect of the same year. During the period, for which the account is kept in terms of the financial year, there is, in this case, only one instance of payment being made after the Collector's final date in June or July. In that case the payment is entered as being in respect of an arrear. But the figures 1913-14 do not occur in the printed sheet, though the payment was undoubtedly received in that financial year. Upon this account, I think it enough to say that the demand is shown, where the financial year is employed, as being for the financial year in which the rent is finally demandable, that is in which on 28th July the holding becomes liable to sale, and that the demand is shown as "current" up till 28th July of that year.

I may here observe that for each payment the tenant gets a chalan or receipt, which presumably shows full particulars of the rent which he has liquidated. The tenant has not produced any one of these, preferring doubtless that his arguments as to double payment should be considered without them. My finding of fact upon the evidence is contrary to that of the learned Judge and I think the appeal should be allowed. It has been called to our attention that the plaintiff has certain buildings which at the date of suit stood on the holding. As the learned Subordinate Judge appears to have expressed an opinion that the plaintiff's right, if the sale were valid, would be to retain possession of them upon the payment of an equitable rent to the defendant we are asked by the appellant to negative this view. While it is clear that at a revenue sale

the buildings do not pass with the land [*Narayan Das v. Jatindra Nath Roy* (3)], the learned Advocate-General has not defended the view that the defaulting tenant is entitled to retain possession of the buildings on the land upon payment of an equitable rent. The appellant is willing that the plaintiff should, if he so desires, remove the buildings; or if he does not desire to remove the buildings, the appellant is willing to take them at a reasonable valuation. This does full justice to the rights of the respondent and we will order accordingly. The result is that the appeal is allowed with costs and the plaintiff's suit is dismissed with costs. But in our decree we will make the order which I have indicated as regards the buildings.

Mitter, J.—I agree entirely with my Lord, the Chief Justice both in the reasons and conclusions of his judgment in this case.

K.S. Appeal allowed.

3. A I R 1927 P C 135=102 I O 198=54 I A 218=54 Cal 669 (P C).

A. I. R. 1933 Calcutta 377

PATTERSON, J.

Pratapchandra Ghosh — Plaintiff — Appellant.

v.

Ramanimohan Ghosh and others — Defendants—Respondents.

Second Appeal No. 365 of 1930, Decided on 10th June 1932, against decree of Sub-Judge, Bogra, D/- 25th September 1929.

Landlord and Tenant — Gift of occupancy holding without consent of landlord—Landlord is not entitled to eject transferee.

The principle that on a sale of an occupancy holding the landlord in the absence of his consent is ordinarily entitled to enter on the holding does not apply to transfers of such holding otherwise than by sale or mortgage, e.g., by gift. Even if it be held that the above principle applies to transfers by gifts, where there is an agreement between the donor tenant and the donee by which the donor tenant occupies some portion of the land, the landlord is not entitled to eject the transferee as before this question can arise, he must show that he has a right of re-entry as against the original tenant: 42 Cal 172 (F B), Dist. [P 378 C 1; P 379 C 2]

Radhabhnode Pal and Jyotireendranath Das—for Appellant.

Jateendranath Sanyal — for Respondents.

Judgment.—This appeal arises out of a suit for the ejectment of the defendants from a certain non-transferable occu-

pancy holding, on the allegation that they are in possession thereof as trespassers. The original tenant was one Kamalkamini Debi. Defendant 2 is the daughter of Kamalkamini and defendant 1 is the husband of defendant 2. Defendant 3 is a bargadar in actual cultivating possession of the land in suit. In 1322 B. S. Kamalkamini executed a deed of gift in respect of certain properties, including the holding in suit, in favour of her daughter and her son-in-law, defendants 1 and 2. This was at or about the time of the marriage of defendant 1 to defendant 2, and since that time defendant 1, together with his wife, defendant 2, has been living with his mother-in-law Kamalkamini as ghar-jamai, and has been in possession of the land in suit by virtue of the deed of gift executed in his favour by Kamalkamini, and by realization of his share of the paddy grown on the land by the bargadar, defendant 3. It may be observed that this bargadar, defendant 3, used also to cultivate the land under Kamalkamini before she executed the deed of gift in favour of defendants 1 and 2. It may further be observed that, although Kamalkamini has admittedly not paid any rent to the landlord for some years back, previous to that and subsequent to the execution of the deed of gift, the rent for the years 1325 to 1327 and the first quarter of 1328 were realized from her by suit.

It is common ground that the transfer was effected without notice to the landlord and without his previous or subsequent consent, and in those circumstances the question arises whether there has been an abandonment of the holding by Kamalkamini, and whether the landlord is entitled to treat the defendants as trespassers and to eject them from the land. On behalf of the appellant, reliance is placed on that portion of the decision of the Full Bench in *Dayamayi v. Ananda Mohan Roy* (1), in which it is laid down that:

"where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding."

It is contended that although the decision of *Dayamayi's* case (1) relates expressly to transfers for value of occupancy holdings, the principles laid down apply with equal force to other kinds of

transfers, such as transfer by gift, in which the whole holding is transferred and in which the tenant does not retain any subsisting interest in the holding. This contention cannot, in my opinion, be supported. The decision in *Dayamayi's* case (1) was based on a consideration of a number of previous and to some extent conflicting decisions regarding the effect of transfers for value of occupancy holdings, or of portions of such holdings, and also on a consideration of changes that were taking place in economic conditions in so far as such changes influenced and were influenced by the extension of the practice of the sale or mortgage of occupancy holdings with or without the landlord's consent.

This being so, it does not at all follow that the principles laid down in *Dayamayi's* case (1) with regard to transfers for value of occupancy holdings ought to be regarded as being applicable to transfers of such holdings otherwise than by sale or mortgage, e.g., by gift. Transfers by gift, unlike transfers by sale or mortgage, are few and far between, and suits for ejectment arising out of such transfers are probably rare. Moreover, transfers by gift generally take place between persons who are related to one another, and their frequency or infrequency is probably in no way affected by changes in economic conditions, as in the case of transfers by sale or mortgage. This being so, I am of opinion that, although transfers by gift may, in certain circumstances, amount to or result in abandonment, no inference of abandonment can be drawn from such transfers on the authority of the decision in *Dayamayi's* case (1), which relates exclusively to transfers for value.

Assuming however for the sake of argument, that the principles laid down in *Dayamayi's* case (1) apply with equal force to transfers by gift, the appellant is confronted with a further difficulty in the use of the word "ordinarily" in the passage in the decision in *Dayamayi's* case (1) quoted above. The use of the word "ordinarily" in this connexion appears to me to point to the conclusion that although an inference of abandonment may be drawn from the fact of the entire holding having been transferred, the door is left open to the tenant or his transferee to show that special circumstances exist which would negative such

an inference. It seems to me that such special circumstances have been proved to exist in the present case. Although the transfer of the holding has to some extent affected the legal rights of Kamalkamini and of the defendants, as amongst themselves, the legal rights of the landlord have not been materially affected. There has been no cessation of cultivation and no repudiation on the part of Kamalkamini of her liability to pay rent to the plaintiff. Kamalkamini has continued to live in the same house, and the bargadar has continued to deliver the tenant's share of the paddy grown on the land to the inmates of that house for the enjoyment of Kamalkamini and the other members of her household.

The only real difference that the transfer of the holding to the defendants 1 and 2 has made is that the title in the holding, as against Kamalkamini, is now vested in them, and they now vested in Kamalkamini's house and share in the enjoyment of the crops grown on the land. It has been repeatedly held that, even if the entire holding is transferred neither the original tenant nor his transferee is liable to ejectment provided the tenant continues to occupy some portion of the land by virtue of some sort of agreement between him and his transferee, but as far as I am aware it has never been held that, in order that the position of a tenant and his transferee may be safeguarded as against the landlord, it is necessary that the agreement between them should be of a legally binding nature. It seems to me that, in certain circumstances, an informal agreement between them would have the same effect, even though it might not be legally binding. This seems to be the position in the present case, Kamalkamini having made some sort of arrangement with her son-in-law to the effect that he and his wife should come and live in her house and that they should all share in the enjoyment of the crops grown on the land.

It may be said that even if the above view of the matter is correct, it applies only as between the landlord and the original tenant, but that the transferees, having acquired no title as against the landlord, are in the position of trespassers and are liable to be ejected from the land. This contention has been raised more than once in similar cases that

have come before this Court and has, in recent years, invariably been negatived. Before the question of ejecting the transferee can at all arise, the landlord must show that he has a right of re-entry as against the original tenant. This right he may seek to establish either by showing that the conditions laid down in S. 87, Ben. Ten. Act, have been fulfilled, or that the case comes within the purview of the rules laid down in *Dayamayi's* case (1). Even if, under the rules laid down in *Dayamayi's* case (1), an inference of abandonment may be held to have arisen from the fact that the entire holding has been transferred, it is still open to the tenant or to his transferee to show that circumstances exist which negative that inference. As already stated, I am of opinion that the rule laid down in *Dayamayi's* case (1) does not apply to the present case, and I am further of opinion that, even if it does, the inference of abandonment that may arise on the application of that rule will, in the particular circumstances of this case, have to be negatived.

I am therefore of opinion that the plaintiff has failed to prove that he has a right of re-entry as against the original tenant, from which it follows that he has no right to eject the original tenant's transferees and to take khas possession of the land in suit. The result is that the appeal is dismissed with costs and the judgment and decree of the lower appellate Court are affirmed.

K.S.

Appeal dismissed.

* A. I. R. 1933 Calcutta 379

MITTER AND M. C. GHOSE, JJ.

Dharanidhar Roy — Applicant—Appellant.

v.

P. D. Sethi and others—Decree-holders—Respondents.

Appeal No. 250 of 1932, Decided on 24th January 1933, against appellate order of Dist. Judge, Burdwan, D/- 4th May 1932.

* (a) Civil P. C. (1908), O. 21, R. 46—Mortgage debt can be attached by the Court within whose jurisdiction the mortgage bond is found.

The locality of a mortgage debt is where the mortgage bond is found and the Court within whose jurisdiction it is found can attach it even though the mortgagor or the property comprised in the mortgage is outside the jurisdiction of such Court: 89 Cal 104, Dist.; New York

Life Insurance Co. v. Public Trustee, (1924) 2 Ch. 101. *Rel. on.* [P 380 C 2]

(b) **Mortgage—Mortgage debt is payable where mortgagee resides in absence of contract to contrary.**

A mortgage debt is payable at the place the mortgagee resides, for unless a particular place be agreed upon for payment of the mortgage debt a personal tender is generally necessary.

[P 381 C 1]

(c) **Civil P. C. (1908), O. 21, R. 46—Mortgage debt due to judgment-debtor is moveable property.**

For the purposes of execution a debt due to a judgment-debtor under a hypothecation bond is moveable property within the meaning of O. 21, R. 46; *A I R 1915 Mad 209, 1 Ref.* [P 381 C 1]

Sailendra Nath Banerjee—for Appellant.

Jitendra Nath Ray and Pravasa Chandra Basu—for Respondents.

Mitter, J.—This is an appeal from the order of the District Judge of Burdwan affirming an order of the Additional Subordinate Judge of Asansol by which he directed the attachment of a debt secured by a mortgage of immovable property in favour of the judgment-debtor. It appears that the Asansol Motor Engineering Ltd. obtained a decree against Dharanidhar Ray, a minor who was represented by his guardian ad litem Swarupini Devi and in execution of the said decree has attached a mortgage bond executed in favour of the judgment-debtor by Raja Bon Behari Singh. The attachment has been made according to the provisions of O. 21, R. 46, Civil P. C., by a written order prohibiting the mortgagee, the judgment-debtor in this case, from recovering the mortgage debt and Raja Bon Behari Singh, the mortgagor, from making payment thereof until the further order of the Court. To this attachment the judgment-debtor through his mother, the guardian ad litem, takes exception and contends that as the mortgagor Raja does not reside within the jurisdiction of the Court which has directed the attachment and as the mortgaged property is not also situated within the jurisdiction of the said Court the attachment of the mortgage debt is illegal. This objection has been overruled by both the Courts below, hence the present appeal.

In this appeal it is contended that as the mortgage is a usufructuary mortgage O. 21, R. 46 does not apply. But this contention which was faintly urged was abandoned and it is now conceded

that the mortgage is really a simple mortgage. It is argued that as the mortgaged property is situate in Manbhum and as the garnishee mortgagor also resides at Manbhum the Asansol Court which is the attaching Court has no jurisdiction to issue the prohibitory order on the garnishee, and reliance has been placed in support of this contention on the case of *Begg Dunlop & Co. v. Jaganath* (1). It is said that the proper procedure is that the decree-holder should apply for the transfer of the decree for execution to the Manbhum Court, and after the decree is so transferred he should apply to the Manbhum Court to issue a prohibitory order upon the mortgagor from paying the debt to the judgment-debtor. We are unable to accept this contention. The locality of a mortgage debt is where the mortgage bond is found and it is admitted in the present case that the mortgaged bond is with the judgment-debtor who resides within the jurisdiction of the Asansol Court. In the case of *New York Life Insurance Co. v. Public Trustee* (2), Pollock, Master of the Rolls, quoted the rule of law applicable to this matter from the judgment of Lord Abinger in *Attorney-General v. Rywens* (3). Lord Abinger said this:

"As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies, specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death."

A mortgage debt is a specialty debt as opposed to a simple contract debt. Lord Atkins, J., in the *New York Insurance* case (2), just referred to, pointed out that in respect of specialty debts the test has always been not the place and residence of the debtor, but the actual place where actual document constituting the specialty exists, namely, where the piece of paper, is to be found. The piece of paper, i. e., the mortgage bond in the present case, is found with the judgment-debtor in

1. (1912) 39 Cal 104=11 I C 417.

2. (1924) 2 Ch 101=93 L J Ch 449=40 T L R 430=131 L T 436=68 S. J. 477.

3. 4 M & W 171.

Asansol and that is the locality of the mortgage debt. The mortgage debt is also payable at Asansol where the judgment-debtor mortgagee resides, for unless a particular place be agreed upon for payment of the mortgage debt a personal tender is generally necessary: see Fisher on Mortgage, Edn. 6, para. 1504. It is competent to a Court under O. 21, R. 46 to issue a prohibitory order upon a person resident outside the limits of its jurisdiction in respect of property which is within its jurisdiction and the mortgage bond which is the property sought to be attached is within the jurisdiction of the Asansol Court. And it has been correctly held in the majority of the High Courts in India that for the purposes of the execution a debt due to a judgment-debtor under a hypothecation bond is moveable property within the meaning of O. 21, R. 46, Civil P. C.: see *Nataraja Iyer v. The South Indian Bank of Tinnevely* (4).

The case of *Begg Dunlop and Co. v. Jagannath Marwari* (1) is distinguishable in its facts. There the decree under execution was obtained in the Court of Burdwan against the judgment-debtor residing in Burdwan and there was a debt due to the judgment-debtor from the firm of Messrs. Begg Dunlop & Co. and Williamson Maggor & Co., two firms of merchants carrying on business in the town of Calcutta; the debts being also payable in Calcutta, and in those circumstances it was held that it was not competent to a Court in execution of a decree for money to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor by a non-resident outside the jurisdiction. In the present case the property attached is within the jurisdiction of the attaching Court although the garnishee is resident outside its jurisdiction. In *Begg Dunlop's* case (1) both the garnishee as well as the property sought to be attached were outside the jurisdiction of the Court which directed the attachment. Besides in the *Begg Dunlop's* case (1) the debt was not a specialty debt but a simple contract debt and the locality of the simple contract debt is within the area of the local jurisdiction within which the debtor for the time being resides: see *Commissioner of Stamps v.*

Hope (5). For the reasons given above we are of opinion that the conclusion reached by the Courts below is right and that this appeal must be dismissed with costs. We assess the hearing fee at two gold mohurs.

M. C. Ghose, J.—I agree.

K.S. *Appeal dismissed.*

5. (1891) A O 476.

A. I. R. 1933 Calcutta 381

COSTELLO, J.

Altapali Khan — Defendant—Appellant.

v.

Uzirali Khan and others—Plaintiffs—Respondents.

Second Appeal No. 587 of 1930, Decided on 2nd June 1932 against decree of Addl. Sub-Judge, Chittagong, D/- 19th September 1929.

Deed—Construction—Some rules stated.

The character of a document has to be determined mainly with reference to the terms of the document itself. More attention should be paid to what the document itself says than to a mere existence of a description expressive on the margin of the document.

[P 382 C 1 P 384 C 2]

The intention of the parties must be deduced from the language in which the document is couched and not by reference to the particular religious beliefs or ethical doctrines of the persons using them: *Case law referred*. [P 385 C 2]

A document was expressed to be a kabala and the transferee was in the possession of the property. There was a clause that the transferor was to get back the property if he paid the purchase amount and an equal amount within eight years from date of document. In the margin of the document there happened to be an expression *kat kabala*. The transferor failed to pay the amount and get back the property within eight years, but subsequently sought to redeem the property on the ground that the document was one for mortgage by conditional sale.

Held: that the transaction was an out and out sale and not a mortgage. [P 386 C 1]

Chandrashekhar Sen—for Appellant.

Rohinibinode Rakshit — for Respondents.

Judgment.—This is an appeal from a decision of the Additional Subordinate Judge of Chittagong, dated 19th September 1929, whereby he reversed the decision of the Munsif, 3rd Court, Patiya, dated 5th September 1927. The suit, out of which this matter arises, was instituted on 20th December 1926, and the plaintiffs were claiming to redeem certain lands, originally held by their predecessor in *kayami raiyati* right. The plaintiffs claimed to redeem those lands upon the allegation that they

were mortgaged by the plaintiff's predecessor-in-title to one Ashkar Ali on 23rd Jaistha 1260 M. E., corresponding to 5th June 1898. The defendant asserted that he had been continuously in occupation of the lands in question from the date just mentioned up to the time of the institution of the suit on 20th December 1926. The real defence to the plaintiffs' claim was that the document dated 23rd Jaistha 1260, was in law not a mortgage but was a deed of sale by which the lands therein referred to were sold, but subject to re-purchase, the condition of such re-purchase, being if the transferor repaid the sum stated to be the price together with an equal amount of profit within a period of eight years from the date of the document then he would be entitled to get back the lands transferred by him. The plaintiffs were ready and willing to pay to the defendant an amount equal to the principal sum and an equal amount by way of profit in order to redeem the lands from the defendant.

The only question which arises for determination in this appeal is the short point whether or not the document of 23rd Jaistha 1260 was a mortgage by way of conditional sale or was an out and out sale. It is admitted by the defendant that if that document is a mortgage, then the plaintiffs have not lost their right to redeem the lands and that they are entitled to succeed in their suit. On the other hand, if the document effected an out and out sale of the lands then the plaintiffs long since lost their right to buy back the lands, and their suit fails. The question whether a document of this character is a mortgage or an out and out sale has to be determined mainly with reference to the terms of the document itself. Lord Davey in giving the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Bal-kishen Das v. Legge* (1) said with reference to a matter of this kind:

The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

In the present case it appears that the plaintiffs sought to support their

contention that the document of 23rd Jaistha 1260 was really a mortgage, by referring to statements in a petition which had been put forward in connexion with certain execution cases by the defendant, in which the defendant had described the document with which we are now concerned as *kat-kabala*. In my opinion, however, as the filing of that petition was an event which occurred some time subsequent to the execution of the document, it is not a matter which falls within the latter part of the proposition laid down by Lord Davey and accordingly that petition ought not to be taken into account one way or the other for the purpose of deciding the point at issue between the parties in the present proceedings. It is to be observed, from the dates which I have already mentioned that some 28 years had elapsed from the time when the bargain was made between the parties to the time when the present suit was instituted and therefore in endeavouring to construe the terms of the document, one must bear in mind the observations of Lord Cranworth, L. C., in the well-known case of *Alderson v. White* (2) where he said:

What is there to show that it (that is to say the document then under consideration) was intended to be a mere mortgage? I think that the Court, after a lapse of 30 years, ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be, and I see but little evidence to that effect here.

That passage in the judgment of the Lord Chancellor has been quoted in a number of cases since and always with approval, notably by Lord Atkinson in the judgment of the Judicial Committee of the Privy Council in the case of *Jhanda Singh v. Wahiduddin* (3). The same passage had previously been referred to by Sir Barnes Peacock in giving the judgment of the Judicial Committee of the Privy Council in the case of *Bhagwan Sahai v. Bhagwan Din* (4). Owing to the lapse of time in the present case, I think one is bound very carefully to scrutinize the actual provisions of the document of 23rd Jaistha 1260 before approving the judgment of the learned Subordinate Judge of Chit-

2. (1858) 2 D E G & J 97=4 Jurns 125=G W R 242.

3. A I R 1916 P C 49=36 I C 38=43 I A 284. =38 All 570 (P O).

4. (1890) 12 All 387=17 I A 98=5 Sar 551 (P C).

1. (1899) 22 All 149=27 I A 58=7 Sar 601 (P C).

tagong, who came to the conclusion that the view taken by the learned Munsif that the transaction was an out and out sale was not correct and that the transfer was really by way of mortgage. There is another important passage in the judgment of Lord Cranworth in *Alderson v. White* (2), which also has been relied upon in subsequent cases where a point similar to the present one was under consideration. That passage is in the following terms:

The rule of law on this subject is one dictated by commonsense that prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instrument?

In order to decide what is the meaning of the instrument now before me, one must therefore look at the precise terms of the document itself. They are as follows:

This kabala for absolute sale of lands and rent sheweth:—"I possess, separately, in kayomi raiyati right the lands measuring 1 kan! 4 gandas and 2 karhas, at an annual rent of Rs. 2-15-0 in proportion to my share, out of the total lands and rents described below with details regarding mauza, mehal, dags, etc. Now, owing to my necessity, for clearing up my debts, I sell the said lands absolutely to you at the price of Rs. 44. You, being possessor in my right and title, continue to enjoy and possess the said lands in succession of sons and grandsons downwards, with all its tenements and hereditaments. On no occasions, I or my successors-in-interest should claim or have the right to claim the said lands; if such a claim is ever made, it will be disallowed. If ever there be any impediments to your purchase or possession, then you shall be able to realize the principal amount and an equal amount of profits with costs and interest at the rate of one anna per rupee per month from me personally and from my moveable and immovable properties—calculating the date of the cause of action from the date of your disposition. I have not created any charge on the said lands, etc., by any deed in favour of anybody; if the creation of any such charge be proved, then I shall be liable to be prosecuted under the Penal Code. Be it known that if the said principal amount and the equal amount of profit be paid to you within the period of eight years, then you shall return back the said lands with this kabala. Under these terms I execute this absolute sale-deed."

It is to be observed that the document begins with the words:

"This kabala for absolute sale of lan and rent sheweth."

The document therefore at the outset purports to be a deed of sale and also to sell absolutely the lands described in it

at the price of Rs. 44. The transferee is not only to be the possessor in the right and title of the transferor, but is to continue to enjoy and possess the lands in succession of sons and grandsons downwards, but on no occasion shall the transferee or his successors-in-interest claim or have the right to claim the said lands and, if such a claim is ever made, it is to be disallowed. It seems to me therefore that, on the face of this document, it is an absolute sale of the lands described therein and that it operated as a transfer of the property in those lands to the present defendant immediately upon the execution of the document. The learned Subordinate Judge has been greatly influenced by the fact that in the margin of the document there is a writing in these terms "kat-kabala: lands 1 kani 4 gandas 2 karhas, amount—Rs. 44." The learned Subordinate Judge, contrary to the view of the Court of first instance, came to the conclusion that that endorsement on the document must have been put there by or with the knowledge and assent of the defendant and therefore afforded some indication that the parties themselves intended the document to operate as a mortgage by conditional sale. The appellate Court below seems to have placed more reliance on the presence of the expression kat-kabala in the margin of the document than on the presence of the word kabala in the body of the document itself. Whereas, on the other hand, the learned Munsif said:

"The words 'kabala of sale' are very significant and had the transaction been really a mortgage there was no bar in writing the words 'deed of conditional sale' in place of 'kabala of sale'."

In passing, I may point out that it seems that, in its origin, the expression kat-kabala meant no more than a conditional agreement or any deed of conditional sale stipulating that if by a certain date the purchase price or money advanced be not paid, then the sale would become absolute: see Wilson's Glossary, p. 267. It seems clear that originally the expression was not used as necessarily meaning a mortgage. Mr. Sen, on behalf of the defendant-appellant in this appeal, has drawn my attention to the case of *Kinuram Mondol v. Nitye Chand Sirdar* (5), and in particular to a passage in the judgment of

Sir Francis Maclean, C. J., at p. 402, where he says:

"Let us look at the documents. There can be very little doubt upon the face of the first document that it was an out and out sale. The language of the document is clear, that the defendants did sell the property in question, and they speak of this document as a clear deed of sale divesting all rights for a consideration of Rs. 875, which they say is 'its proper value at the present time.' The purchasers were to become entitled to all the rights of the vendors and to possess and enjoy the property with their 'heirs, sons and grandsons, etc.' This clearly is an out and out sale."

Mr. Sen points out that in the present case, the document is not one of the kind where there is a provision that, if the transferor does not repay the price with or without some addition by way of compensation within a certain time, then and in that event, the property will pass to the transferee, which in effect was the situation as regards one of the documents in the case, to which I have just referred. Mr. Sen lays much stress upon the point that, as regards the document in the present case, the effect was that the property passed at the time of its execution and that the provision relating to the getting back of the property was in these words:

"If the said principal amount and the equal amount of profit be paid to you within the period of eight years, then you shall return back the said lands with this kabala. Under these terms I execute this absolute sale-deed."

Mr. Sen accordingly argues that the property in question passed immediately upon the execution of the document and the transferors had merely the right to get back the property the event of their taking advantage of the condition within the specified period of eight years. Mr. Rakshit on the other hand, on behalf of the plaintiffs-respondents to this appeal, relied upon and emphasised the reasons given by the learned Subordinate Judge in the course of his judgment in support of his view that the transaction was really a mortgage and not an out and out sale. In particular Mr. Rakshit says that the clause in the document, to which I have just referred, is really in favour of the plaintiffs because there is no stipulation in the document providing for a re-conveyance of the land in question. It simply provides that "you (that is, the transferee) shall return back the said lands with this kabala." Those words, says Mr. Rakshit, clearly indicate that the transac-

tion was a mortgage, seeing that what the parties agreed to was that if the principal and an equal amount of profit were paid within a period of eight years the transferor would get back the lands and the kabala would be handed over for cancellation. On the whole I think the view put forward by Mr. Sen is correct and moreover I think I ought to give greater weight to the fact that the document is expressed to be a kabala (i. e., a deed of sale) and to the provisions in it indicative of absolute conveyance of the lands, rather than to the other fact already discussed, namely, that in the margin there happens to be the expression "kat-kabala." In my opinion, such an endorsement placed outside the actual terms of the documents by no means necessarily stamps the instrument with the character of a mortgage.

The expression in any case might be intended to do no more than indicate that the document was a deed of sale with a condition subsequent. The marginal addition cannot be taken conclusively to affect the transaction set forth in the document with all the incidents and implication of a mortgage. The descriptive expression may mean no more than that the kabala contains a condition for re-purchase of the lands described in the kabala on certain terms. I take the view therefore that I ought to pay more attention to what the document itself says than to a mere existence of a descriptive expression on the margin of the document which might have found its way there by some wholly fortuitous circumstances or for some extraneous reason. I do not think that much weight need be given one way or the other to the fact that the condition for getting back the land by payment of money is expressed by the words "if the said principal amount and an equal amount of profit be paid," because it has to be borne in mind that whatever the nature of the transaction was, undoubtedly throughout all the years subsequent to the transfer, the defendant was in possession of the land and enjoyed therefrom all the profits accruing from the use and occupation of it. Mr. Rakshit has argued that because the words used are "principal amount and an equal amount of profit," they ought to be read and construed as

if they were "principal amount and interest." He has sought to explain the particular form of words in the document upon the ground that the parties to the transaction are Mahomedans and so have disguised what is in substance a mortgage in the form of an out and out sale in order not to offend against the religious principles of their community which at one time at any rate were opposed to the lending out of money at interest. In support of this aspect of the matter, Mr. Rakshit cited the case of *Mohammed Usman v. Abdul Rahman* (6) (at p. 76 of 42 O L J) where Mukerji, J., with the concurrence of Greaves, J., said:

The Subordinate Judge says that the document on the face of it purports to be a kabala, that the word 'sale' is clearly mentioned in the document, and it is also stated in the document that the purchaser, his sons and grandsons are to enjoy the lands and the executant gives up his right and authorises the purchaser to transfer the same by sale or gift, etc. These terms undoubtedly would go to show that the object of the executant was to make out that the document would purport to be one representing an out and out sale. But that is a matter of very little consequence if we take into consideration the fact that the document was executed between Mahomedans, and even if the real object of the parties was to create a mortgage they might conceal that intention by using terms and expressions of this description.

In the same connexion, Lord Atkinson in *Jhanda Singh v. Wahiduddin* (3) referred to the proposition of law laid down by Lord Cranworth which I have cited and said:

"that statement of the law by Lord Cranworth was approved of in *Manchester, Sheffield, and Lincolnshire Railway Co. v. North Central Wagon Co.* (7)."

It may not be applicable to transactions governed by the Mahomedan law. Lord Atkinson however went on to say:

It (i.e., the statement of law as enunciated by Lord Cranworth) was apparently held applicable by Sir Barnes Peacock, who had vast experience of India and its people, to the case before him. In this particular case Sir Barnes Peacock decided that it was clear that the case was not one of mortgagor and mortgagee, but one of absolute sale with a right to re-purchase within a period of ten years.

Lord Atkinson was of course referring to the judgment of Sir Barnes Peacock in the case of *Bhagwan Sahai v. Bhagwan Din* (4).

In the light of that authority, I think that in the present case the learned

Subordinate Judge placed too much reliance on the fact that the parties are Mahomedans. In his judgment he said:

The parties are Mahomedans who, in this part of the country, try to conceal the real nature of the transaction in case of mortgages. The wording of the deed shows that they prefer to call interest profit or khesarat or compensation.

It seems to me that the learned Subordinate Judge has rather assumed that because the parties are Mahomedans the transaction must therefore be of a different nature from what is apparent on the face of it and accordingly he seeks to explain the use of particular expressions upon that basis. That method of reasoning is however in my view, wrong, because, instead of seeking to construe the terms of the document as they stand for the purpose of ascertaining the effect of the document, it starts with the assumption that the transaction is other than its terms would indicate and then seeks to justify the use of those terms. To use a colloquialism, it is in effect putting the cart before the horse. The fact that the parties are Mahomedans does not really assist the Court to interpret the actual language of the document itself, which after all is really the only matter in a case like this with which the Court is concerned. It seems to me only reasonable to hold that the intention of the parties must be deduced from the language in which the document is couched and not by reference to the particular religious beliefs or ethical doctrines of the persons using them.

The other point raised by Mr. Rakshit that the document contains no express provision for the reconveyance of the property but only for the return of the deed and the giving up of possession of the land also seems to have had considerable weight with the Subordinate Judge. As regards this point Mr. Sen referred to the case of *Ayyavayyar v. Rahimansa* (8). In that case A, having previously hypothecated certain land to B, executed a conveyance of it to him in 1873 for a consideration which was now found to have been an inadequate price. On the same day, B executed to A a "counter document," by which he covenanted to re-convey the land and return the sale-deed, if the sale amount were repaid to him in cash on 27th May 1875. The documents contained no

8. (1890) 14 Mad 170.

6. A I R 1926 Cal 1151=90 I C 100=42 C L J 74.

7. (1888) 13 A C 554=58 L J Ch 219=37 W R 805=59 L T 730.

provision as to interest and reserved no power for the purchaser to recover his purchase money. In 1888 A's representative, alleging that the transaction evidenced by the above documents was a mortgage, brought a suit to redeem it. It was held by the Court, consisting of Sir Arthur Collins and Shephard, J., that the transaction did not constitute a mortgage and that the plaintiff was not entitled to redeem. In giving judgment the Court said:

Having regard to the language used in the two instruments, dated 17th January 1873, we think there can be no doubt that a sale with a condition for re-purchase on the date specified was intended. The absence of reference to a reconveyance does not appear to us to be important, and there are certainly no words positively indicating that a mortgage was intended. There is no mention of interest and no power is reserved to the purchaser to recover his purchase money.

That judgment indicates that the Court was of opinion that the absence of a provision for reconveyance was not a decisive factor.

In the present case, neither of the Courts below came to any definite finding upon another matter which might have been of some importance in the determination of the case, namely whether or not the price of Rs. 44, which was paid, was adequate. Therefore the question of the consideration for the execution of this document cannot affect the determination of the case one way or the other.

I can only decide this case therefore upon an examination of the actual terms of the document. Bearing in mind the principles already set forth, I come to the conclusion that I ought to hold that the intention of the parties was that the transfer would be in the nature of an out and out sale with a right reserved to the vendor to re-purchase the land on the terms stated, at any time within a period of eight years from the date of the execution.

It follows therefore that this appeal is allowed. The judgment of the Subordinate Judge is set aside and that of the Munsif restored. The defendant is entitled to his costs of this appeal. I make no order as to costs in the Courts below.

K.S.

*Appeal allowed.***A. I. R. 1933 Calcutta 386**

AMEER ALI, J.

Keshab Lal Dhar, In re.

Application in Insolvency case No. 24 of 1923, Decided on 28th June 1932.

Presidency Towns Insolvency Act (3 of 1909), Ss. 23 and 41—Annulment of adjudication on failure to apply for discharge—Fund vests in Official Assignee for benefit of creditors.

Where an adjudication is annulled by reason of the default of the insolvent, the insolvent is to lose the benefit of the insolvency, but is not to benefit by the annulment. Hence on an annulment under S. 41 being made, the fund should be vested in the Official Assignee or proper officer under the Act in force, and is so vested in him for the benefit of the creditors, and may be dealt with as if the fund was being dealt with in the insolvency; and the insolvent cannot claim the money under S. 23: *A I R 1930 Mad 278, Foll.* [P 287 C 1]

On the annulment of an order of adjudication the Court ordered that the money was to be in the hands of the Official Assignee and should be kept pending further order of the Court.

Held: that even though there was no express order vesting fund in any person, still that was the intention and that the insolvent cannot claim it. [P 287 C 1]

Sudhir Roy—for Applicant

J. C. Hazra—the Creditor.

Judgment.—This is an application by the Official Assignee of Calcutta for directions. The directions asked for are not specified in the prayer to the petition. The matter arises in this way: Keshab Lal Dhar was adjudicated on 9th April 1923. Beereshwar Ghosh, the creditor, appearing on this present application, lodged his proof on 11th July 1923. Nothing apparently was done in the insolvency. On 23rd April 1928 the Official Assignee applied for and obtained an order for annulment on the ground that the insolvent had not applied for his discharge, the application being under S. 41, Presidency Towns Insolvency Act. The order was made with the direction that the money to the credit of the estate in the hands of the Official Assignee be kept pending the further order of the Court. I have not got the order before me, but that gives the sense of the direction. The sum to the credit of the estate was a sum of Rs. 903, and that is the sum which is now in question. The insolvent applied for payment to him of that sum. Apparently notice of that application was given to Beereshwar Ghosh, the creditor, who opposes. Keshab Lal Dhar claims the money under S. 23, Presidency Towns In-

solvency Act, on the ground that, by the terms of that section, unless there is a specific order vesting the fund in any other person for the benefit of the creditors, the fund reverts to and vests in the "insolvent." He further relies on the fact that, if compelled to sue, the creditors' claim is well barred by limitation.

In my view, the principle of the law is as follows: Where an adjudication is annulled by reason of the default of the insolvent, as in this case, the insolvent is to lose the benefit of the insolvency, but he is not to benefit by the annulment. The annulment is not for his advantage. I therefore agree with the ruling in *Jethaji Peraji v. Krishnayya* (1), that normally, on an annulment under S. 4 being made, the fund should be vested in the Official Assignee or proper officer under the Act in force, and is so vested in him for the benefit of the creditors and may be dealt with as if the fund was being dealt with in the insolvency. Although the order in this case does not specifically vest the fund in the Official Assignee, I take it that such was the intention. In any event, the order kept the fund in suspense. Although I do not think it necessary, I am prepared now to make an order vesting this fund in the Official Assignee for the benefit of the creditors, and he will deal with it as indicated above. Having regard to the nature of the application, to the lapse of time and inactivity of the creditors, I propose to give Keshab Lal Dhar his costs of this application out of the assets, as also the costs of the creditor. The Official Assignee's costs will also come out of the assets. I certify for counsel. This for practical purposes will effectively dispose of the fund in question.

K.S.

Order accordingly

1 A 1 R 1930 Mad 278=122 I C 351=52 Mad 64.

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RANKIN C. J. AND C. C. GHOSE, J.
Pareshram—Appellant.

v

Official Assignee of Calcutta—Respondent.

Insolvency Appeal No. 97 of 1931, Decided on 14th July 1932

Insolvency Composition deed—Balance of amount left with trustee after paying credi-

tors — Trustee to pay such balance to debtor.

Under a composition deed, a trustee was entrusted with the assets of the insolvent-debtor to pay to the creditors who prove their claims. After paying the demands made, a balance was left in his hands as some of the creditors did not make their demands or take steps to do so. The debtor applied for payment of that amount to him.

Held: that the unclaimed balance was in the hands of the Official Assignee not as Official Assignee but as a trustee and that he had power to pay the same to the debtor. [P 357 C2]

Sudhir Ray and S. K. Basu—for Appellant.

Facts—The Official Assignee obtained possession of assets to the extent of Rs 17,000 and the creditors of the firm proved their claims in the insolvency. After some three years, a deed of composition was approved and the adjudication was annulled. The material portion of Cl. 4 of the composition deed was :

4. That the payment of the composition be secured in the following manner: . . . (b) The trustee shall stand personally responsible for and pay to such of my creditors as would prove their claim a dividend of annas 4 in every rupee of the principal amount of our debt due to them respectively within three months from the date of the order. The mode of payment shall be in the discretion of the trustee. (c) In consideration of the trustee paying all sums of money in the manner stated above, all the assets and outstandings of our business as also real and personal estate will be assigned over to him which when realized shall be appropriated by the trustee towards the advances made by him for the payment of our debts aforesaid to the extent of his said advances and the balance, if any, shall be paid to us.

A trustee was appointed and the creditors were to get 4-annas in the rupee under the composition deed. The majority of the creditors received their claims from the trustee and there was a balance of amount left with the trustee which was not demanded by the other creditors. The debtor firm applied for payment of this amount.

Rankin, C. J.—We will make an order that the Official Assignee be at liberty to pay to the appellant who was debtor in the insolvency, the unclaimed balance of Rs 2,256 2-10, which is in the hands of the Official Assignee, not as Official Assignee in the insolvency, but as a trustee of the fund put up in connexion with the composition arrangement made with the sanction of the Court. In my judgment, we have power to do this and the order should be made.

C. C. Ghose, J.—I agree.

K.S.

Order accordingly.

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RANKIN, C. J. AND COSTELLO, J.

Mr. Miriam Alice Monk—Appellant.
v.*Mr. William Monk*—Respondent.

Appeal No. 43 of 1932, Decided on 12th July 1932 in Suit No. 24 of 1931.

(a) Divorce Act (1869), S. 14—Separation deed condoning misconduct—Subsequent suit for dissolution of marriage—Wife cannot rely on misconduct prior to separation deed.

In a separation deed there was a clause by which both parties had agreed to condone the previous misconduct and not to take any action in respect of such misconduct. Subsequent to this, wife applied for dissolution of marriage on ground of adultery on the part of the husband coupled with his previous misconduct.

Held: that she was precluded from relying on the misconduct prior to the deed of separation: *Case law referred.* [P 390 C 2; P 391 C 1]

(b) Divorce Act (1869), S. 55—Unsuccessful appeal by wife—Husband need not pay costs to wife—Costs.

There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife.

[P 391 C 2]

Isaacs—for Appellant.*Gregory and S. K. Basu*—for Respondent.

Rankin, C. J.—This is a wife's appeal from the judgment and decree of the learned Judge on the original side, who has dismissed her petition for dissolution of marriage. It appears that the parties were married on 26th April 1920. There is issue of the marriage, one son Derek, born on 13th March 1924. In 1921 the wife began proceedings for judicial separation in this Court which proceedings were discontinued. On 24th November 1930, the parties entered into a separation deed, upon the terms of which the main matter for decision arises. On 13th July 1931, the wife brought another suit against the husband, which she withdrew. On 3rd September 1931, she brought the present petition. In the first instance, four issues were settled. One was whether the petition was barred by reason of the previous proceedings. The second was whether the petitioner was entitled to refer to acts of cruelty alleged in the previous proceedings. Neither of these issues appear to be effective, nor indeed is there anything in the points which are raised thereby. Issue 3 is now the main matter before us:

"Is the petitioner, by reason of the deed of separation referred to in para. 13 of the plaint, precluded from relying upon the acts of cruelty alleged?"

This issue was of cardinal importance by reason of the present petition, which is a petition for dissolution of marriage, grounded on allegation of adultery by the husband subsequent to the separation deed of 24th November 1930, coupled with allegations of cruelty, charged to have taken place prior to the execution of that deed. Before the learned Judge, the terms of Cl. 3 of the deed were carefully discussed. The terms of the clause are as follows:

No proceedings shall be taken by or on behalf of the said William Boyd Monk or the said Alice Miriam Monk against the other of them in respect of any misconduct or alleged misconduct previous to the date of these presents and any offence which may have been committed or permitted by either of them against the other is hereby condoned.

It is to be observed that this clause is in two parts and I will consider later whether the part which refers to condonation can, in any way, be regarded as cutting down the effect of the first part of the clause, which says:

No proceedings shall be taken in respect of any misconduct previous to date of these presents.

The learned Judge came to the conclusion that the term of the clause precluded the wife from founding upon alleged acts of cruelty by the husband committed prior to the date of the deed, even in a case where her claim to dissolution of marriage was partly grounded upon alleged acts of adultery by the husband committed afterwards. He therefore held that this term of the deed was a bar to the suit, so far as it was founded upon allegations of cruelty prior to November 1930. As the parties had been living separate since the date, the wife was naturally enough not in a position to allege cruelty committed after the date of the deed; as the law under the Indian Divorce Act stands, she could make no case for dissolution of marriage on the ground of adultery by itself, though she could get a judicial separation merely by reason of the adultery. The learned Judge, having decided as to the effect of Cl. 3, allowed the wife to raise an issue whether the deed of separation had not been obtained from her by coercion: on that question he found against the wife and in favour of the husband. That matter has not been further agitated before us. On his giving this decision, learned counsel for the wife did not propose to tender further evidence and the suit was, accordingly dismissed.

At the hearing of this appeal, we have been taken very carefully by Mr. Isaacs, on behalf of the wife, through the cases in England, which have raised the question whether or not subsequent misconduct enables a party, who has entered into a covenant to the effect that prior acts of misconduct are not to be put in issue in subsequent proceedings, to found upon them, as part of the grounds of relief, subsequent misconduct having occurred. On this question, the first authority is the case of *Rowley v. Rowley* (1), a decision of the House of Lords in 1866. That was a case where, after the Divorce Court had been established in 1858, the wife brought a petition for divorce against the husband on the ground of cruelty and adultery. At the trial, the case was compromised and a juror withdrawn, the husband undertaking to execute a deed of separation with certain covenants: the term of the compromise which affects the present question is as follows:

"the petitioner undertaking not to institute other proceedings in the Divorce Court."

That was on 12th March 1861. On 9th May 1863, Mrs. Rowley filed a fresh petition in the Divorce Court, charging the same acts of misconduct as were referred to in the first petition, charging other acts of misconduct alleged to have taken place, though not to her knowledge, prior to the date of the compromise and charging further acts of misconduct since the date of the compromise. Sir James Wilde (afterwards Lord Penzance) was of opinion that she could not do so. He said:

It has been ingeniously argued, that the adultery charged to have been committed in 1862, that is, after the date of the deed of compromise revived the previous cruelty, as it would do in an ordinary case of a condonation. Now, condonation is that species of forgiveness or reconciliation which, in furtherance of the marriage bond, the law has declared to be binding only on condition of future good conduct. But here there is no such condition to be found.

He dealt further shortly with the question of public policy. He said:

The agreement has been violated. Why should not the Court give it effect?

He proceeded to distinguish between the course taken by the Court in furtherance of the obligation of marriage and the view that was taken by the Court when the arrangement between the parties was not for the furtherance of

marriage, but for bringing cohabitation to an end. That was the judgment which went on appeal to the House of Lords and both Lord Chelmsford and Lord Cranworth were of opinion, first, that "no condition as to the absence of future misconduct could be read into the undertaking not to institute other proceedings in the Divorce Court";

further, that that undertaking did not affect in any way subsequent acts of misconduct and, thirdly, that it did comprise all deeds of misconduct up to the date of the compromise itself, whether the wife was shown to have no knowledge at the time of the compromise or not. The view taken in the House of Lords was:

"The learned Judge Ordinary very properly rejected the supposed analogy between this case and a case of condonation. In the latter case there is a conditional forgiveness; here there was an absolute release."

Lord Cranworth says:

"It necessarily follows that inasmuch as she has now instituted proceedings founded in part upon something which occurred before that time, the suit cannot be sustained, and consequently the decree appealed from must be affirmed."

I do not refer to this case for the purpose of assuming that the construction of one contract must be a guide to the construction of another. I refer to it to show that we have to keep in our minds two things as separate things. The Common law question of release is one thing; the question of condonation for purposes of Ecclesiastical Court or Divorce Court may be different. In the present case from the words

"no proceedings shall be taken in respect of any misconduct previous to the date of these presents"

it does seem to me that it is impossible for us either by reason of the context or by reason of any general principle to insert an exception into the clause before us, and it is all the less possible because it is now settled and established law that an agreement of this sort is not to be read as impliedly subject to good conduct on the part of the parties. Whatever was right and whatever was wrong in the case of *Gandy v. Gandy* (2) commented upon in the case of *Hyman v. Hyman* (3) that line of decision has established that the view at one time taken by Sir James Hannan to the effect that there is an implied condition

2. (1882) 7 P D 168=51 L J P 41=30 W R 678
=46 L T 607.

3. (1929) A C 601=98 L J P 81=93 J P 209=
45 T L R 444=141 L T 829.

1. (1866) 1 H L 68.

against misconduct in a deed of separation is unfounded. The next case, which bears any close analogy to the present case is the case of *Norman v. Norman* (4). There the wife had instituted divorce proceedings against her husband. After the husband entered appearance, terms were arranged and a deed of separation was executed. After reciting the proceedings, the deed went on:

"All further proceedings in the said suit by the said Mary Ann Norman against the said William Norman shall be stayed and that the said Mary Ann Norman shall in no wise attempt to revive the same in any manner whatever."

It is to be observed that "the same" in that clause refers to proceedings in the said suit. The husband, having afterwards committed adultery and a suit for dissolution of marriage having been instituted, in which the previous misconduct was part of the grievance alleged, Bargrave Deane, J., took the view that the case was not on all fours with the previous case of *Rose v. Rose* (5) where the clause expressly said that in no future proceedings should the antecedent charges be relied on. In *Norman v. Norman* (4)—a new suit upon a fresh allegation of adultery—there was not an attempt to revive the previous proceeding and, on that ground, *Norman v. Norman* (4) is a different case from the case now before us. The matter came before Sir Gorell Barnes in the case of *Balcombe v. Balcombe* (6). The covenant in that case, for all practical purposes, was the same as the covenant before us now and it was contended that the cruelty which preceded the deed was revived by subsequent adultery. It was emphasized that the second part of the elaborate clause in *Rose v. Rose* (5) did not find place in the covenant. Sir Gorell Barnes, having remarked, in the course of the argument, that *Rowley v. Rowley* (1) was more against the petitioner than the case of *Rose v. Rose* (5), proceeded to decide the case before him, upon other grounds, it being very noticeable that he was not prepared to hold that, on the terms of the deed in that case, subsequent misconduct enabled the previous misconduct to be utilized. He held that, for all practical purposes in

that case, the husband had repudiated the deed, he had gone away to America, he had ceased to make any payment under it and he had torn up the copy which he had before leaving the country. It was held, in these circumstances, that the deed was no longer binding on the petitioner at all. The Court was very careful not to lay down the proposition that subsequent misconduct revived the previous misconduct against the terms of the deed. The next case, which throws any light upon this question, is the case of *Ehlers v. Ehlers* (7). That was a case in which the clause in the deed of separation, which Horridge, J., had to construe, contained two parts. The first part was very much to the same effect as the first part of Cl. 3 in the present case:

"Neither . . . shall be at liberty to take any legal proceedings against the other of them in respect of any matters which have hitherto occurred."

But the clause went on to say:

"Neither . . . shall be at liberty to take any proceedings in the future for a judicial separation or any proceedings whatsoever other than the proceedings for a dissolution of marriage."

Apart from exceptional misconduct, which could hardly have been in the contemplation of the parties, the wife could only get dissolution of marriage by proving in addition to adultery some acts of cruelty. Under the separation deed, she could not allege desertion. It was held by Horridge, J., that the second part of the clause showed that, in the event of subsequent adultery by the husband, previous cruelty was intended to be taken into account as a ground of relief at the instance of the wife. In his opinion:

"If the clause had ended with the words 'hitherto occurred,' the petitioner's claim to revival would have been defeated, but the latter part of the clause can only refer to using the past cruelty in addition to subsequent adultery."

It appears to me that if we take the first part of Cl. 3 of the present deed by itself the correct view to take is that this is a release not expressed to be conditional and that there is no condition to be imported to the effect that subsequent adultery by the husband brings the effect of the clause to an end. The second part of the clause before us is to the effect that any offence which may have been committed is hereby condoned and it may possibly be said

4. (1908) P 6=77 L J P 8=24 T L R 37=98 L T 61.

5. (1883) 8 P D 93=52 L J P 25=81 W R 573=48 J. T 378.

6. (1903) P 176=77 L J P 81=99 L T 308.

7. (1915) 113 L T 1215.

that, if the meaning attributed to the first part of the clause is what I have concluded it to be, the second part of this clause would be unnecessary; and that therefore reading the clause as a whole, the first part of the clause should not be taken to mean more than a conditional release, a release conditional upon subsequent good conduct. This argument however can be shown to be entirely bad if only by a consideration of the case of *Gooch v. Gooch* (8) where Sir Francis Jeune had before him the question of the effect of such a clause as this when the previous misconduct was being relied upon not by the petitioner as a part of her ground for relief but by the respondent as a part of his answer. In that case, the wife, after a deed almost exactly in terms of the present clause, presented a petition for judicial separation against the husband on the ground of adultery committed subsequent to the deed; the husband, in his answer, charged the wife with adultery committed prior to the deed; and the whole point of that decision turned upon the fact that, in the deed of separation, there was no clause about condonation. It was held that:

"The covenant in the deed of separation was not equivalent to condonation, and that it did not preclude the husband from pleading in answer to his wife's petition adultery committed by her before the date of the deed."

I am of opinion therefore that the decision of the learned Judge upon the effect of Cl. 3 was right and that, in view of the fact that that decision having been given, the wife did not proceed with her case in order to obtain a judicial separation on the ground of adultery subsequent to the deed, the learned Judge was entirely right in dismissing the suit. In my judgment, this question of the effect of the clause is upon the English cases the only question which is reasonably open to debate. It is suggested to us that it might be held that if the clause has the meaning which I have given to it, the clause is void as contrary to public policy. As to that I can only say that there stand to the contrary the decision of the House of Lords in *Rowley v. Rowley* (1), the decision of the Court of appeal in *Rose v. Rose* (5), the decision of Lord Merrivale

8. (1898) 1 P 99=62 L J P 78=41 W R 655=68 L T 462.

in the case of *L. v. L.* (9), a decision which was given after considering the effect, if any, on the present question of the case of *Hyman v. Hyman* (3) decided by the House of Lords in 1929. That matter therefore is not open to reasonable discussion.

The only question is as to costs of this appeal. I have satisfied myself that there is no practice which requires us to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife and, in the present case, the facts are such that it would be quite impossible for us to make any order more favourable to the wife than that the parties are to pay their own costs and I propose that we make that order. The appeal is dismissed.

Costello, J.—I too am of opinion that Cl. 3 operates as an absolute release and not merely by way of conditional condonation. For the reasons given by my Lord I think that the appeal must be dismissed.

K.S. *Appeal dismissed.*

9. (1931) P 63=47 T L R 260=75 S J 192=144 L T 723.

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GUHA AND M. C. GHOSE, JJ.

Jnanendrakumar Ray and others—
Plaintiffs—Appellants.

v.

Dileepkumar Ray and others— Defendants—Respondents.

Second Appeal No. 1884 of 1929, Decided on 17th June 1932.

Bengal Tenancy Act (8 of 1885), S. 67—Landlord cannot claim interest or damages where rent is undetermined till decision of Court.

The question of awarding interest on arrears of rent either under the general law or under S. 67, Ben. Ten. Act, cannot arise until the rent payable by the tenant has been determined. Where the rate of rent payable by the tenant is required to be fixed by the Court, the landlord is not entitled to interest or damages on the ground that the tenant did not pay rent at the rate claimed by the landlord: 1 W R 56; 1 W R 58 and 10 W R 166, *Inf.* [P 393 C 1]

The discretion or the option left to the Court in the matter of awarding interest on rent decreed is not taken away by changes in law made by S. 67, of Act of 1885: 22 Cal 214 (P C), *Ref.* [P 393 C 1]

*Apurbacharan Mukherji and Durgacharan Ray Chaudhuri—*for Appellants.
*Gunadacharan Sen, Jateendranath Sanyal and Birajmohan Majumdar—*for Respondents.

Guha, J. — This appeal is directed against decision of the learned District Judge, 24 Parganas, passed on appeal in suit for rent and cesses in which a claim for damages was also made. The plaintiffs in the suit claimed rent for the years 1325 to 1328 B. S., on the footing that the annual rent payable by the tenant defendant was Rs. 728-4-7½ gandas, and this was on the allegation that the tenant was holding as part of his tenure an area of land for which he was not paying rent. The definite allegation made was that the defendant was in possession of 1,398 odd bighas of land while he was paying Rs. 533-5-6 gandas as rent for only 1,000 bighas. The original rent payable in respect of the tenure, it may be mentioned, was Rs. 326-5-7½ gandas for an area of 576 odd bighas land. The Courts below have agreed in passing decrees in favour of the plaintiffs for arrears of rent at the rate mentioned by the plaintiffs, negating the defence of the tenant defendant, which mainly related to this, that the plaintiffs were not entitled to the additional rent as claimed in the suit.

In the decree of the trial Court, an amount was mentioned as damages decreed in favour of the plaintiffs, although the judgment of that Court contained no decision or direction so far as payment of damages was concerned. The learned District Judge, on appeal, has reversed the decree of the trial Court and has held that the plaintiffs "will not get the damages" as mentioned in the decree of the trial Court. This appeal, by the plaintiffs in the suit relates to the question that, after the decision of the Court of appeal below disallowing damages, it was incumbent upon that Court to allow the plaintiffs interest on the arrears of rent, although no interest was, in point of fact, claimed in the suit.

The argument in this behalf was based upon the provision contained in S. 67, Ben. Ten. Act; and it was contended on behalf of the appellants that the Court below has altogether overlooked S. 67, which enacts that "an arrear of rent shall bear simple interest at the rate of 12½ per cent per annum." Reliance has been placed on certain observations contained in the judgment of Rampini, Ag. C. J., in the case of *Kripa Sindhu Mukerjee v. Annada*

Sundari (1) decided by a Full Bench of this Court, to the effect that

"Section 67, Ben. Ten. Act, made a great change in the law. Under S. 21, Act 8 of 1869, an arrear of rent was only 'liable to interest.' This gave the Court a discretion to award interest or not, as it thought fit. No such discretion is allowed by S. 67."

In the arguments advanced on behalf of the appellants, no importance or significance is attached to the words of the section that follow those quoted above namely:

"from the expiration of that quarter of the agricultural year in which the instalments fall due to the date of payment or of the institution of the suit, whichever date is earlier,"

and the position is entirely ignored that Ss. 54 to 67, Ben. Ten. Act, lay down a special law as to contracts between landlord and tenant, and indicate that the tenant could not be relieved from his liability to pay interest on arrears, unless either the amount is paid to the landlord, who is bound to grant receipt for the same, or unless a receipt is granted by the Court in which a deposit is made under S. 62, of the Act: (see the judgment of Mitra, J., in the case decided by the Full Bench referred to above). The change in the previous law cannot be disputed, but the liability to pay interest arises and the power of the Court to award interest as mentioned in S. 67 is to be exercised in the manner indicated in the provisions of the law to which reference has been made above. It may be noticed that, according to the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Hemanta Kumari Debi v. Jagadindra Nath Roy* (2), the provision in S. 67 "only applies to cases where the rent is 'payable quarterly.'" In the above view of the question arising for consideration, S. 67, Ben. Ten. Act, cannot possibly support the contention that there was no option or any discretion left in the Court, in the matter of awarding interest in a case like the present, even though, as has been noticed above there was no claim for interest made by the plaintiffs in the suit. Furthermore, regard being had to the fact that the plaintiffs' claim for rent in the suit was not at the rate admitted by the tenant, additional rent having been claimed for

1. (1907) 35 Cal 84=6 C L J 273=11 C W N 983 (F B).

2. (1894) 22 Cal 214=21 I A 131=6 Sar 473 (P C).

the excess are a in possession of the tenant, who set up a case of consolidated rent settled by the document creating tenure, the question of awarding interest on arrears of rent, either under the general law or under S. 67, Ben. Ten. Act, could not arise, until the rent payable by the tenant had been determined as it was determined in the case before us, by the decision of the Court below, an appeal against which has been dismissed by this Court. Where the rate of rent payable by the tenant is required to be fixed by the Court, the plaintiff is not entitled to interest or damages on the ground that the tenant did not pay rent at the rate claimed by the landlord.

The rent of the tenant was undetermined till decision was given by this Court, and he was not liable for interest on arrears of rent: see in this connexion the cases of *Gulam Ali v. Gopal Loll Tagore* (3), *Sumera Khatoon v. Gopal Loll Tagore* (4) and *Raj Mohun Neogee Anund Chunder Chowdhry* (5). There was, in point of fact, no claim for interest on arrears of rent, made by the plaintiffs in the suit. Such claim was not maintainable under S. 67, Ben. Ten. Act. No interest could also be claimed, nor any allowed by the Court, in view of the fact that the rate of rent was not ascertained or determined till the decision of the Court of appeal below, and the dismissal of the appeal against that decision. Interest could only be awarded on arrears of rent, at the rate finally determined. There could therefore be no claim and there was, in point of fact none in the case before us. On all these grounds, the contention urged in the appeal that the Court of appeal below had no option or discretion in the matter of awarding interest on rent decreed in favour of the plaintiffs in the suit is, in our judgment, wholly untenable and must be overruled. In the result the appeal fails, and is dismissed with costs.

M. C. Ghose, J.—I agree.

K.S.

Appeal dismissed.

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GUHA, J.

Satyaniranjan Chakravarty and others
—Plaintiffs—Appellants.

v.

Habibar Sobhan — Defendant—Respondent.

Appeals Nos. 2467 and 2480 of 1930, Decided on 22nd December 1932, against appellate decrees of Sub-Judge, Birbhum, D/- 26th June 1930.

(a) **Part performance—Registered kabuliya to pay rent at certain rate—Agreement to reduce rent and realization of reduced rent—Tenant is entitled to pay only reduced rent even though no registered patta is taken from landlord.**

A certain rent was fixed by registered kabuliya in the year 1882. Subsequently in 1906, there was an agreement to reduce the rent and rent according to the reduced rates was taken till the agreement was ratified by an oral contract in 1920. The tenant did not get registered pattas from the landlord. In a suit by the landlord claiming rent according to the kabuliya of 1882.

Held: that the doctrine of part performance applied as the tenants were entitled to get a registered patta from the landlord and as they had a subsisting contract in their favour which could be specifically enforced and that the landlord was not entitled to realize rent at the rate mentioned in the kabuliya of 1882: *A I R 1931 P C 79, Rel. on; A I R 1914 P C 27 and A I R 1916 P C 9, Ref.* [P 396 C 2]

(b) **Trusts—Reduction of rent effected by trustee authorized to do so is binding on trust estate.**

Where a trustee for the time being is authorized by the trust deed to grant reduction and remission of rent, such reduction or remission allowed by the trustee is binding on the trust estate. [P 296 C 2; P 397 C 1]

Sitaram Banerjee and Hari Prosanna Mukherjee—for Appellants.

Nasim Ali and Gopendra Kumar Banerjee—for Respondent.

Judgment.—The plaintiffs in the suits out of which these appeals have arisen sued the defendants, as Trustees to the Estate of Ram Ranjan Chakravarty, for realization of arrears of rent due in respect of fourteen different jamas or tenancies, for the period from Kartic to Fulgun of the year 1334 B. E. The claim as made in the fourteen suits was resisted by the tenant-defendant, who had acquired interest in the tenancies in the year 1325 B. E. (1918), by purchase from the previous tenants the Chongdars, who in their turn derived their interest from the Roys of Duarka, in whose favour the tenancies were created in the year 1289 B. E. (1882), by Maharaja Ram Ranjan Chakravarty, the predecessors-in-title of the plain-

3. (1864) 1 W R 56.

4. (1864) 1 W R 58.

5. (1838) 10 W R 166.

tiffs, who are trustees in possession by virtue of a deed of settlement (or trust) executed by the said Maharaja in the year 1284 B. E. (1887). The right of the plaintiffs to realize rent at the rates mentioned in the kabuliyats creating the tenancies in 1882, was denied by the defendant, who asserted that in the year 1313 B. E. (1906), the Maharaja granted a reduction of the rates of rent payable in respect of the tenancies to the then holder, Giris Chandra Chongdar, by a document. The defendants asserted that there was a long continued payment of rent at the reduced rates, on the strength of the document of 1906, from 1316 to 1332 B. E. It was further asserted by the defendants that there was an oral agreement with the plaintiffs, the present trustees, in the year 1327 B. E. (1920), on payment of selami &c., giving effect to the reduction, granted in the year 1906. The tenant defendant wholly repudiated the position that rent at the rates originally settled in respect of the tenancies in 1882, was recoverable from him by the plaintiffs.

On the pleadings of the parties various points were raised for determination in the suits. For the purpose of appeals to this Court, mention may be made of the main questions. The question was mooted as to whether Maharaja Ram Ranjan Chakravarty was competent to allow reduction of rent to the then tenant. The effect of payment of rent at reduced rates for a long period before the institution of the suits was to be considered; and the further question was raised on the pleadings and upon the materials placed before the Court, as to the position created by the plaintiffs by acceptance of rent at reduced rates, after the alleged agreement to reduce the rates of rent on the part of the landlords in the year 1920: whether the contract between the plaintiffs and the defendant as alleged by the defendant was performed in part, so as to create an equitable estoppel against the plaintiffs precluding them from claiming rent at the rate mentioned in original settlement of the year 1882.

The Court of first instance came to the conclusion that the reduction in the rates granted by the trustee in 1906, could not be held to be binding on the plaintiffs, the present trustees: it was held on a construction of the deed of

trust (or settlement), that a trustee could have no power to grant reduction of rent. It was further held that the document evidencing the reduction of rent in the year 1906, Ex. A-7 in the case, was without consideration and was "not to the advantage of the trust property." With reference to the agreement to reduce the rates of rent by the plaintiffs themselves in the year 1920, the trial Court came to the decision that it could not stand "as bar to the plaintiffs' realizing the kabuliyat rentals." As to the payment at reduced rate of rent, the trial Court came to the conclusion that in the year 1325, as also in 1333, there were payments at the original rates, thus demolishing the case of uniform payment at reduced rates. In the above view of the case decrees were passed in favour of the plaintiffs, allowing their claims in the suits in full, negating the defence raised by the tenant-defendant. On appeal by the defendant the learned Subordinate Judge of Birbhoom has reversed the decision of the trial Court, on all material points arising for consideration in the cases.

In regard to the reduction of rent granted in 1906 by the document Ex. A-7, it was held by the Court of appeal below that the deed of trust (or settlement) itself contemplated reduction of rent; that the Maharaja as the first trustee under the trust created by himself, acted for the benefit of the estate in granting reduction of rent, and it did not lie in the mouth of the Maharaja's successors, his sons and grandsons, the plaintiffs, to question the discretion exercised by the founder himself in the management of the trust estate, and that the plaintiffs themselves had realized rent at the reduced rates, for a long period. The lower appellate Court has definitely found that it was through a mistake that full rates were realized in the year 1325 B. E. and that the excess rent realized was credited to the rent realized at the reduced rates in the year 1327 B. E. With reference to the realization of rent at full rates in 1333 B. E. the Court below has observed that the material placed before the Court by the plaintiffs were not sufficient for the purpose of proving realization of rent at full rates in that year. According to the lower appellate Court, the plaintiffs in the suits ratified the

old contract of 1906, and the contract of 1906 was superseded by a new contract by the plaintiffs in 1920, on receipt of substantial selami, whereby they agreed to execute pattas and accept kabuliyats at old reduced rates, subject to certain conditions about furnishing of security, and payment of cesses. The contract entered into in the year 1920, was according to the Court of appeal below, partly performed as there was acceptance of rent at reduced rentals up to the year 1332 B. E. and that even if the plaintiffs realized rent at the full rates in the year 1333 B. E. as alleged by them, their conduct at best might be construed as tantamount to refusal to execute pattas, as agreed to between the parties.

It has been pointed out by the Court below, that there was no time fixed for specific performance of the contract of 1920, and the plaintiffs were therefore to execute the pattas on demand; it has been found as a fact, that the defendant did not make any demand for getting the pattas from the plaintiffs, even up to the time of the institution of the suits. The defendant's right to get specific performance of the contract, i. e., for getting pattas executed by the plaintiffs, the trustees, at reduced rates, was still subsisting, at the date on which the suits were instituted. In the above view of the case before him, the learned Subordinate Judge, in the Court of appeal below, came to the decision that on equitable grounds effect was to be given to the doctrine of part performance of the contract of 1920, and that the plaintiffs were not therefore entitled to realize rent at full rates as claimed by them in the suits; but that they were entitled to realize rent at the reduced rates as shown in the document Ex. A-7. The arrangement for reduction of the rates of rent payable on account of the tenancies in question, come to in the year 1906, was agreed to by the plaintiffs themselves in 1920. The plaintiffs have appealed to this Court from the decision arrived at by the Court of appeal below, and the decrees passed by that Court, allowing the plaintiffs' claims in the suits only in part, in accordance to the reduced rates of rent shown in the document Ex. A-7.

It was argued in support of the appeals that the view taken by the Court

below that the alleged agreement of 1920, could supersede the contract evidenced by the registered lease of the year 1882, was erroneous and unsupportable, and that the oral contract of 1920 set up by the defendant, was not capable of specific performance. The plaintiffs were therefore entitled to realize rent at the original rates settled in 1882. The questions thus raised are intermixed with each other and must be answered in accordance to the judgment pronounced by their Lordships of the Judicial Committee of the Privy Council, in the case of *Ariff v. Jadu Nath Mazumdar* (1) on which very great reliance has been placed by the learned advocate for the plaintiffs-appellants. To clear up the position of the parties as it stands, after the decision arrived at by the final Court of facts, it must be taken to have been established in these cases that there was an agreement in the year 1906, to reduce the rates of rent payable by the tenant according to the original settlements of 1882. This agreement of 1906 was valid and operative. In consonance with the agreement of 1906, rents at reduced rates were realized till the agreement of 1906 was ratified and superseded by the oral contract in the year 1920, for reduction of the rates of rent. That there was realization of rent at reduced rates from 1316 to 1332 B. E., has been definitely found by the Court of appeal below on the materials before the Court, as a fact directly bearing upon the question of part performance of the contract evidenced by the document Ex. A-7, executed by Maharaja Ram Ranjan Chakravarty, the first trustee, and of the subsequent oral contract by the plaintiffs, the present trustees, in the year 1920.

It has also been found as a fact by the Court of appeal below, that the defendant did not make any demand for getting pattas from the plaintiffs up to the time of the institution of these suits, and it was held that even if there was realization of rent at full rates in accordance with the original kabuliyats of 1282 B. E., in the year 1333 B. E., as alleged by the plaintiffs, the conduct of the plaintiffs might be construed as a refusal to execute pattas as agreed between the parties, the effect of the con-

1. A I R 1931 P C 79 = 131 I C 762 = 58 I A 91 = 58 Cal 1235 (P C).

clusion thus arrived at being that the defendant's right to get specific performance of the oral agreement of 1920 was subsisting at the date of the institution of these suits for rent at higher rates than those shown in the document Ex. A-7 of 1906, and those agreed upon in 1920. The Judicial Committee of the Privy Council after a consideration of the two previous decisions on the subject, in *Mahomed Musa v. Aghore Ganguli* (2) and *Lakshmi Venkayamma v. Venkata Narasingha Appa Rao* (3), summarized the equitable doctrine of part performance of contract in these words:

"In each case however the judgment contains statements to the effect that even if the contract in question had been incomplete, the acts of parties had been such that equity would in some way have bound the parties. Their Lordships do not understand these dicta to mean more than that equity may hold people bound by a contract which, though deficient in some requirement as to form, is nevertheless an existing contract. Equity does this, as before stated, in the case of a verbal contract which has been partly performed. Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed and where no contract was in fact made; nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be produced) confer upon a person a right which the statute enacts shall be conferred, only by a registered document."

In the case before us, the verbal contract of 1920, was deficient in some requirement of form, inasmuch pattas and kabuliyats had not been executed and registered; but it was nevertheless an existing contract at the date of the institution of these suits as the defendant's right to obtain specific performance of the contract was not barred at that date under Art. 113, Sch. 1, Lim. Act, there having been no demand for pattas by the defendant and there having been no refusal to execute the same before at least 1333 B. E. The verbal contract to realize rent at reduced rates had been partly performed, by realization of rent at reduced rates from 1316 to 1332 B. E. at least. The cases before us are not cases in which no contract was in fact made, or where no contract existed in view of the definite findings arrived at by the Court below that the contract

was made for reduction of rates of rent in 1920, and that the contract was one which was a subsisting contract, at the date of the institution of these suits, regard being had to the provision contained in the Limitation Act, as to the institution of a suit for specific performance of a contract. Nor can it be said in these cases that the defendant's case before the Court was not sustainable on the ground that equity could not override the provisions of a statute, even on the footing that registered documents were required for the purpose of reducing the rates of rent as shown in the registered kabuliyats of 1882, seeing that the right to get registered pattas from the plaintiffs were subsisting at the date of the institution of these suits.

In accordance with the pronouncement of the Judicial Committee in *Driff's* case (1) which has been quoted above, the plaintiffs had no right to realize rent at the rates mentioned in the kabuliyats of 1882 creating the tenancies in respect of which rent was sought to be realized for the period Kartic to Falgun of the year 1334 B. S. The question whether the plaintiffs will be entitled to realize rent at the rates mentioned in the kabuliyats of 1882, after the defendants' right to obtain specific performance of the contract of 1920, is barred by limitation, is a question which does not require decision in these cases, and that question must expressly be left open. In the above view of the cases, the claim of the plaintiffs in the suits out of which these appeals have arisen, for rent at the rates mentioned in the kabuliyats of 1882 must be disallowed, as it has been disallowed by the Court of appeal below, and the plaintiffs are entitled in these suits to recover rent at the reduced rates as admitted by the defendant in view of rates of rent mentioned in the document Ex. A-7 of 1906.

It may be mentioned that the learned advocate for the plaintiffs-appellants wanted to make out that the agreement of 1906, evidenced by the document Ex. A-7, was not operative and binding on the plaintiffs. The deed of settlement or trust deed makes the position abundantly clear that by virtue of the terms contained in Cls. 4 and 21 thereof, the trustee for the time being had the right to grant reduction and remission of rent payable by tenants of the trust estate;

2. A I R 1914 P C 27=28 I C 980=42 I A 1=42 Cal 801 (P O).

3. A I R 1916 P C 9=34 I C 921=48 I A 136=39 Mad 509 (P C).

and the findings arrived at by the Court below amply support the conclusion that the reduction of rates of rent made in 1906 by Maharaja Ram Ranjan Chakravarty, was binding on the trust estate: the action of the Maharaja in this behalf was followed up by the present trustees, the plaintiffs, in the suits by their own verbal contract in the year 1920. The contentions advanced on behalf of the plaintiffs-appellants by which attempt was made to go behind the agreements of 1906 and 1920, must be overruled, for the reasons stated above.

The learned advocate for the defendant-respondent during the course of his argument, wanted to support the decision arrived at by the Court of appeal below in favour of his client, on grounds other than those stated in the judgment of the Court below. It is not necessary to go into new grounds, seeing that on the facts found by the lower appellate Court, and giving full effect to the law laid down by their Lordships of the Judicial Committee in the case of *Ariff v. Jadunath Mazumdar* (1) referred to above in detail, the defendant was entitled to resist the claim of the plaintiffs, as made in the suits out of which these appeals have arisen. It is wholly unnecessary therefore to go into those other points which were argued by the learned advocate for the defendant-respondent. In the result the appeals are dismissed with costs: one hearing fee of 5 gold mohurs is allowed for all these appeals.

K.S.

Appeals dismissed.

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RANKIN, C. J. AND C. C. GHOSE, J.

Radhakanta Pal—Appellant.

v.

Manomohinee Pal—Respondent.

Letters Patent Appeal No. 1 of 1932, Decided on 6th July 1932 in Appeal No. 2681 of 1929.

Cosharer—One of cosharers leaving land uncultivated—Others taking possession and cultivating it without denying title of cosharer—Cosharer is not entitled to damages.

A widow of one of co-owners went to her father's house being unable to cultivate the land herself. The other brothers took possession of the land and cultivated it. They did not deny the title of the widow, but paid her a portion of the usufruct of the land :

Held: that the widow cannot claim damages against them. [P 898 C 2]

Ramdayal De—for Appellant.*Nagendranath Chaudhuri*—for Respondent.

Rankin, C. J.—In my opinion, this appeal must be allowed. I am somewhat sorry for the plaintiff; she does not appear to have been treated very well; but it is necessary that the elementary law with reference to the rights of joint tenants under Hindu law should be kept clear and properly applied.

The position shortly is this: The plaintiff is the widow of one son. The defendants are her late husband's brothers. The plaintiff's name is Manomohinee and her husband's name is Kalikanta. Kalikanta died in 1330, and as often happens, his widow left her husband's joint family house soon after his death, namely, in 1331, and went to live in her father's place. She brought the suit on 11th May 1927, and the case she made by her plaint was that her husband had a certain share in the family lands, that she was his sole heir and that the principal defendants, finding the plaintiff a helpless woman, continued to treat her badly and so the plaintiff came to the house of her father in 1331 and had been residing there. The plaint goes on to say:

"Since then, taking advantage of their being on the properties, the principal defendants have been very unjustly appropriating to themselves almost all the fruits, crops and the like, nominally giving something to the plaintiff's father and brothers when they went to possess all the said properties on behalf of the plaintiff."

It says that if any competent male person could possess the properties by remaining on the same the plaintiff could get at least Rs. 160 as profits from the properties in 1332 and 1333. The plaint then goes on to use some language about misappropriation and so on and it says in the end:

"None of the defendants denies the title or possession of the plaintiff's husband or of the plaintiff; but taking advantage of the helpless and miserable condition of the plaintiff, they having merely appropriated the plaintiff's share of the produce along with their own share of the same, the plaintiff has instituted this suit in the present form for compensation only in respect of the produce."

Now, the meaning of the plaint is that her title as the widow of their brother is not denied by her brothers-in-law, that her brothers-in-law, far from denying that, have given something to her in respect of her share of the usufruct, that they have given her very little,

that she had to go to her father's house because she could not get on with her husband's family, that she was unable to cultivate herself, that the defendants have cultivated her part and that the defendants have wrongfully cultivated her part and have wrongfully refused to hand over the profits to her. In my judgment, the learned Munsif took the right view of this case at the beginning. He says that the plaintiff's cause of action according to her own narrative does not entitle her to damages. He says :

"The plaintiff clearly states in her plaint that the defendants never challenged her title or her right to exercise possession in the joint lands. The only thing that she says against them is that they exercise physical possession in the lands as they have every opportunity to do so, while she herself, being a helpless woman living at a distance from the lands, cannot manage to exercise such possession in the lands and take her fair share of the usufruct."

There is no doubt at all that, if the plaintiff is not in a position to go and cultivate the lands, the defendants do nothing wrong by going there and cultivating the same. They are quite entitled to cultivate the whole land as long as the plaintiff is not prepared to cultivate her share. The question is— is it the right of one co-owner, who does not find it convenient to possess or cultivate joint land, to say to the other :

"Either you must not cultivate my share at all or if you do you must hand over the whole net produce to me."

In my judgment no such right has ever been laid down as a right of the owner of joint property and it seems to me that the plaintiff makes no case for damages, because she does not show that the defendants have done anything wrong. The learned Subordinate Judge proceeded, to begin with, to enlarge the finding of the Munsif and the allegation in the plaint. The allegation in the plaint is that the defendants continued to treat the plaintiff badly, that is to say, I have no doubt, they nagged her and might have done so, so as to make her life quite intolerable. It does not appear that they have done anything illegal. The Munsif says :

"Though I see no reason to hold that the plaintiff was treated by the defendants with positive cruelty, I have no doubt in my mind that she did not get such treatment as her condition deserved. I find it impossible to believe that a woman in such a position would have left the house without substantial grievance."

That, certainly, is quite enough to

show that the lady acted quite reasonably and sensibly in leaving this house and going to that of her father's. The Subordinate Judge says :

"The Munsif also found that the plaintiff had to leave her husband's house owing to the ill-treatment of the defendants which might not amount to a positive cruelty. 'This finding too was not challenged before me.'"

It appears to me that the learned Subordinate Judge has somewhat exaggerated the effect of the Munsif's finding. In any case, if the position was such that the lady felt her life intolerable and chose to go to her father's house, that does not, in any way, impose a duty upon the defendants to cultivate her share of the land and hand over to her the net profits thereof. It was quite clear that they never denied their title. She has not shown at all that they ever refused to let her come and cultivate and does not even say that they ever refused to give her any part of the profits. Of course, she can sue for partition. It does not seem to me that there is any foundation for the case which the plaintiff brought into Court. I therefore think that the appeal should be allowed and the decision of the learned Munsif restored and the suit dismissed with costs in all the Courts.

C. C. Ghose, J.—I agree.

K.S.

Appeal allowed.

* A. I. R. 1933 Calcutta 398

Roy, J.

Surenranath Ghosh—Plaintiff.

v.

Haridas Biswas and others — Defendants.

Original Civil Suit No 1125 of 1930, Decided on 10th June 1932.

*** Transfer of Property Act (1882), S. 78—Availing of time allowed by law for registering mortgage is not gross neglect.**

When a mortgage is registered within the period of four months allowed by s. 23, Registration Act, it is prima facie registered within a reasonable time. Where a prior mortgagee has done nothing towards inducing a subsequent mortgagee to advance money, but has simply availed himself of the time given to him by the law for registering his mortgage, he cannot be said to be guilty of "gross neglect" within the meaning of S. 78, T. P. Act. [P 46 C 2]

Where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage : 13 I C 653, *Ref.* [P 46 C 2].

B. C. Ghose and J. K. Ghose — for Plaintiff.

P. C. Ghose, P. N. Sen, B. C. Datta and S. N. Bose—for Defendants.

Judgment. — This is a suit to realize mortgage securities. There are altogether five mortgages and two further charges involved in the suit. The mortgagor was one Haridas Biswas, who was originally defendant 1. He died on 5th January, 1932. On his death his infant sons were brought on the record and are now the first three defendants. The mortgage in favour of the plaintiff is dated 20th March 1927. All the other mortgages and further charges are subsequent in date to the mortgage of the plaintiff. Defendants 4 to 8 are the subsequent mortgagees. The mortgages have all been duly proved and in the normal course a mortgage decree in the usual form would follow.

A question of priority has however been raised by the defendant Durgacharan Mitra. This has led to some further evidence being given and considerable argument being advanced, in the course of which various cases have been cited. The mortgage in favour of the defendant Durgacharan Mitra was executed on 1th June 1927, and registered on the following day. There was a further charge in favour of the defendant Durgacharan Mitra on 6th August 1927, which was registered on 8th August 1927. The defendant Durgacharan Mitra has claimed that, though his mortgage and further charge are subsequent to the plaintiff's mortgage and the mortgage in favour of the defendant Kunjalal Datta, which was executed on 21st May 1927, Durgacharan Mitra should have priority over the mortgages of the plaintiff and the defendant Kunjalal Datta. The way this claim has been formulated is to be found in paras. 3 and 4 of Durgacharan Mitra's written statement. Though there was a suggestion of fraud made in para. 3 of the written statement, learned counsel appearing on behalf of the defendant Durgacharan Mitra stated that he did not rely on any case of fraud. In para. 3 it has been alleged that, through the "gross neglect" of the plaintiff and the defendant Kunjalal Datta in not getting their respective mortgages registered until after the mortgage and further charge in favour of the defendant, Durgacharan

Mitra, he was prevented from having any notice or knowledge of the prior mortgages and was induced bona fide to advance money to the mortgagor Haridas Biswas on the security of the mortgage and further charge. In para. 4, the claim has been put forward that the plaintiff and the defendant Kunjalal Datta are estopped from claiming priority in respect of their mortgages. In support of his case, the defendant Durgacharan Mitra has relied on the evidence of his solicitor, Babu Rajkumar Basu. The defendant Kunjalal Datta gave evidence on his own behalf. The plaintiff has not called any evidence.

Now, it is clear that the case of "gross neglect" made by the defendant Durgacharan Mitra is based simply on the fact that the mortgages in favour of the plaintiff and the defendant Kunjalal Datta had not been registered prior to the mortgage and further charge in his favour. The mortgage in favour of the plaintiff was presented for registration on 22nd June 1927, and was registered on 12th August 1927. The mortgage in favour of the defendant Kunjalal Datta was presented for registration on 21st September 1927, and was registered on 20th January 1928. The delay in registration in both cases was undoubtedly due, to a great extent, to the default of the mortgagor, who in both cases had to be compelled to register the documents. Mr. P. C. Ghosh on behalf of the defendant Durgacharan Mitra has argued that there was a duty on the part of the prior mortgagees to register their mortgages within a reasonable time and he submitted that, by neglecting to register their mortgages prior to the date of his client's mortgage and further charge, they had held out that the properties were free from encumbrances, and so induced his client to advance the money. He contended that, on general equitable principles and under S. 78, T. P. Act, his client was entitled to priority. The sole question therefore for determination by me, as has been admitted by Mr. P. C. Ghosh, is whether the plaintiff and the defendant Kunjalal Datta, by not having their mortgages registered prior to the date of the mortgage and further charge of Mr. P. C. Ghosh's client, could be said to have been guilty of such "gross neglect" as would entitle the defendant Durgacharan

Mitra to claim that his mortgage should have priority over theirs.

In the course of his argument, I asked Mr. P. C. Ghosh if he could tell me as to what would be reasonable time within which a mortgage should be registered or presented for registration. Mr. P. C. Ghosh said that the answer to the question would depend on the facts of each particular case, and he suggested that, in the circumstances of this case, the prior mortgagees should have presented their mortgages for registration within a week from the date of execution. I am not prepared to accept that suggestion. Moreover, I cannot see how the presenting of the mortgages for registration could have improved the position so far as Mr. P. C. Ghosh's client was concerned. If a mortgagor has to be compelled to register the mortgages, as happened in the case of the mortgages in favour of the plaintiff and Kunjalal Datta, considerable time might elapse between the date of the presentation and the date of the actual registration of the deeds; and until the actual registration the subsequent mortgagee would not have known of the prior mortgages. On the facts of this case I am unable to hold that there has been any such "gross neglect" on the part of the plaintiff and the defendant Kunjalal Datta as would entitle the defendant Durgacharan Mitra to claim priority over them. For the meaning of "gross neglect" within S. 78, T. P. Act, I adopt the observations of Page, J., in the case of *Lloyds Bank, Ltd. v. P. F. Guzdar & Co.* (1). Each case however must turn upon its own facts.

Here the only suggestion of "gross neglect" is that there was unreasonable delay in registration. In my judgment, there has been no unreasonable delay. The mortgage in favour of Durgacharan Mitra was executed about 16 days after the mortgage in favour of the defendant Kunjalal Datta and a little over two and half months after the mortgage in favour of the plaintiff. The defendant Kunjalal Datta has given an explanation as to why his mortgage could not be registered earlier and, though the plaintiff gave no evidence, on the materials before me, I do not think I would be wrong in holding that whatever delay there has been in the presenting of the mortgages

for registration and in their actual registration was due largely to the default of the mortgagor. I am not prepared to hold that the mere fact that the prior mortgagees in this case had not registered their mortgages prior to the date of the mortgage and further charge in favour of the defendant Durgacharan Mitra is sufficient by itself to postpone their mortgages. In my view, when a mortgage is registered within the period of four months allowed by S. 23, Registration Act, it is prima facie registered within a reasonable time. Where a prior mortgagee has done nothing towards inducing a subsequent mortgagee to advance money, but has simply availed himself of the time given to him by the law for registering his mortgage, he cannot be said to be guilty of "gross neglect" within the meaning of S. 78, T. P. Act. S. 47, Registration Act, lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration and, in my view, where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage.

"There is no special hardship on the subsequent encumbrancer, because, as in this country documents do not take effect from the date of registration, every person who acquires property takes it subject to the risk that there may be a prior title created within the preceding four months or in some instances even eight months. Ss. 23 and 24, Registration Act: see *Jadunandan Prosad Singh v. Kallyao Singh* (2)."

In my judgment the defendant Durgacharan Mitra has failed to make out his case and cannot therefore claim any priority. There will be the usual mortgage decree. The costs will be as usual in a mortgage suit like the present one, except that the defendant Durgacharan Mitra must pay the costs of the second day's hearing of the suit to the plaintiff and the defendant Kunjalal Datta. The guardian-ad-litem's costs will be paid in the first instance by the plaintiff and will be added to the plaintiff's claim.

K.S.

Suit decreed.

2. (1911) 19 I C 653.

* A. I. R. 1933 Calcutta 401

PANCKRIDGE AND PATTERSON, JJ.

Manmathanath Kundu and others—
Petitioners.

v.

*Emperor—Opposite Party.*Criminal Ref. Nos. 127 to 131 of 1932,
Decided on 9th February 1933, made by
Sess. Judge, Dinajpur.* (a) Criminal P. C. (1898), S. 386 (1)—
Undivided share of convicted person cannot
be attached.The Criminal Procedure Code does not entitle
the Court to order the seizure and sale of move-
able property in which the convicted person has
only an undivided share, without the consent
of those jointly interested with him: 20 Cal
478, *Rel on.* [P 402 C 1](b) Ordinance (2 of 1932), S. 51—Sessions
Judge has no power of revision and cannot
refer case under Criminal P. C. (1898),
S. 438.The phraseology of S. 51 is very wide, and
that part of it which deprives other Courts of
any jurisdiction of any kind in respect of any
proceedings of any Court constituted under the
ordinance, save as therein provided, has the effect
of depriving the Sessions Judge of the right of
calling for and examining the record under
S. 435 and of referring the case for orders of the
High Court under S. 438, sub-S. (1) [P 402 C 2](c) Ordinance (2 of 1932), S. 51—Whether
High Court can exercise power of superin-
tendence—Government of India Act, S. 107
—*Quære.**Quære.*—Whether High Court can exercise
its power of superintendence under S. 107, Govern-
ment of India Act, with respect to order under
Ordinance 2 of 1932. [P 402 C 2]*Naresh Chandra Sen Gupta and Bama-*
prasunna Sen Gupta—for Petitioners.*Advocate-General and Monindra Nath*
Mukherji—for the Crown.*Order.*—This Reference (No. 128 of
1932) is one of several references made
by the learned Sessions Judge of Dinaj-
pur. It appears that one Babu Loken-
dra Mohan Sen was convicted by the
Special Magistrate of Dinajpur under
the provisions of Ordinance No. 2 of 1932.
He was sentenced to undergo a term of
rigorous imprisonment and also to pay
a fine of Rs. 400. The letter of reference
states that a petition was presented to
the learned Sessions Judge by one Kshi-
tindra Mohan Sen, the brother of the con-
victed person. The petitioner brought
the following facts to the notice of the
Judge: It appears that, in order to re-
alize the fine the Magistrate issued
what the learned Judge describes as dis-
tress warrant in respect of certain
moveable property which is stated to
be the joint property of the petitioner
and his brother, the convicted person.I have looked into the record of the
Special Magistrate, and it is evident
that he was prepared to accept the peti-
tioner's statement that the moveable
property was joint, but held that he
was nevertheless entitled to have the
property seized under S. 386, sub S. (1),
para. (a), Criminal P. C., and subse-
quently sold the rights of the petitioner
being limited to pre-emption or, if he
was not disposed to exercise that right,
to one half of the price realized at the
same.In the opinion of the Sessions Judge
the order for seizure and subsequent
sale of the property in question is un-
justified, and he draws our attention in
his letter to the decision of this Court
in *Queen-Empress v. Sita Nath Mitra* (1),
where it was held that the liability of
moveables in which the delinquent had
an undivided share could not be en-
forced by distress. In the opinion of
the learned Sessions Judge, the substi-
tution of the word "attachment" for
the word "distress" in S. 386 by the
amendment of 1923, has not affected the
applicability of this decision. The lear-
ned Advocate-General who has appeared
to oppose the reference has drawn our
attention to various authorities of which
Shivalingappa Nijappa v. Gurlingava
(2) is one. He has also argued that
even if the order is wrong, we have no
jurisdiction to set it aside, and that if
there is any remedy open to the appli-
cant, it is by way of a civil suit. He
has also drawn our attention to the fact
that no rules have been made by the
Local Government under the powers
conferred by S. 386, sub-S. (2) for the
determination of the claims of third
parties to property attached under sub-
S. (1), para. (a) of that section, and that
therefore no machinery exists whereby
the Court ordering the attachment can
investigate the justice of the claimant's
assertion that he is interested in the
property attached. In my opinion, in
the circumstances of the present case,
the last argument has but little import-
ance because the Special Magistrate had
not questioned the petitioner's assertion
that he is entitled to a half share in the
property, but has dealt with the matter
on the basis that he is so entitled.

1. (1893) 20 Cal 478.

2. A I R 1926 Bom 103=94 I C 604=27 Cr LJ
652=49 Bom 906.

We are not required to decide whether S. 386, sub-S. (1), para. (a) is totally inapplicable to the case of joint property. It may very well be that under that paragraph, an undivided share in joint moveable property may be attached and even sold, according to the procedure recognized by civil law. Speaking for myself, I should be most reluctant to hold that the action of the Special Magistrate is covered or contemplated by the provisions of the paragraph. In my opinion *Queen-Empress v. Sita Nath Mitra* (1), already referred to, is to be preferred to the other decisions to which our attention has been directed, and I should find considerable difficulty in arriving at the conclusion that the language of the Criminal Procedure Code, as it now stands does not entitle the Court to order the seizure and sale of moveable property in which the convicted person has only an undivided share, without the consent of those jointly interested with him. However I have come to the conclusion that whatever view we hold as to the regularity of the order of the Special Magistrate, we should not interfere with it, because I consider that the Judge has no jurisdiction to refer the case to us under S. 438, Criminal P. C. The date of the order of reference is 17th June 1932, when the Ordinance 2 of 1932 was still in operation. Under that Ordinance there is in certain cases an appeal from conviction and sentence by a Special Magistrate to the Court of Session. I am therefore, not prepared to say that the Court of a Special Magistrate is not a criminal Court inferior to the Court of the Sessions Judge within the meaning of S. 435, Criminal P. C. Prima facie therefore the Sessions Judge would have power to call for and examine the record of any proceeding before the Special Magistrate and thereafter, if he saw fit, to report the result of his examination for orders of the High Court under S. 438, sub-S. (1). The difficulty however arises from the provisions of S. 51, Ordinance 2. The words of the section are as follows:

"Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided by this Ordinance, be no appeal from any order or sentence of a Court constituted under this Ordinance, and, save as aforesaid,

no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under S. 491 of the Code, or have any jurisdiction of any kind in respect of any proceedings of any such Court."

The phraseology of S. 51 is clearly very wide, and in my opinion that part of it which deprives other Courts of any jurisdiction of any kind in respect of any proceedings of any Court constituted under the Ordinance save as therein provided, has the effect of depriving the Sessions Judge of the right of calling for and examining the record under S. 435 and of referring the case for orders of the High Court under S. 438, sub S. (1). The reference therefore appears to us to be made without jurisdiction. It may be, had the petitioner seemed fit to move this Court within the period prescribed by practice from the date of the order of which he complains, we should have been ready to consider whether the case was one in which we should be justified in exercising our power of superintendence under S. 107, Government of India Act. This however need not be considered, as the order complained of was passed nearly a year ago. In these circumstances we think that we are compelled to reject the reference. We pass similar orders in the remaining references where the facts are the same.

R.K.

Reference rejected.

*** A. I. R. 1933 Calcutta 402**

PANCKRIDGE AND PATTERSON, J.J.

Pramatha Bhushan Roy and others—
Petitioners.

v.

Emperor—Opposite Party.

Criminal Ref No 133 of 1932, Decided on 22nd February 1933.

* (a) Criminal P. C. (1898), S. 386 (1)—
Undivided share cannot be seized.

Moveable property in which the offender has only an undivided fractional interest is not liable to attachment by seizure and subsequent sale: 20 Cal. 478; A. I. R. 1932 Pat. 22 and A. I. R. 1932 Mad. 689, *Foll.*; A. I. R. 1926 Bom. 103, *not Foll.* [P 403 C 2]

(b) Criminal P. C. (1898), S. 386 (1) (a)—
Quære.

Quære.—Whether it is not possible under S. 386 (1) (a) to attach an undivided share of a moveable property by some other method than seizure. [P 404 C 1]

J. C. Gupta, *Ihagirath Chandra Das* and *Jnananath Borah*—for Petitioners.
Khondkar and Anil Chandra Roy Chaudhury—for the Crown.

Panckridge, J. — This is a reference made to us by the learned Sessions Judge of Khulna under S. 438, Criminal P. C. A person named Nani Gopal Roy was convicted on 26th January 1932, by a First Class Magistrate of an offence punishable under S. 117, I. P. C. He was sentenced to a term of imprisonment and also to pay a fine of Rs. 500. On 17th February 1932, a warrant was issued under S. 386 (1) (a) Criminal P. C., authorising the officer in charge of a certain police station, to attach any moveable property belonging to the convicted person and to sell such property to satisfy the fine, if the fine was not paid within 15 days after attachment was effected. The police officer proceeded to attach and seize certain moveable properties, and the letter of reference states that he also sold certain of the articles seized before the expiration of the period specified in the warrant. This fact however is not of importance for the purposes of the reference. Subsequently to the sale, the brothers of the convicted person filed a petition before the Magistrate for release of the moveable seized, on the allegation that they were the joint property of the convicted person and his five brothers, or, in other words, on the allegation that the interest of the convicted person in the moveables seized amounted only to a 1/6th undivided share. In accordance with the rules framed by the Local Government under S. 386, (2), Criminal P. C., the matter was referred to a Sub-Deputy Magistrate who reported that the convicted person was only entitled to a 1/6th share in the attached property.

The Sub-Deputy Magistrate however stated that he was of opinion that the attachment and seizure of the moveables were nevertheless legal; and on this report, the Magistrate rejected the petition filed by the five brothers. The learned Sessions Judge states that he considers the order of the Magistrate rejecting the petition to be erroneous. To decide the question raised by the letter of reference, it is necessary to consider the provisions of S. 386 (1) (a), Criminal P. C. That section gives power to a Court passing a sentence of fine to take steps for recovering the amount of fine by, among other things, issuing a warrant for the levy of the amount by attachment and sale of any moveable property

belonging to the offender. The first point to consider is whether these words entitle an officer executing such a warrant to attach by seizure and to sell moveable property in which the offender has only an undivided fractional share. Prior to the Code of Criminal Procedure Amendment Act of 1923, the section authorized the Court to issue a warrant for the levy of the fine by distress and sale of any moveable property belonging to the offender. It was held as long ago as 1892 by this Court in the case of *Queen-Empress v. Sitanath Mitra* (1) that under the section, as it then stood, a Magistrate could only attach moveables of which the delinquent was the sole owner. The Court in laying this down must be held to have meant by "attachment" "attachment by seizure," because as the section then stood, that was the only form of attachment contemplated by it. In my opinion, the case is still an authority for the proposition that moveable property in which the offender has only an undivided fractional interest, is not liable to attachment by seizure and subsequent sale. This has been recognized quite recently by a Special Bench of the Patna High Court, in the case of *Rajendra Prosad Misser v. Emperor* (2).

This view is also taken by Pakenham Walsh, J., in the case, *In re Marina Narasanna* (3) to which the learned Deputy Legal Remembrancer has directed our attention. The same question was raised before us in *Manmatha Nath v. Emperor* (4). In those cases however it was not necessary to come to a decision on the point, as we were of opinion that in the particular circumstances of each of these the learned Sessions Judge had no jurisdiction to make a reference under S. 438, Criminal P. C. I wish however to refer to my judgment in those cases, because when they were being argued before us we were informed that no rules had been framed by the Local Government under S. 386 (2), Criminal P. C. This information turns out not to be accurate. Our attention has been drawn to the rules during the hearing of this case, and in fact the inquiry made by the Sub-Deputy Magistrate was made in

1. (1893) 20 Cal 478.

2. A I R 1932 Pat 292 = 1932 Cr C 744 = 43 Cr L J 872 = 12 Pat 27 = 110 I C 101 (SB).

3. A I R 1932 Mad 538 = 1932 Cr C 468 = 23 Cr L J 622 = 55 Mad 1041 = 138 I C 148.

4. A I R 1933 Cal 401.

pursuance of the powers given by those rules. Nothing however that has been said in the course of argument in this case has caused me to modify my opinion expressed in the former cases, namely, that the authorities that lay down that moveable property in which the offender has only a fractional share is not liable to attachment by seizure or sale, are correct and should be followed in preference to the case of *Shivalingappa Nijappa Tubchi v. Gurlingava* (5) where the contrary view was taken. It follows therefore that the Magistrate was wrong in rejecting the petition before him on the finding arrived at by the Sub-Deputy Magistrate. In these circumstances I am of opinion that the reference should be accepted and the order of the Magistrate rejecting the petition should be set aside. It follows that the attached property will be released from attachment. This order disposes of the reference.

The learned Deputy Legal Remembrancer has argued on the authority of the decision of Pakenham Walsh, J., cited above that although attachment by seizure may not in the circumstances be legitimate, yet it does not follow that the offender's interest in the property may not be attached in some other way under S. 386 (1) (a), Criminal P. C. He suggests that it is within the jurisdiction of the Court under that section to attach the offender's share by a prohibitory order or by appointment of a receiver and thereafter to put such share up to sale in accordance with a procedure analogous to that familiar in the execution of civil decrees. This matter is not before us, and we are not prepared to express any opinion upon it. I only desire to say that as far as I am concerned, my decision that in the circumstances of this case attachment by seizure was not permissible. It is not to be taken in any way as indicating that I hold that it is not possible under S. 386 (1) (a) to attach an undivided share of a moveable property by some other method.

Patterson, J.—I agree.

R.K.

Reference allowed.

5. A I R 1926 Bom 103 = 27 Or L J 652 = 49 Bom 906 = 94 I O 604.

* A. I. R. 1933 Calcutta 404

PANCKRIDGE AND PATTERSON, JJ.

Emperor

v.

Panchanon Sarkar—Accused.

Criminal Ref. No. 17 of 1932, Decided on 9th December 1932.

(a) Criminal P. C. (1898), S. 307—Scope.

Section 307 requires not only that the Judge should disagree with the verdict of the jurors, but also that he should be clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court. [P 405 O 1]

(b) Criminal P. C. (1898), S. 307—"Necessity to submit the case."

The necessity of submitting a case should depend on the gravity of the offence and its prevalence and considerations of a similar nature. [P 405 O 2]

* (c) Criminal P. C. (1898), S. 301—Verdict of jury that "they give the accused person the benefit of doubt" is not verdict according to law.

Verdict of the jury in the form that "they give the accused persons the benefit of the doubt," is not a verdict which is known to the law though jurors sometimes do express a verdict of not guilty in that way. A verdict of not guilty covers every degree of mental condition from mere hesitating doubt as to the guilt of the accused to a complete conviction of his innocence. [P 405 O 2]

(d) Criminal P. C. (1898), S. 307—Judge should state offence committed.

When a Sessions Judge refers the case under S. 307 he should state the offence which he considers has been committed by the accused. But a mere omission to state the offence does not in itself entail a rejection of the reference by the High Court. [P 406 O 1]

B. M. Sen—for the Crown.

Suresh Chandra Talukdar and Mon-mothanath Roy (Jr.)—for Accused.

Order.—We are both of opinion that in the circumstances the reference must be rejected. The accused Panchanon was tried by a jury for offences punishable under S. 467 and S. 477-A, I. P. C. The record shows that at the conclusion of the trial after deliberation lasting for more than half an hour the jury in answer to the questions put to them replied that they were unanimous and that they found the accused not guilty on all the charges. The accused was a tahsildar of the Cossimbazar estate and it was alleged that in one case he had collected rent from a tenant and had put the proceeds into his own pocket, and that in another case he had collected rent from another tenant and had only credited a portion of the rent so collected to the estate and misappropriated the balance, and further that in order to conceal his dishonesty he had made certain false

entries and alterations in the books of the estate containing counterfoil receipts. He was charged under both the sections.

I have mentioned in respect of a counterfoil receipt which was marked as Ex. 6, and which, it was suggested, was used to take the place of the counterfoil which would have ordinarily come into existence in respect of the rent receipt granted to the tenant the whole of whose rent had been misappropriated. He was also charged under both the sections in respect of a counterfoil which was a counterfoil in respect of the rent receipt granted to that tenant, whose rent was partly paid into the account of the estate with the Imperial Bank, and partly misappropriated. It was the prosecution case that these documents and certain other documents were in their entirety in the handwriting of the accused, and evidence to prove this was called, the witnesses being persons who were familiar with the handwriting of the accused and had actually seen him write and also a handwriting expert Mr. Bennett. It is not quite plain to what extent the accused admitted that the documents were written by him, but undoubtedly a suggestion was made on his behalf that he might have been the victim of conspiracy on the part of other employees of the estate, who succeeded in getting him into trouble by means of rent receipts which bore his signature in blank. This summary of the case is sufficient to enable us to deal with the reference.

When we turn to the letter of reference we find it irregular in more than one respect. S. 307, Criminal P. C., requires not only that the Judge should disagree with the verdict of the jurors, but also that he should be clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court. The learned Judge in this case states that he is unable to agree with the unanimous verdict of the jury, and is of opinion that the verdict is not only not in accordance with the weight of evidence, but is also perverse.

I myself feel some difficulty in appreciating exactly what is intended by the words "necessary for the ends of justice to submit the case." If the words merely mean that the Judge should be in complete disagreement with the verdict, I should be inclined to hold that

he has sufficiently indicated the completeness of his disagreement in this case by the use of the word "perverse." While it is not necessary to decide the point the language appears to me to mean something more than this and I am inclined to think that the necessity of submitting a case should depend on the gravity of the offence and its prevalence and considerations of a similar nature. As I say, it is not necessary to go more fully into that aspect of the matter because we do not think that when the letter of reference is examined, the learned Judge purports to disagree with the verdict of the jurors at all in the sense contemplated by S. 307. After giving a summary of the facts the learned Judge makes the following observations:

"The verdict not being one of giving accused benefit of doubt, it seems that the opinion was that it was Dukhaharan who had altered the counterfoils and wrote the register 8 at the time or soon after the collection. This could only be if he was entrusted with the collections in question, which conclusion the evidence does not justify."

The learned Judge appears to have taken the view that the position would have been different if the jury had given their verdict in the form that "they give the accused person the benefit of the doubt." We need hardly point out that that is not a verdict which is known to the law though jurors sometimes do express a verdict of not guilty in that way. A verdict of not guilty covers every degree of mental condition from mere hesitating doubt as to the guilty of the accused to a complete conviction of his innocence. It appears to us that the learned Judge had no warrant for supposing that the verdict of the jury meant that they accepted the suggestion of the defence or that they considered that the suggested conspiracy against the accused had been established. Their verdict might perfectly well mean that they considered that Exs. 6 and 6-T and the other documents had not been proved to be in the handwriting of the accused. Unless the learned Judge was prepared to disagree with the opinion of the jury on this interpretation of their verdict he was not justified in referring the case.

We certainly gather from his language that it was largely because he construed the verdict of the jury as an acceptance of the suggestions of the defence that he

referred the case to this Court, and we are not satisfied that he would have felt justified in disagreeing with the verdict of the jury taking that verdict to mean, as it may very well have meant, that in the opinion of the jurors the prosecution had not succeeded in establishing their case beyond reasonable doubt. We may also observe that the learned Judge did not as the section requires of him, state the offence which he considered had been committed although from the body of his letter of reference it is quite clear that he was not of opinion that an offence under S. 467 had been committed, but thought that the accused should have been convicted under S. 477-A. We are not prepared to say that on the mere omission to state the offence we should be prepared to reject the reference, but we base our decision on the other grounds which I have stated. In the circumstances the reference is rejected and the accused is acquitted and discharged from his bail bond.

V.S. *Accused acquitted.*

***A. I. R. 1933 Calcutta 406**

PANCKRIDGE AND PATTERSON, JJ.

Tulsi Das—Petitioner.

v.

Sm. Saraju Dei Devi and others—Opposite Parties.

Criminal Roven. No. 944 of 1932, Decided on 2nd March 1933.

*Criminal P. C. (1898), S. 488—"In the whole" do not mean that Rs. 100 is maximum limit for all dependants together.

The words "in the whole" in S. 488, Criminal P. C., do not mean that Rs. 100 is the maximum limit for all the dependants together but means for all kinds of maintenance for each dependant. They are intended to prevent the Court from exceeding the statutory limit in the case of any particular dependant and are not intended to restrict the powers of the Court to ordering a monthly allowance of Rs. 100 in respect of the maintenance of all the dependants: *A I R 1926 Mad 53, Folk.*; *Cal Cr Rev No. 220 of 1932, not Folk* [P 403 C 2]

Prabodh Chandra Chatterjee and Bircwar Chatterjies for *Apurba Dhun Mukherjee*—for Petitioner.

D. N. Bhattacharjee and Provash Chandra Chatterjee—for Opposite Parties.

Order.—The only point on which we think it necessary to come to a final decision is that raised by the first ground upon which the Rule was issued. It appears that the first opposite party,

Sm. Saraju Dei Devi, applied under S. 488, Criminal P. C., for an order that her husband should be directed to make a monthly allowance to her and to her minor children. The Magistrate having taken the circumstances of the case into consideration has ordered the petitioner to make a monthly allowance of Rs. 100 for the maintenance of the lady and a monthly allowance of Rs. 30 in respect of each of five minor children. He has thus been ordered to pay a total monthly allowance of Rs. 250. The petitioner submits that this order is illegal; and he relies on the fact that the section limits the power of Court to ordering a monthly allowance at a rate not exceeding Rs. 100 in the whole. According to the petitioner, this means that however many dependants a person is neglecting to maintain he cannot, under the Code, be ordered to make as a monthly allowance for their support a total sum more than Rs. 100. For this *Mr. Chatterjee* for the petitioner has relied on an unreported judgment of *Jack, J.*, sitting singly in *Criminal Roven. No. 220 of 1932*. It is clear that in that case the attention of the Court was not drawn to the case of *E. C. Kent v. Mrs. H. E. L. Kent* (1), where the point was raised and decided by *Devadoss, J.*, in a sense contrary to the opinion expressed by *Jack, J.* Both the decisions are of Judges sitting singly and neither of them is binding upon us.

I certainly prefer the decision of *Devadoss, J.*, which is to the effect that the words "in the whole" in the section do not mean that Rs. 100 is the maximum limit for all the dependants together, but means "for all kinds of maintenance for each dependant." The judgment examines the result which will follow if the construction for which *Mr. Chatterjee* argues is the correct one. I need not elaborate them here. But it is sufficient to say that in my judgment the words "in the whole" are intended to prevent the Court from exceeding the statutory limit in the case of any particular dependant and are not intended to restrict the powers of the Court to ordering a monthly allowance of Rs. 100 in respect of the maintenance of all the dependants. That being so we are not prepared to vary the order of the Magis-

1. A I R 1926 Mad 59=26 Cr L J 1597=49 Mad 891=90 I C 659.

trate on the first ground mentioned in the petition. With regard to the merits it appears to me that the most important question is whether the estate out of which, it is suggested, the petitioner should pay the maintenance ordered is secular or debuttar. That is not a question which can satisfactorily be decided by us, and in addition to this, it is a question which is in issue in at least one suit now pending between the parties. It is for the petitioner, if there is any foundation for his suggestion as to the character of the property, to have the civil proceedings expedited and, if he obtains a decision in his favour, to apply to the Magistrate to vary the maintenance order.

Although the order was made on 29th March 1932 nothing has been recovered under it and its execution was stayed when the Rule was granted. We are of opinion that this stay order should not be allowed to remain in operation, except to a limited extent with regard to the arrears of maintenance. We therefore discharge the Rule and vacate the stay order except to this extent namely, that it is stayed with regard to the arrears of maintenance due under the order up till 1st January 1933, and we uphold the order of maintenance at the rate of Rs. 250 a month. If the opposite parties are successful in the civil proceedings, it will be for them to apply for leave to execute the maintenance order in respect of the arrears mentioned above.

K.S.

Rule discharged.

A. I. R. 1933 Calcutta 407

MALLIK AND JACK, JJ.

Jagadambya Debya—Appellant.

v.

Bibhuti Bhushan Sarkar and others—Respondents.

Appeal No. 3005 of 1930, Decided on 20th January 1933, from appellate decree of Addl. Dist. Judge, Pabna, D/- 23rd May 1930.

Award—Suit based on debt found due by arbitrator—Plaintiff not being party to said arbitration—Plaintiff cannot maintain suit—Contract Act (1872), S. 2.

A died leaving him surviving B, his wife and C and D, his two sons. All the property of A vested in B by virtue of a will made by A. C managed the family affairs for some period and then separated from his mother and brother. After the separation an arbitrator was appointed to apportion the debts incurred by C as a

manager. The arbitrator decided that B was liable for a certain amount of debt due to the plaintiff. The plaintiff brought a suit for recovery of his debts against all the three. Both the lower Courts decreed the suit as against B and C. B preferred an appeal.

Held: that the plaintiff's claim against B based as it was on the arbitration award was not maintainable inasmuch as the plaintiff was not a party to the arbitration award: *A I R 1930 Mad 382 (F B)*, *Foll;* 5 *C W N* 96, *Dist.* 36 *I C* 792 and *A I R 1914 Cal 129*, *not Appr.*

[P 403 C 1; 2]

Krishna Kamal Maitra—for Appellant.

Surojit Chandra Lahiri—for Respondents.

Mallik, J.—The facts which have given rise to the present appeal are briefly these: Defendants 1 and 3 are two brothers and defendant 2 is their mother. The father of defendants 1 and 3, who was the husband of defendant 2, left a will by which the whole of his properties vested in defendant 2. After his death defendant 2, the widow, managed for some time the properties, and thereafter defendant 1 managed the family affairs till May 1921, when he separated from his mother and the other brother. In the course of his management various loans were contracted. Some of the loans were taken by defendants 1 and 2 jointly and others were taken by defendant 1 alone. After the separation, two of the senior pleaders of the Pabna Bar were appointed arbitrators by defendants 1 and 2 to decide who, among the two defendants, was liable for the debts contracted. The arbitrators gave their award holding inter alia that defendant 2, that is to say, the mother, was liable for a debt of about Rs. 900 due to the plaintiff in the present case. On these allegations the plaintiff instituted the present suit for recovery of the money due on the hand-note executed in his favour by defendant 1 on 13th November 1921 against all the defendants. The defence of defendant 2 inter alia was that the plaintiff had no cause of action as against her. The Court of first instance decreed the suit against defendants 1 and 2 and dismissed the plaintiff's claim as against defendant 3. Against this decision defendant 2 preferred an appeal to the lower appellate Court. This appeal was however dismissed by the learned Additional District Judge of Pabna. Against the decree of the learned Addl

tional District Judge, defendant 2 has come up to this Court on appeal.

On behalf of the appellant, defendant 2, it was contended in the first place that the plaintiff's claim against her, based as it was on the arbitration award was not maintainable, inasmuch as the plaintiff was not a party to the arbitration between defendants 1 and 2. This contention seems to me to be well founded. No doubt, it is true that the general rule as enunciated in *Tweddle v. Atkinson* (1) that a stranger cannot enforce a contract between two other people, is not applicable in this country and that in India such a contract in certain circumstances can be enforced by a stranger thereto. But the circumstances in which it can be thus enforced have been enumerated in a Full Bench decision of the Madras High Court in *Subbu Chetti v. Arunachalam Chettiar* (2). In this Full Bench case Kumaraswami Sastri, J., after a full survey of all the case-law on the subject has held that the exception to the general rule that a contract cannot be enforced by a person who was not a party thereto, arises from the following circumstances: (1) where one of the parties to the contract afterwards agrees with the stranger to pay him direct; (2) where the contract creates a trust in favour of the stranger; (3) where the contract charges the money to be paid out of some immovable property; and (4) where the money is due to the stranger under a marriage settlement, partition or other family arrangement. None of these circumstances existed in the present case. Defendant 2 never agreed with the plaintiff to pay him the money. No trust was created in favour of the plaintiff and it was never arranged that the money due to the plaintiff was to be paid out of some immovable property and the money was not held to be due to the plaintiff under any marriage settlement, partition or other family arrangement.

On behalf of the respondent some reliance was placed upon three decisions of this Court: *Pratap Narain v. Sarat Kumari* (3), *Debnarayan Dutt v. Chuni*

Lal (4) and *Dwarka Nath Ash v. Priya Nath* (5). As regards the *Pratap Narayan* case (3), I am of opinion that it is clearly distinguishable. In that case a person was held entitled to sue for recovery of the money on the basis of a compromise to which she was no party, but she was so held on the ground that the compromise of doubtful rights, the case of some of the parties in the suit that was compromised being that a partition was invalid and inoperative while the others maintained that it had been duly effected. In the present case there was no litigation which was terminated by the arbitration award; and it is not known whether there was any real contest between defendant 1 and defendant 2, over the particular debt due to the plaintiff which I may mention again was a loan contracted on 13th November 1921, some months after the termination of defendant 1's management of the family affairs. As regards the other two decisions I mean the decisions reported in *Delmarayan Dutt v. Chuni Lal* (4) and *Dwarka Nath Ash v. Priya Nath* (5) all that I need say is that the rule enunciated in these two decisions was not followed by two other later decisions of this Court, viz., in *Jiban Krishna v. Nirupama Gupta* (6), and *Krishna Lal Sadhu v. Pramila Bala Dasi* (7).

I would therefore hold, following the Full Bench decision of the Madras High Court reported in *Subbu Chetti v. Arunachalam Chettiar* (2), that the plaintiff in the present case was not entitled to lay any claim against defendant 2 on the basis of the arbitration award, and that being so his claim against her ought to have been dismissed. The result therefore is that this appeal succeeds. The plaintiffs' claim against defendant 2 will stand dismissed. Defendant appellant 2 will get her costs in all the Court.

Jack, J.—I agree.
v.s.

Appeal allowed.

4. A I R 1914 Cal 129=20 I C 680=41 Cal 187.

5. (1918) 36 I C 792.

6. A I R. 1926 Cal 1009=96 I C 846=53 Cal 922.

7. A I R 1928 Cal 518=114 I C 658=55 Cal 1815.

1. (1861) 1 B & S 398.

2. A I R 1930 Mad 322=124 I C 55=53 Mad 270 (F R).

3. (1901) 5 C W N 386.

A. I. R. 1933 Calcutta 409

MALLIK AND JACK, JJ.

Secy. of State—Appellant.

v.

Bhola Nath Mitra—Respondent.

Appeal No. 1888 of 1930, Decided on 21st February 1933, from decree of Sub-Judge, Howrah, D/- 17th March 1930.

Railway—Gratuity—Rules for, R. 8—R. 8 does not impose legal liability and employee cannot lawfully demand gratuity.

Gratuity is something of the nature of a gift and therefore R. 8 of the Gratuity Rules does not impose any legal liability on the Railway Administration to pay any gratuity to the employee nor does it confer on him any right which he can lawfully demand. The Court is not entitled to interfere and compel payment even if it is found that the discretion vested in the Railway Administration was not exercised bona fide but arbitrarily or has been influenced by extraneous and irrelevant consideration: 6 All 634; A I R 1924 Bom 88; 25 Bom L R 599 and A I R 1932 Pat 311, *Rel. on.*

[P 409 C 1, P 410 C 1, 2]

*Barwell and Bhabes Narayan Bose—*for Appellant.

*Bepin Chandra Mallik and Gobinda Chandra Dutt—*for Respondent.

Mallik, J.—This appeal arises out of a suit for recovery of arrears of pay and gratuity. The suit was instituted by one Bhola Nath Mitra who was in service under the East Indian Railway Company and his case was that when he was discharged on a certificate of unfitness on medical grounds, he asked for gratuity under R. 8 of the rules for the grant of gratuities on retirement, to subordinate railway employees and his application was refused. The Courts below both held that the plaintiff's case was a case of discharge on the ground of unfitness on medical grounds and on that finding the lower appellate Court gave to the plaintiff a decree for Rs. 52 odd as arrear pay as also for Rs. 384 as gratuity. Against this decision the Secretary of State for India in Council who was impleaded in the Court of appeal below as a defendant on the devolution of the interest of the East Indian Railway Company on him, has appealed before us. A preliminary objection was raised on behalf of the respondent. It was said that the present appeal is incompetent inasmuch as it has been filed by the Secretary of State for India in Council and not by the East Indian Railway Company. I do not think that there is any substance in this preliminary objection. It would

appear that the Secretary of State for India in Council was a party in the Court of appeal below and the decree that was made by the lower appellate Court was against the Secretary of State for India in Council as well. That being so it cannot for a moment be contended that the Secretary of State for India in Council is not a party who can be said to have been adversely affected by the lower appellate Court's decree.

Coming now to the merits of the case it would seem that the only point that arises for consideration, is whether the lower appellate Court was justified in allowing the gratuity to the plaintiff on the basis of R. 8 of the Rules for the grant of gratuities. R. 8 runs thus;

"In case of men whose service is less than 15 years and who have been discharged either in consequence of reduction of establishment or a certificate of unfitness on medical grounds, not due to the employee's own fault, a gratuity may be allowed which shall ordinarily be limited to half a month's pay for each year of service or six month's pay in all and which may in special cases where circumstances warrant be raised to a full months pay subject to a similar maximum."

On behalf of the respondent it was contended that the word "may" in this Rule means "shall." But no reason was assigned why the word "may," as it is to be found in this rule, should be taken to mean "shall." Rule 8 seems to me to be only an enabling rule enabling the directors to pay gratuity from the railway revenue, leaving the matter of payment of gratuity entirely at their discretion. It was said that the discretion in the present case should have been properly exercised. I could have understood this contention if the exercise of the discretion was something that had been imposed on the Railway Administration by any Statute. But there is nothing to show that it was imposed on them in that way. S. 47, Railways Act 1890, enumerates the purposes for which rules can be framed under the provisions of that Act. But the granting of gratuity finds no place in the list of these purposes. Besides, gratuity, in my opinion, is something of the nature of a gift and a gift is not a thing which can be compelled. I am therefore of opinion that R. 8 of the Gratuity Rules, did not impose any legal liability on the Railway Administration to pay any gratuity to the plaintiff nor did it confer on the plaintiff any

right which he could lawfully demand. The result therefore is that the decree of the lower appellate Court in so far as it awarded to the plaintiff Rs. 384 as gratuity is set aside and the appeal succeeds to this extent only. The appellant is entitled to his costs in this Court and in proportion to his success in the Courts below.

Jack, J.—This appeal has arisen out of a suit for recovery of arrear pay and gratuity by the plaintiff who was discharged by the East Indian Railway Company from their service. The appeal is by the Secretary of State for India in Council and relates only to the gratuity which it is maintained, has wrongly been decreed by both the Courts below, in favour of the plaintiff. The claim is based on R. 8 of the rules for the grant of gratuities on retirement to subordinate railway employees. The rule states:

"In case of men whose service is less than 15 years and who have been discharged either in consequence of reduction of establishment or a certificate of unfitness on medical grounds not due to the employee's own fault, a gratuity may be allowed which shall ordinarily be limited to half a month's pay for each year of service or six months' pay in all and which may in special cases where circumstances warrant be raised to a full month's pay subject to a similar maximum."

Rule 1 states that such bonuses are to be given at the discretion of the Board of Directors and the Railway Board. From this it is clear and this has been found by both the Courts below that the grant of the gratuity is discretionary. The gratuity is in fact a gift which, under the authority of the Directors may be given when an employee is discharged, as in this case, on medical grounds. Being a gift it is something which the employee cannot claim as of right and this is so even in cases in which its payment has been sanctioned, as shown by the authorities to which we have been referred by the learned counsel for the appellant: *Janki Das v. E. I. Ry. Co.* (1) and *Natha Gulab v. W. C. Shaller and G. I. P. Ry. Co.* (2). In these cases it was held that a gratuity which had not been actually paid could not be attached because it was money which the employee could not claim as of right. Similarly it was held in another case, *Secy. of State v. Jamuna*

Das (3), that it could not be claimed by the creditors of the employee as part of his assets even where the company had the intention of paying it to the employee. But it is urged that the Court is entitled to interfere and compel payment if it is found that the discretion vested in the Railway Administration was not exercised bona fide but arbitrarily or has been influenced by extraneous and irrelevant consideration. No authority has been shown for the proposition that the Court has any such powers of interference except in the case of an authority constituted under a Statute to carry out statutory powers with which it is entrusted. Such cases are discussed in the case of *Short v. Poole Corporation* (4) at p. 84 where the cases of *Reg. v. Governors of Darlington School* (5) and *Rex v. Board of Education* (6) are referred to.

But in the present case the gratuity is payable under rules made by the Directors of the East Indian Railway Company and as the plaintiff continued in the service of the Railway Company after the Secretary of State took over the assets and administration of the company, these rules are still applicable to him. There is however nothing to indicate that the Court has any authority to interfere with the discretion of the Railway Administration in the payment of such gratuities. Even if it be held that there were such powers in the Court inasmuch as in the present case the railway has been taken over by the State, the lower appellate Court has not definitely found that the discretion of the Administration was wrongly exercised. The learned Subordinate Judge merely says: "I cannot say that the gratuity was not refused to the plaintiff arbitrarily and illegally." To justify the Court, if it could at all be justified in compelling the payment of a gratuity it should in any case be found positively that the discretion had been wrongly exercised. I therefore think that this appeal should be allowed and that the

3. A I R 1932 Pat 811=140 I O 561=11 Pat 584.

4. (1926) 1 Ch 66=95 L J Ch 110=185 L T 110=90 J P 25=42 T L R 107=70 S & J 245.

5. (1871) 6 Q B 682.

6. (1910) 2 K B 165=79 L J K B 595=26 T L R 422=8 L G R 549=74 J P 259=102 L T 578.

1. (1884) 6 All 684=(1884) A W N 210.

2. A I R 1924 Bom 88=87 I O 312.

amount of gratuity Rs. 384 should be deducted from the amount decreed in favour of the plaintiff. The decree of the lower appellate Court will be modified accordingly with costs in this Court and in proportion to the success of the appellant in the Courts below.

R.K.

Appeal allowed.

* A. I. R. 1933 Calcutta 411

MUKERJI, J.

Kulachandra Ghosh and others — Defendants—Appellants.

v.

Jogendra Chandra Ghosh and others — Plaintiffs—Respondents.

Second Appeal No. 1010 of 1930, Decided on 20th July 1932, from decree of Second Sub-Judge, Sylhet, D/- 18th November 1929.

* **Transfer of Property Act (1882), S.54—Vendee in permissive possession of property on date of sale—If character of possession is changed into possession as vendee, there is sufficient delivery of possession.**

The essence of delivery of possession for a sale is no doubt that possession should change, but where the vendee is already in permissive possession of the property on date of sale, it is enough for such delivery of possession to be sufficient within S. 54 if the character of his possession changes; and this can be effected if the vendor converts by appropriate declarations or acts the previous permissive possession of the vendee into possession as that of a vendee: 34 Cal 207, *Dis from and Dist.*; 24 Cal 179; *A I R 1915 Mad 573*; 40 Bom 313; *A I R 1925 Mad 566*; 4 C W N 142n; *A I R 1911 Cal 754*; 34 I C 692 and *A I R 1919 Cal 325, Ref.* [P 412 C 2]

Hemendrakumar Das—for Appellants.

Priyanath Datta—for Respondents.

Judgment. — The plaintiffs' case was that they, as heirs of their father Bangshiram, were entitled to recover possession from the defendants of certain lands. Defendant 1 is the son of one Chandrakala, who is a daughter of Bangshiram and is defendant 5. Defendant 5 was married to one Golak, who had a brother Neel. Plaintiffs' case was that Golak and Neel were the former owners of the land and that they sold the land to Bangshiram in 1286 B. S. and that they were dispossessed by the defendants in 1334 B. S.

The defence was that, under an arrangement between Bangshiram on the one hand and Golak and Neel on the other, the latter two remained in possession in spite of the sale to the former; that, in 1225, Bangshiram sold the land to defendant 5 and the latter thus came

into possession after Golak's death. The Courts below have allowed the plaintiffs a decree. They were of opinion that, when the land was in the possession of Golak and Neel, and so of defendant 5 at the time of Bangshiram's sale to her, there could be no delivery of possession of it to her; and, as the kabala evidencing the sale was an unregistered one, there was no valid sale. The trial Court held that the possession of the defendants originated in an arrangement with, and so permission from, Bangshiram, and there was no evidence to show that such possession ever became hostile or adverse. The Subordinate Judge held that such possession, though originally permissive, could become adverse to Bangshiram since the sale by the latter to her, but that, in point of fact, defendant 5 had no possession, and that the defendants had failed to prove that they had possessed the land for more than 12 years before suit. He held therefore that the defendants acquired no title by adverse possession. Defendants 1 and 5 have appealed. On the question of validity of the sale, as effected by delivery of possession, the Courts below have relied on *Silendrapada Banerjee v. Secy. of State* (1), which is an authority for the proposition that, if at the time of the intended sale the vendee is already in possession, there can be no sale by delivery of possession. In the case of *Gunga Narain Gope v. Kali Churn Goala* (2), it had been held that, if on the date of the sale the vendee gets into possession with the assent, express or implied, of the vendor, it may be held that there has been delivery of possession. The learned Judges, who decided *Silendrapada's* case (1), distinguished *Gunga Narain Gope's* (2) on the ground that in the case before them the vendee had been in possession from before.

They were of opinion that, as delivery is the essence of the transaction, there could be no delivery in the circumstances and so there was no valid sale. They were of opinion that no loose construction should be put upon S. 54, as the consequences of such a construction may be far reaching and injurious in many instances. It is very difficult to agree with all that has been said in *Silendrapada Banerjee's* case (1). It has been dis-

1. (1907) 34 Cal 207=5 C L J 390.

2. (1894) 22 Cal 179.

sented from in *Muthukaruppan Samban v. Muthu Samban* (3) and in *Dawood v. Moiden Batcha* (4), and has been very guardedly referred to and not expressly approved in *Bhaskar Gopal v. Padman Hira* (5). In *Fatik Karikar v. Rajendra Nath* (6) it was held that where the property was in the possession of a usufructuary mortgagee, the process of making over of the property by the mortgagee to the mortgagor and redelivery by the latter to the former was not necessary to bring about a sale in favour of the former under S. 54, T. P. Act, but that it would be enough, if the mortgagee took the property as a purchaser and the mortgagor admitted that from that moment the purchaser held the property as purchaser and not as mortgagee. In *Fakira Mahton v. Leakut Hosain* (7), the learned Judges were not inclined to hold that such a strict interpretation of S. 54, as was suggested in *Sibendrapada's* case (1), was justified.

In *Sonai Chutia v. Sonaram Chutia* (8) no express dissent was expressed, but it was said that the sale in that case was valid, as there was in fact a delivery of possession, because the boundaries of the land had been pointed out and everything that was possible to do for such delivery was done; formal possession being delivered and endorsement of satisfaction being made on the mortgage bond, under which the vendee had been holding possession from before as mortgagee. In a later case, namely, *Hushmat v. Jamir* (9), both *Sibendrapada's* case (1) and *Fatik Karikar's* case (6), were referred to, as if the two were not in conflict with each other; and Walmsley, J., observed that if of two plots mortgaged to a person one is subsequently sold to him and the said person restores possession of the plot, which is not sold, to the mortgagor and retains possession of the one that is sold, that would be good evidence of delivery of possession. The present case is distinguishable from *Sibendrapada's* case (1), in that the defendant 5 was at the date of the sale in permissive possession under an arrange-

ment with Bangshiram. I am not therefore obliged to apply that ruling to this case. The evidence on the record satisfies me that whatever was necessary and possible in the circumstances to effect a delivery of possession was done. The details spoken to by defendant 5 amply make out that Bangshiram "made over the land of the kabala to her satisfaction," and that, after the sale, she made over the rest of the land in her possession to her father.

The essence of delivery no doubt is that possession should change but I think it is enough if the character of possession changed; in other words, if the vendor converted by appropriate declarations or acts the previous possession of the vendee, which in this case was permissive possession, into possession as that of a vendee. I hold therefore that there was sufficient delivery of possession within the meaning of S. 54, T. P. Act. On this finding, for the plaintiffs to succeed, they must show that they have acquired a title by adverse possession. The case has not been looked into from this point of view. This will have to be done now and for this purpose I send it down, so that the lower appellate Court may determine the question of adverse possession and then finally dispose of the appeal before it. The appeal is allowed and the case will be remanded with the aforesaid directions. The costs of this appeal will abide the result of the remand.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 412

MITTER AND M. C. GHOSE, JJ.

Brojendra Nath Ganguly—Appellant.
v.

Promatha Bhushan Dev and others—
Respondents.

Appeal No. 7 of 1931, Decided on 21st February 1933, from decision of 4th Class Sub-Judge, 24 Parganas, D/- 29th August 1930.

(a) Civil P. C. (1908), O. 17, Rr. 2, and 3—Applicability of Rr. 2 and 3 pointed out—Court can proceed under R. 3 if adjournment is given at instance of party and if there are materials on record.

In a case where there are no materials on the record the proper procedure to be followed would be that laid down in R. 2, but if there are materials on the record the Court ought to proceed under R. 3. To apply the procedure laid down in R. 3 to a case there must be the presence of both the elements: viz.: (i) the adjourn-

3. A I R 1915 Mad 578=25 I C 772=38 Mad 1158.

4. A I R 1925 Mad 566=87 I C 331.

5. (1916) 40 Bom 318=33 I C 267.

6. (1900) 4 C W N 142n.

7. A I R 1914 Cal 754=23 I C 318.

8. (1916) 34 I C 692.

9. A I R 1919 Cal 325=52 I C 558.

ment must have been at the instance of a party and (ii) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of R. 3. A suit was adjourned to a certain date at the instance of the plaintiff for producing witnesses for the decision on a question of jurisdiction. The plaintiff did not appear on the date and there was already some evidence recorded on behalf of the defendant. The Court decided on the material on record and ordered the plaint to be presented to the proper Court as it found that it had no jurisdiction.

Held: that, the order was quite proper
A I R 1914 Cal 360 and 34 Cal 235, Rel. on
A I R 1924 Lah 545; A I R 1928 Pat 167
A I R 1925 All 267 and 41 Mad 286 (F B), Ref.
[P 414 C 1]

(b) **Practice—Evidence taken on commission need be formally tendered at trial to be treated as evidence in case.**

It is not necessary to tender the evidence taken on commission formally at a trial to make it evidence in the case: 36 Cal 566, *Ref.*

[P 414 C 2]

Sidheswar Chakraborty—for Appellant.

Brojo Lal Sastri, Profulla Kamal Das Khitish Chandra Ghatak and Bijan Behary Das Gupta—for Respondents.

Mitter, J.—This appeal is directed against an order of the Subordinate Judge of 24 Parganas dated 29th August 1930 by which he returned the plaint of the plaintiff, now appellant, in a partition suit valued at Rs. 3,80,101 to be filed in the proper Court. He made the order in the absence of the plaintiff and held on such materials as had been put before him by defendant 6, Raja Promatha Bhusan Deb Ray of Naldanga, that the Alipur Court had no jurisdiction to entertain the suit as none of the properties which formed the subject-matter of partition lie within the jurisdiction of that Court. Hence the present appeal.

Two questions have been debated before us in the appeal: (1) whether the Subordinate Judge should have proceeded to deal with the suit under the provisions of O. 17, R. 2 instead of proceedings under O. 17, R. 3, Civil P. C.; (2) whether the materials before the Court were sufficient to justify the conclusion that the Alipur Court had no jurisdiction to entertain the partition suit. (After stating the case of plaintiff and that of the defendant as given in the plaint and written statement, the judgment proceeded). Several issues were framed. It is necessary to notice issue 1 which runs as follows: "Has the Court jurisdiction to try this suit." On 10th June 1930 de-

fendant 6 put in a petition praying for decision of issues 1 and 2 first. Issue 2 related to the insufficiency of court-fees. On 20th June the Court ordered that the issue of jurisdiction and court-fees should be taken up first, and fixed 29th July 1930 for hearing of those issues and directed the parties to come with evidence on that date. On 21st August the defendant was ready with his witnesses on the question of jurisdiction but plaintiff was not ready and the Court adjourned the hearing of the issues to 29th August and remarked that as the case was more than eight months old no further adjournment would be given and directed the payment of adjournment costs to defendant. On 29th August plaintiff did not appear and did not pay the adjournment costs. The defendant was ready with his witnesses. In the meantime some of the witnesses had been examined on behalf of the defendant and the learned Judge passed a cryptic order to the following effect:

"From the evidence taken on commission it appears that this Court has no jurisdiction to go on with the case. Ordered that the plaint be returned to the plaintiff's pleader for presentation in the proper Court."

The plaintiff has preferred the present appeal and two points have been taken on behalf of the appellant: (1) that the Court should not have returned the plaint but should have dismissed the suit altogether as plaintiff was absent and the provisions of O. 17, R. 2 of the Code applied; (2) even if the provisions of O. 17, R. 3 applied the evidence does not justify the conclusion that the Subordinate Judge had no jurisdiction to try the suit. With reference to ground 1 taken it is said that as the plaintiff was absent and did not produce the evidence on the point of jurisdiction the proper rule applicable was O. 17, R. 2 and not R. 3 and in support of this contention reliance has been placed on a number of authorities. There is a conflict of authorities on this point in different High Courts in India. The High Court of Madras has held that the Court should in such a case proceed under R. 2 and dismiss the suit for default so that the plaintiff may have an opportunity to apply under R. 9, O. 9 to set aside the dismissal: *Pichamma v. Sreeramulu* (1). The High Court of Bombay takes the same view. In

1. (1918) 41 Mad 286=43 I C 566 (F B).

Allahabad the balance of authority is in favour of this view; *Ganesh Lall v. Debi Das* (2). The Patna High Court has held that this rule does not apply unless the hearing is commenced: *Mahabir v. Sheo Dayal* (3). The Lahore High Court has held that if there are no sufficient materials the Court should proceed under O. 17, R. 2; otherwise if there are materials the Court should proceed to determine the matter: *Jhanda Singh v. Sadek* (4). The respondent has relied strongly on a decision of this Court in the case of *Enatulla v. Jiban Mohan Roy* (5), where it has been pointed out that in a case where there are no materials on the record the proper procedure to be followed would be that laid down in R. 2; but if there are materials on the record the Court ought to proceed under R. 3. To apply the procedure laid down in R. 3 to a case there must be the presence of both the elements, viz.: (i) the adjournment must have been at the instance of a party; and (ii) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of R. 3. In an earlier case *Mariannisa v. Ram Kalpa* (6), Mukherji and Holmwood, J.J., held that the scope of S. 157 of the Code of 1882 which corresponds to O. 17, R. 2 was distinct from that of S. 158 (O. 17, R. 3), but that the Court can act under S. 158 even though the parties are absent if the requirements of S. 158 are satisfied. In my opinion this seems to be the correct view with reference to the scope of these two rules. Although therefore the plaintiff was absent on 29th August to which date the suit was adjourned at his instance for producing witnesses for the decision on the question of jurisdiction it was open to the Court to proceed to determine the question of jurisdiction on the materials put before it by defendant 6, and O. 17, R. 3 properly applies to the present case.

We now proceed to deal with ground 2, namely, that the Court should have held

that the Alipore Court has jurisdiction to entertain the suit. It is argued that in arriving at the conclusion that the Alipore Court has no jurisdiction the Subordinate Judge has relied on evidence taken on commission which was never read before the Court, and was not formally tendered at the trial. The answer to this contention is that regard being had to the practice of the mofussil Courts, which is not only consistent but is also in strict accordance with the provisions of the Code, it is not necessary to tender the evidence taken on commission formally at a trial to make it evidence in the case: see *Dhanuram v. Murali* (7). We are therefore of opinion that there is no substance in this point. (After discussing the evidence, the judgment concluded). In this view we are of opinion that the decision of the Subordinate Judge is right and this appeal must be dismissed but in all the circumstances there will be no order as to costs.

M. C. Ghose, J.—I agree.

K.S. *Appeal dismissed.*

7. (1909) 36 Cal 566=1 I C 366.

A. I. R. 1933 Calcutta 414

REMFRY, J.

Nutbihari Das—Appellant.

v.

Bishweshwari Debee—Respondent.

Appeal No. 639 of 1930, Decided on 1st August 1932, against decree of Sub-Judge, Burdwan, D/- 11th July 1929.

Limitation Act (1908), Art. 142—Trespasser's declining to vacate land in spite of demands of owner amounts to open dispossession—Adverse possession.

If a trespasser admits that a portion of the land belongs to the owner when the owner challenges his possession but declines to vacate the land in spite of demands there is open dispossession and the owner must bring his suit within 12 years of dispossession. The admission of the trespasser cannot give further time to the owner unless such admissions come within S. 19, Lim Act: 2 C L J 125 Dist. [P 415 C2]

Gopendranath Das—for Appellant.

Patitpaban Chatterji and *Pannalal Chatterji* for *Prubhashchandra Sen*—for Respondent.

Judgment.—The plaintiff filed a suit to eject the defendant from some huts and from a plot of land claiming that he was the sole owner of the land on the ground that the defendant was a trespasser. He had previously filed two suits alleging that the defendant was

2. A I R 1923 All 207=25 I C 470=47 All 140.

3. A I R 1923 Pat 167=107 I C 824=7 Pat 236.

4. A I R 1924 Lah 545=78 I C 458=5 Lah 218.

5. A I R 1914 Cal 360=28 I C 769=41 Cal 956.

6. (1907) 34 Cal 235=5 C L J 260.

his tenant but both were dismissed on the ground that he had failed to prove any tenancy. In this suit the plaintiff satisfied the two lower Courts that he was the sole owner of the land, but the suit was dismissed on the ground that it had not been filed within 12 years from the time when the plaintiff was dispossessed of the land by the defendant. It has been found as a fact that the defendant has been in possession of the disputed land for 18 or 19 years. The only point that was urged in second appeal was that the possession of the defendant was not adverse to the plaintiff in respect of a half share in the land, because of her admissions in her written statement. The defendant in her written statement para. 6, stated that one Satyapada Das had been in possession of a land for over 12 years and in para. 7 stated:

This defendant never denied the title of the plaintiff... on the other hand this defendant has been admitting all along that in the disputed vastu the plaintiff is 8 annas malik and Satyapada Das is a cosharer malik of the remaining 8 annas.

The defendant was given possession by this Satyapada Das. Reliance was placed on the case of *Ishan Chandra Mitter v. Dhamranjan Chakrabutty* (1), where it was held that a tenant who had encroached on his landlord's land for 12 years, acquired a right of tenancy in the land so held. Mookerji, J., held that:

"the extent of the dispossession depends on the extent of the claim of right under which possession by the trespasser is obtained and kept."

This he said applied where the landlord allows a tenant to hold an encroachment on the same terms as if it had been part of the holding. He added:

"the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it."

This view of the law must be read in its context and relates to a case where the tenant encroaches on his landlord's land and is presumed to do so as a tenant. Doubtless a limited right in respect of immovable property can be acquired by user, such as a right of way. But the decision relied on and the decisions therein cited all refer to cases between landlords and tenants or tenure-holders. I can find no case that supports the suggestion that a trespasser pure and

simple who takes exclusive possession of land without the consent of the owner in any way acquires no right to the whole of the land simply because he claimed a title to less than the whole. If a trespasser on land admits nothing the owner must bring his suit within 12 years of dispossession: if the trespasser, when the owner challenges his possession admits that the land belongs to the owner but in spite of demands declines to vacate it that is open dispossession. On principle, it cannot make any difference if the trespasser admits that the person claiming ownership has an undivided share in the lands, if he still insists on possession. It seems to me that if an owner sues 12 years after dispossession from land he cannot set up admissions made by the trespasser as giving him further time in which he may bring his suit unless those admissions come within S. 19, Lim. Act. Under Art. 142, the suit must be brought within 12 years of dispossession and it has been found that the plaintiff in this case was dispossessed 18 or 19 years before he filed his suit, nor will the admission of the defendant that she had dispossessed him of all or part of his land assist the plaintiff.

It is argued that the defendant admitted all along that the plaintiff was entitled to an undivided half share, but in fact she dispossessed him of his share and he had but 12 years in which he could sue to eject her admission or no admission. It may be that when a trespasser claims to be a tenant and as such takes possession he cannot thereafter claim that he possessed as a trespasser for the claim purported to justify the possession but when the trespasser asserts that he has no claim as against the owner to possess the whole of the land, his possession is clearly adverse and in my opinion it does not alter the nature of the dispossession to admit that in respect of a half share the title is with the person who claims the land when the dispossession continues against the will of the owner or part owner. That owner cannot attribute his acquiescence in his dispossession from all or any share in the land to anything but the laches which bars a claim under Art. 142, nor is the dispossession any the less adverse because the trespasser admits that it is adverse. This case

comes within the second class of cases mentioned in the case cited where a tenant unequivocally informs the landlord that he is holding an encroachment on the landlord's land adversely to the landlord. There Mookerjee, J., said Art. 144, Lim. Act might apply but it was never doubted in any other case, that it would apply and the possession be adverse and whatever doubt there may be it does not apply where there is no relationship of landlord and tenant. The defendant claimed that she was entitled to possession under a third party who in fact had no title. She did not admit that she was the tenant of or held under the plaintiff. In such a case the possession is adverse from the start and no admission or promise to vacate which does not result in a license to hold affects the fact that the possession is adverse or prevents time running against the owner and after 12 years he cannot recover possession. That is what has been found to have happened in his case and the appeal accordingly fails. The appeal is dismissed with costs.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 416**

MALLIK AND JACK, JJ.

Jatindra Nath Raha and others —
Plaintiffs—Appellants.

v.

Kali Kista Roy Choudhury and others
Defendants—Respondents.

Appeals Nos. 2361 and 2362 of 1930,
Decided on 15th February 1933, against
decree of Addl. Sub-Judge, Khulna, D/-
23rd May 1930.

(a) Civil P. C. (1908), O. 41, R. 23 — Re-
mand not under R. 23 — Directions given as
to way of assessment of rent—Order held to
be decree and hence appealable.

Where the appellate Court remands the case
to the Court of first instance giving some direc-
tions in its judgment as to the way in which
the assessment of the rent in kind should be
made is really a decree because it is not an order
of pure remand but contained a determination
of the principle on which the assessment was to
be made. [P 416 C 2]

(b) Bengal Tenancy Act (1885), S. 40 —
Applicability.

Section 40 relates to the case of an occupancy
raiyat and has no applicability to the case of a
tenure-holder. [P 416 C 2]

(c) Bengal Tenancy Act (1885), S. 7 —
Decree based on S. 7—Circumstances con-
sidered—Decree cannot be assailed.

Where the decree is based on the provisions of
S. 7 and the Judge in determining the fair and
equitable rent, has taken into his consideration

the circumstances under which the tenures had
been created it cannot be successfully assailed.

[P 417 C 1]

Hemendra Chandra Sen and Satyendra
Chandra Sen—for Appellants.

Narendra Chandra Bose, Bireswar
Bagchi, Nirmal Kumar Sen and Jotindra
Mohan Choudhury—for Respondents.

Mallik, J.—The two suits which have
given rise to the present appeals were
for enhancement of rent, in respect of
two tenures under S. 7, Ben. Ten. Act.
The defence in the case was that the
tenures were mukarrari and therefore not
liable to enhancement of rent. Both the
Courts below found against the defend-
ants on this point and they held that
the tenures were not mukarrari but were
liable to enhancement of rent. The Court
of first instance allowed enhancement to
the plaintiffs and in determining the
assets of the defendants calculated the
value of the paddy at the rate of Rs. 9
per shola. Against this decision there
were appeals preferred by the defendants
and the lower appellate Court remanded
the cases to the Court of first instance
giving some directions in its judgment
as to the way in which the assessment of
the rent in kind should be made. Against
this decision the plaintiffs have come up
to this Court in second appeal.

A preliminary objection was raised be-
fore us that as the order of the lower
appellate Court was an order of remand
and as the order of remand could not be
an order under O. 41, R. 23, Civil P. C.,
no appeal lay in the case. This prelimi-
nary objection does not appear to me
to have any substance in it. The order,
whereby the lower appellate Court sent
the case back to the Court of first in-
stance was really a "decree" because it
was not an order of pure remand but
contained a determination of the princi-
ple on which the assessment was to be
made. Coming now to the merits of the
appeals I am inclined to think that the
lower appellate Court was not justified
in directing an assessment to be made
in accordance with the provisions as
they are to be found in S. 40, Ben. Ten.
Act. S. 40 of the Act relates to the
case of an occupancy raiyat and has no
applicability to the case of a tenure-
holder. The decree of the lower appel-
late Court cannot therefore be allowed
to stand.

Now the question is whether the decree of the Court of first instance can be maintained. The trial Judge, as would appear from his judgment, took into his consideration the circumstances under which the lands were first let out and if he fixed a fair and equitable rent on the basis of the rate of Rs. 9 per shola of paddy, he did it on the ground that the defendants themselves had been claiming the price of paddy rent from their own tenants at that rate for the year 1922 to 1925, which was a period shortly before the date of institution of the present suit. The trial Judge in fixing a fair and equitable rent also gave effect to the provisions of sub-S. (3), S. 7, Ben. Ten. Act. Having regard therefore to the fact that the decree of the Court of first instance is based on the provisions of S. 7 and that the trial Judge in determining the fair and equitable rent took into his consideration the circumstances under which the tenures had been created, I am of opinion that it cannot be successfully assailed. I would therefore allow the appeals, set aside the decrees of the lower appellate Court and restore those of the Court of first instance with costs both in this Court and in the Court below.

Jack, J.—I agree,

R.K.

Appeals allowed.

A. I. R. 1933 Calcutta 417

RANKIN, C. J. AND C. C. GHOSE, J.
Pratapmal Rameshwar—Appellant.

v.

Chunilal Jahuri—Respondent.

Appeal No. 45 of 1932, Decided on 14th July 1932, from order of Ameer Ali, J., in Insolvency case No. 47 of 1932.

(a) *Presidency Towns Insolvency Act (1909), S. 13—Creditor's petition—Onus of proving ability to pay debts is on debtor.*

The onus of proving that the debtor is able to pay the debts so that the creditor's petition may be dismissed is on the debtor himself.

[P 417 C 2]

(b) *Presidency Towns Insolvency Act (1909), S. 13—"Ability to pay debts"—Meaning explained.*

What the statute means by ability to pay debts is not merely that the man has assets which, if liquidation proceeds, may, in the result, provide sufficient money to discharge his debts. It means that he is not so embarrassed that he cannot meet his debts in the ordinary way by making legal tender and discharging his debts. The circumstance that a man has assets and the assets are not liquid assets and therefore he cannot pay his debts is a circumstance

which stand in favour of having a liquidation and not against having a liquidation [P 418 C 1]

(c) *Civil P. C. (1908), O. 21, R. 52—Appointment of receiver by Court of rents and profits—R. 52 has no application.*

Order 21, R. 52 is not intended to apply to a case where the Court appoints a receiver of the rents and profits of the immovable property.

[P 412 C 2]

(d) *Civil P. C. (1908), O. 21, R. 54, and Calcutta High Court Original Side Rules Ch. 27—Immovable property of judgment-debtor in custody of receiver appointed in another suit—Decree-holder can attach property in his hands with leave of Court under O. 21, R. 54.*

Where properties of a judgment-debtor are in the custody of a receiver appointed in another suit, the decree-holder can apply to the Court which has appointed the receiver and ask for leave to attach the property of the judgment-debtor notwithstanding the appointment of receiver and the attachment can be formally effected under O. 21, R. 54.

[P 419 C 1]

S. N. Banerjee—for Appellant.

N. N. Sircar and N. C. Chatterjee—for Respondent.

Rankin, C. J.—This is an appeal from an order made by my learned brother Ameer Ali, J., whereby he dismissed a creditor's petition for the adjudication of the two respondents as insolvents under the Presidency Towns Insolvency Act. The petition was brought on 4th March of the present year and the learned Judge proceeded upon the ground that, in his opinion, it was not made out by the creditor that the debtors were not in a position to pay their debts. It is quite true that one of the reasons, for which the Court is enabled to dismiss a creditor's petition is the reason given in S. 13. Presidency Towns Insolvency Act, which says that:

"the Court shall dismiss the petition if the debtor appears and satisfies the Court that he is able to pay his debts."

It will be seen that the burden of proof is entirely on the debtor. In the present case the question appears to be what is meant by saying that the debtor has to prove that he is able to pay his debts. The case made by the respondents was not a case that they were able to pay their debts, if it be carefully examined; though they do say in so many words "we are still in a position to pay all just and reasonable debts." But the case they make is that they are entirely unable at the present to pay the petitioning creditor's debt, to speak of that alone, apart altogether from any other debts. They say they have got a number of immovable properties; that

the mortgages will be less than the value of these properties. They wind up by saying that they are not insolvents, but, in the circumstances, they have no ready cash to pay. What the statute means by ability to pay debts is not merely that the man has assets which, if liquidation proceeds, may, in the result, provide sufficient money to discharge his debts. It means that he is not so embarrassed that he cannot meet his debts in the ordinary way by making legal tender and discharging his debts.

The circumstance that a man has assets and the assets are not liquid assets and therefore he cannot pay his debts is a circumstance which stands in favour of having a liquidation and not against having a liquidation. The judgment to be exercised on this ground in connexion with a petition for adjudication is exercised on very much the same lines as the discretion to annul an adjudication on the ground that the debts have been paid or that the debtor ought never to have been adjudicated. It was never the intention of the statute that a man, having a petitioning creditor's debt and proving an act of bankruptcy, should be told that no provision whatever will be made for the payment even of his debt, and that the petition is to be dismissed on the ground that the debtors are able to pay all their debts. If, to a petitioning creditor who has knowledge of an act of bankruptcy, tender of money is made for his own debt, he is not, in a usual case, at all obliged to receive the money and have the petition dismissed, because it may very well be that other creditors may proceed in insolvency and that the payment will be held bad against the Official Assignee. But, if coupled with such an offer, it can be shown that there are no other debts or that the debtors are prepared and able to pay off all the other debts, then no doubt a strong case arises for dismissal of the petition. In my judgment the learned Judge has misapplied the terms of the section, on which he has relied, and the judgment cannot be supported upon the ground on which it has been based.

Before us, the appeal has been supported by a contention to the effect that the only act of insolvency shown is that premises No. 38, Baratola Street, belonging to the debtors were attached on 19th January 1932, and continued under at-

tachment for more than 21 days. It is said that that attachment was an irregular or illegal attachment altogether. It appears that the Court appointed a receiver over the properties of the debtors including this property. It appears that the petitioning creditors, who held a decree for their debts, applied to the Court, which had appointed a receiver, and asked for leave, notwithstanding the appointment of a receiver, to attach two definite specified immovable properties in which the debtors had an interest. The Court gave the leave asked for and the attachment was formally and regularly made by an attachment under O. 21, R. 54. The way in which it is said that that attachment is illegal or improper is this: It is said that under R. 52, O. 21, Civil P. C., this proceeding was not rightly taken. It is quite true that that proceeding has no connexion whatever with R. 52, O. 21. R. 52 refers to property 'in the custody of a Court or public officer. It provides that an attachment can be made in a way which leaves no room for an application for the leave of the Court or of the public officer. It is to be noticed that it treats the Court and the public officer exactly in the same way. Under that rule, in any case to which it applies, the executing Court simply issues attachment without consulting the other Court. Apart altogether from any question whether R. 52 applies to immovable property, while it is true in a sense that the Court, when it appoints a receiver, takes possession of the property, I am reasonably clear that the rule was never intended to apply to a case where the Court appoints a receiver of the rents and profits of the immovable property.

What has been done in this case has been done following the practice on the original side, which of late years, became settled in view of principles well-settled in England and is now in Ch. 17 of our rules. It is very common for persons who apprehend execution to start a partnership suit and have a receiver appointed of the assets of the partnership, or a partition suit, and have a receiver appointed of the assets of the family; or a mortgage suit and have a receiver appointed of the assets under mortgage. In these cases, the endeavour to use O. 21 R. 52, is of very small use to the executing creditor. It may be that the suit

for partition or for dissolution of partnership is entirely collusive, and under R. 52, O. 21, very little relief is to be obtained by the executing creditor. According to the particular practice in this Court and in the Courts in England the creditor, in such circumstances, is to go to the Court who appoints the receiver, and he asks the Court to give him leave, so far as a certain property is concerned, to ignore the receivership altogether. In that case he proceeds exactly as if no receiver has ever been appointed and that is the course adopted by the creditor in this case. Sometimes, when a creditor goes and asks leave in such fashion, the Court will not allow him to attach the assets direct.

In many cases that might result in interfering with the administration of the Court as regards the partnership assets. In a partnership case, the Court calls for the creditors and endeavours to pay the creditors of the firm out of the assets and to hand back the balance, if any, to the partners according to their shares. In many cases therefore to allow an executing creditor to come in and levy upon the assets directly and independently of the Court's proceedings would lead to confusion and cause injustice or give preference to the attaching creditor. In such cases the Court will refuse the relief in that form and will make an order in the well-known form now known by the case of *Kewney v. Attrill* (1). It will give the creditor no leave to attach direct, but it will give him a charging order upon the assets that are being administered upon the term that the creditor will use that charging order in a way which will be under the control of the Court. The present is a case where the Court granted leave to attach the assets direct by the ordinary process and the Master, in this case, upon a tabular statement, is quite right in ordering attachment under R. 54, O. 21. That attachment is a perfectly good attachment and the act of bankruptcy therefore cannot be challenged.

We have been asked in this case, to give the debtors further time. I am well aware of the difficulties of giving debtors very much time when a bankruptcy petition has been filed and is being contest-

ed. But had there been any attempt when this petition was first filed on the part of the debtors to provide for the petitioning creditor's debt on term of being given a little time, I should have been the last person to have objected to any reasonable order of adjournment. One may take notice of the fact that at the present time, people may very legitimately have special difficulty in finding the necessary liquid money to pay debts; but this petition was presented in March and nothing whatever has been done to pay off even the petitioning creditor, let alone any of the other creditors. Mr. Banerjee, who has to look after the interests of his client, is not disposed to consent to further time being given to the debtors, and his client might very well be, for all we know, in difficulty at this stage in receiving his money, unless indeed all the other creditors can be ascertained and at the same time paid. It is quite impossible for us therefore to thrust upon Mr. Banerjee's client, against his will, a further adjournment for any such purpose.

In the result the order of adjudication must be made. We find the act of insolvency being the act mentioned in Cl. 1, para. 6 of the petition and we find the petitioning creditor's decretal debt to be a good petitioning creditor's debt and we make the adjudication now. The appeal will be allowed. The petitioning creditor's ordinary costs of this Court and of the Court below certified for counsel will come out of the assets.

C. C. Ghose, J.—I agree

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 419

RANKIN, C. J., PEARSON AND
MITTER, JJ.

Nibaran Chandra Dutta—Plaintiff—
Appellant.

v.

Amar Chandra Das—Defendant—Res-
pondent.

Letters Patent Appeal No. 31 of 1932,
Decided on 14th March 1933, from judg-
ment of Mukerji, J., in Appeal No. 1681
of 1930, D/- 25th August 1932.

Bengal Tenancy Act (1885), Ss. 85 and
49 (a)—Kabuliyat for under-raiyati right for
nine years—Clause in kabuliyat that grantee
shall enjoy land after expiry of nine years
by execution of fresh kabuliyat—Grantee has
option to execute kabuliyat and continue on

1. (1886) 34 Ch D 345=56 L J Ch 448=38 W R
191=55 L T 805.

the same terms and he cannot be ejected by grantor.

The defendant executed a kabuliyat to the plaintiff for the grant of under-raiyati right for nine years. There was clause in the kabuliyat to the effect that on the expiry of nine years the grantee shall enjoy the land on execution of a fresh kabuliyat. The grantor brought a suit for ejectment two months after the expiry of the nine years.

Held: that under the kabuliyat the defendant was entitled at his option to have a grant for another term of nine years, that the covenant was not rendered invalid by S. 85 and that the landlord was not entitled to eject him. [P 421 C 2]

Held further: that even though the terms of renewal were not expressly stated in the contract, it should be presumed that the contract intended the same rate of rent and same period of tenancy: 4 I. C. 535; 18 I. C. 912; 33 I. C. 448 and A. I. R. 1925 Cal. 516, Ref. [P 422 C 1]

Rupendra Coomar Mitter—for Appellant.

Radhika Ranjan Guha—for Respondent.

Mukerji, J.—This appeal has arisen out of a suit to eject the defendant under S. 49, Cl. (a), Ben. Ten. Act, and for recovery of rent due from him for the years 1332 to 1334. The trial Court gave the plaintiff a decree for rent only; but the lower appellate Court, on appeal by the plaintiff, gave him a decree for ejectment as well. The defendant has appealed. The defendant held as an under-raiyat under a lease for nine years which ran from 1326 to 1334, and which he had obtained on payment of a selami. There was a renewal clause in the lease which ran in these words: "On expiry of the term I shall possess the land after executing a fresh kabuliyat." The suit was instituted on 11th July 1928 (Ashar 1335). The trial Court held that the defendant was protected by this clause as to renewal. The Subordinate Judge held thus:

"This covenant was for the benefit of the tenant, but it gave him no right to the land unless he chose to take advantage of it in the manner prescribed therein by executing a kabuliyat for another term. This the tenant has not done. I do not see how defendant can resist the claim of the plaintiff to khas possession."

It is conceded on behalf of the respondent that the view which the Subordinate Judge has taken cannot be supported; there was no stipulation in the lease that if the defendant was to exercise his option he would have to exercise it before the expiry of the term; and a sufficient period had not elapsed since the expiry of the term from which a refusal to exercise that option could be

inferred. But the decision of the Subordinate Judge sought to be supported on the ground; firstly, that the renewal clause, if it is to be taken to have meant that on the expiry of the original period a fresh lease for the same period and on the same terms as in the original lease was to be given, effected a present demise for a second term and would be a clourable evasion of S. 85, Ben. Ten. Act, and therefore void; and secondly that if on the other hand it be held that the renewal clause left the terms undecided the contract was too uncertain to be specifically enforced and so would not afford a protection to the defendant against eviction. The argument no doubt is very ingenious. But I think the clause is capable of and does, in fact, bear an interpretation that on the expiry of the original term, it was optional with the defendant to ask for a fresh lease, if he desired to hold on, and if he did so apply the plaintiff would be bound to grant it on the same terms and for the same period as the original one. Such a contract would not effect a present demise nor be vague or incapable of specific performance and would protect the defendant. In that view of the matter, the appeal should succeed. The decision of the Subordinate Judge being set aside that of the Munsif should be restored with costs in this and the lower appellate Court. Leave to appeal under S. 15, Letters Patent, is asked for and it is granted.

Rankin, C. J.—In 1325 B. S. the plaintiff accepted from the defendant a kabuliyat which was registered and by which the plaintiff granted to the defendant an under-raiyati right in certain land for a term of nine years upon a certain rental therein specified. The kabuliyat contained the following clause:

"Be it expressed that the right being kolekarsha the kabuliyat is executed for nine years under the requirements of law from 1326 B. S. till (the end of) 1334 B. S.; on expiry of the term I shall enjoy the land on executing a fresh kabuliat."

The plaintiff two months after the expiry of the nine years brought his suit in ejectment. He brought his suit, and it is important to notice this: under S. 49 (a), Ben. Ten. Act, that is to say, not on the footing that the defendant was holding otherwise than under a written lease and had been given a year's notice but on the footing that the plaintiff was entitled to

evict on the expiration of the term of the registered instrument.

The question before us now is whether the covenant which I have read with reference to a fresh settlement affords an answer to the defendant in the suit in so far as it is a suit for ejectment and Mr. Mitter for the appellant before us in the Letters Patent appeal puts forward two contentions. He says, first of all, that if this is a covenant for renewal then it is a mere colourable evasion of the provisions of S. 85, Ben. Ten. Act, as it stood before it was amended by Act 4 of 1928 and he says, secondly, that if according to the cases it be held that this is a lease for nine years with a valid contract for another nine the terms upon which the lease is to be renewed or a fresh lease is to be given are not sufficiently expressed and the contract cannot be specifically performed because it is too vague. Now, until the Full Bench decision in *Chandra Kanta v. Amjad Ali* (1) it was considered that as between the grantor and the grantee of an under-rajyati lease non-compliance with the conditions laid down by S. 85 did not render the lease invalid; but after the Full Bench decision it is clear law that if a lease is for a longer period than nine years then it is not capable of registration and as there is no estoppel against the statute the grantor can take advantage in ejectment of the invalidity of the instrument. I mention this merely because it may be that this turning point in the decisions on the question has a bearing upon whether or not previous decisions on other aspects of this matter have any authority.

To take the two points which have been put forward by Mr. Mitter in their order, the first is the question whether the covenant for renewal in the instrument before us is a mere evasion of S. 85. I am of opinion that it is not. No doubt a covenant may be entered into to the effect that at the end of the term of nine years the landlord shall be bound to grant and the tenant shall be bound to take a further term for another nine years. Whether that would be good or not is a question and I think a grave question. If the position be that the covenant before us is a covenant for the benefit of the tenant and is to

the effect that the tenant may at his option continue for another term and the landlord at the tenant's request shall be bound to grant another term, that is not a mere colourable continuation of the old lease. As Mukerji, J., in the present case has pointed out such a contract that the tenant shall have an option for renewal would not effect a present demise nor is it capable of being so regarded. I have no doubt that from the language of the instrument before us it is to be construed as a covenant by the lessor in favour of the lessee that the lessee shall at his option have a grant for another term from the lessor. That being so, I have no difficulty in holding that the covenant is not rendered invalid by S. 85, Ben. Ten. Act. I come now to the second point which is whether this covenant is too vague to be specifically performed or to give the tenant any right. Of course if it is a mere covenant that the parties should enter into a new contract without specifying the terms such covenant is not a covenant at all. It is said however that in the case of *Surendra Nath Sen v. Dinabandhu Naik* (2), a very similar clause was regarded by Mitra, J., as too vague to give the defendant any right. In my judgment, this is a matter which is governed by well-settled principles of which the fairness and convenience cannot be challenged. If I may take the statement of the principle from Foa's book on landlord and tenant:

"a lease granting premises for a certain term and purporting to be granted 'with the option of renewal' simply, may have effect given to it, as it imports that the renewed tenancy is to be of the same duration and (with the exception presently referred to)" (that means with the exception of the covenant for renewal itself), "subject to the same terms as the one to which it succeeds. And in conformity with the principle that a doubtful grant is always construed in his favour, such option is vested only in the lessee."

If that principle is to be applied to the case before us there can be no question of the covenant being too vague to be enforced. I find from previous decisions on the point that, apart from the case before Rampini, J., *Ali Mahamad v. Nayan Rajah Bhuiya* (3) where it was thought that a covenant for renewal was a covenant for renewal at a fair rent, there is ample authority in this Court for applying the principle which I have

1. A I R 1921 Cal 451=61 I C 466=48 Cal 788 (F B).

2. (1909) 4 I C 535.

3. (1912) 18 I C 912.

expressed to cases under the Bengal Tenancy Act. Probably the strongest authority is the case of *Lani Mia v. Muhammad Easin Mia* (4) where the English principle was applied to a covenant almost exactly in the words which we have before us. This was followed by a Division Bench presided over by Suhrawardy, J., in the case of *Shulochona Mazumdar v. Kali Bibi* (5), and there is therefore a body of authority now both to the effect that a contract for renewal at the option of the tenant is not invalid and for the proposition that where the terms of the renewal are not expressly stated in the contract it is to be presumed that the contract intended the same rate of rent and for the same period of tenancy. These are the propositions which Mukerji, J., has applied to the present case and it appears to me that no exceptions can be taken to the reasoning of the learned Judge. The Letters Patent appeal therefore fails and must be dismissed with costs.

Pearson, J.—I agree.

Mitter, J.—I agree with my Lord the Chief Justice.

K.S. *Appeal dismissed.*

4. (1916) 83 I C 448.

5. A I R 1925 Cal 516=79 I C 317.

A. I. R. 1933 Calcutta 422

MITTER AND M. C. GHOSH, JJ.

Ashutosh Choudhury—Appellant.

v.

Sm. Kumed Kamini Dasi — Respondent.

Appeal No. 121 of 1932, Decided on 22nd February 1933, against order of Dist. Judge, Bankura, D/- 7th October 1931.

(a) Limitation Act (1908), Art. 181—Deposit of sale price by auction-purchaser — Decree-holder drawing amount due to him—Excess amount due to judgment-debtor in Court deposit—Sale set aside—Auction-purchaser withdrawing money in Court deposit—Order setting aside sale set aside on appeal—Spit by judgment-debtor for restitution of money drawn by auction-purchaser—Limitation is three years from date of such order—Civil P. C. (1908), Ss. 144 and 151.

The right to apply for restitution accrues really on the date when for the first time a decision is given which entitles the party asking for restitution to have restitution. [P 423 C 2]

In execution of a decree for rent, the holding was sold by auction and the auction-purchaser deposited the amount which was in excess over the decree amount in Court. The decree-holder withdrew the amount due to him and the balance due to the judgment-debtor was kept in

Court. On an application to have the sale set aside, it was set aside and the auction-purchaser's money was ordered to be paid. The auction-purchaser withdrew amount in Court deposit. The decree-holder filed an appeal against the order and the sale was confirmed. An appeal was filed against this appellate order by one of the judgment debtors in which the plaintiff, also a judgment-debtor was impleaded as respondent; but the appeal was dismissed. Plaintiff filed a suit for restitution of the amount withdrawn by the auction-purchaser three years after the order confirming the sale, but within three years from the date of High Court's order of dismissal of appeal.

Held: that the cause of action arose on the date confirming the sale, that the appeal in the High Court did not concern him as he had not appealed and that the suit was time barred: *ALR 1931 Cal 779 and A I R 1925 Pat 1 (F D), Ref.; A I R 1932 P C 165, Dist.*

[P 424 C 2]

(b) Limitation Act (1908)—Construction.

In construing the provisions of the Limitation Act equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide: *A I R 1932 P C 165, Ref.*

[P 424 C 1]

Gopendra Nath Das—for Appellant.

Kamalaksha Basu—for Respondent.

Mitter, J.—This is really an unfortunate case for although the merits of the case are in favour of the appellant we are constrained to arrive at a decision adverse to him on the ground of limitation. It appears that one Hari Sadhan Panja obtained a decree for rent against Asutosh Chowdhury and his cosharers in Rent Suit No. 876 of 1916. One Bhagaban Chandra Pan had the decree assigned to him and he applied for execution of the decree in the year 1920 by sale of the rent property. In that execution the holding in question was sold and it was purchased by a lady of the name of Kumud Kamini Dasi for a price of Rs. 1,255 on 27th July 1920. The sale was confirmed in August. Two of the judgment-debtors, one of whom was an infant, applied on 27th July 1923 under O. 21, R. 90, Civil P. C., for setting aside the sale. At all subsequent stages this application under O. 21, R. 90 was prosecuted by Jamini Kanta Chowdhury alone. The application to set aside the sale was allowed in the first instance by an order of the Court dated 12th March 1924. When the sale was set aside by this order the Court gave a direction for refund of the purchase-money with interest to the auction-purchaser. The sale proceeds were in excess of the amount due under the decree and therefore the portion of the surplus

sale proceeds remained in deposit for payment to the judgment-debtors, the decree-holder having already taken the sum which was found due to him. In accordance with this order of refund the auction-purchaser withdrew from the Court a sum of Rs. 442-11-9 which really was to be credited to the judgment-debtors as a part of the surplus proceeds which the judgment-debtors would be entitled to in the event of the sale being confirmed. A direction was given to the decree-holder to refund the amount withdrawn by him.

The decree-holder however preferred an appeal to the District Judge against the order setting aside the sale. After several intermediate proceedings to which it is not necessary to refer, the sale was ultimately confirmed by an order of the appellate Court dated 17th August 1925. An appeal was however taken to the High Court against the order confirming the sale by one of the judgment-debtors and not by the present appellant Ashutosh Chowdhury. Asutosh however was made a respondent to the said appeal. That appeal was dismissed on 24th March 1927 and on 22nd March 1930 Asutosh put in an application for an order on the auction-purchaser to re-deposit the amount which had been withdrawn by him from the Court out of the surplus sale proceeds.

The Munsif who dealt with the matter in the first instance was of opinion that the auction-purchaser should be compelled to re-deposit the money which he had withdrawn. On appeal however by the auction-purchaser the District Judge was of opinion that she would not be entitled to retain the surplus sale proceeds but for the plea of limitation which had been taken by her. The District Judge was of opinion that the right of the judgment-debtor for restitution really accrued on 17th August 1925 when the order setting aside the order setting aside the sale, or in other words the order confirming the sale was made by the District Judge on 17th August 1925 under Art. 181 of the Schedule to the Limitation Act. As this application for restitution was not made within three years from the time when the right to apply accrued the application was barred by the said article. He accordingly dismissed the application of the judgment-

debtor for restitution "on the ground of limitation.

Against this decision the present appeal has been preferred and it has been contended on behalf of the appellant that the application could not be treated as one under S. 144, Civil P. C., namely, as an application for restitution. It was really an application for asking the Court to exercise its inherent powers under the provisions of S. 151, Civil P. C., and in support of this contention reliance has been placed on the recent decision of this Court in the case of *Sasi Kanta Acharjee v. Jalil Baksha Munshi* (1) in which my learned brother Mukerji, J., held that in the circumstances similar to the present the Court could act under its inherent powers under S. 151, Civil P. C. The learned Judges did not decide in that case that even if the application be treated as one under S. 151, Civil P. C., the article of limitation applicable is not Art. 181. Of course there is a decision of the Patna High Court which has been referred to by the learned advocate for the respondent in the case of *Balmakund Marwari v. Busanta Kumari* (2), where it was held that an application in such cases comes both under the provisions of Ss. 144 and 151, Civil P. C. The real question therefore in controversy is as to when the right did accrue in the appellant for asking for the refund of the money withdrawn by the auction-purchaser seeing that the sale has now been confirmed and the money being in excess of the decretal amount really belongs to the judgment-debtor. It has been held in a series of cases that the right to apply accrues really on the date when for the first time a decision is given which entitled the parties asking for restitution to have restitution and that was undoubtedly in this case on 17th August 1925.

It is argued however that as an appeal was pending against that decision the appellant before us could not consistently ask for restitution, for that position would have been inconsistent with the conduct of the appeal. We were at the first blush inclined to agree with the view, for it was argued on the basis that the appellant was one of the appellants

1. A I R 1931 Cal 779=184 I C 1185.

2. A I R 1925 Pat 1=78 I C 200=8 Pat 371 (F B).

before the District Judge. That however does not appear to be so for the present appellant was merely a respondent in the said appeal and there was in our opinion nothing to prevent appellant from asking for restitution. It is said on behalf of the appellant that he could not have possibly taken that course as that would have affected any right which he might have acquired if the appeal against the order confirming the sale had been allowed. We do not see much force in that contention. It was not he who had appealed; he was rather content with the order confirming the sale. In such circumstances as this the right to ask for refund of the money withdrawn by the auction-purchaser arose on 17th August 1925 and he ought to have applied within three years from that date. We are of opinion therefore that the learned District Judge was right in the view which he has taken. Stress has been laid on a recent decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Nagendra Nath Dey v. Suresh Chandra Dey* (3). Mr. Das has drawn our attention to a passage in that judgment which runs as follows:

"It is at least an intelligible rule that so long as there is any question sub judice between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage."

These words were said with reference to the provisions of Art. 182, Lim. Act, and the question which was for consideration before their Lordships of the Judicial Committee was as to whether the word "appeal" in S. 182 (2), Lim. Act, meant any appeal of any kind and their Lordships were of opinion that there was no warrant for reading into the words any qualification that the appeal must be regular or competent and that the parties to such subsequent execution proceedings must be parties thereto or that the whole decree must be imperilled. On the other hand, there are observations of the Judicial Committee in that very case which would go to show that in construing the provisions of the Limitation Act equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide. In this view we

are of opinion that the right to apply accrued as soon as the order of the District Judge was made in August 1925 confirming the sale and as the present application was not made within three years from that date it has been rightly held that the application was barred by limitation. It might be a misfortune to the appellant but we have to administer the law as we find it. The appeal is dismissed. There will be no order as to costs.

M. C. Ghose, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 424

PANCKRIDGE AND PATTERSON, JJ.

Mehr Ali Mia and others—1st Party—Petitioners.

v.

Bidyut Baran Mukherjee and another 2nd Party—Opposite Parties.

Criminal Revn. No. 995 of 1932, Decided on 24th February 1933.

(a) Criminal P. C. (1898), S. 145—Possession delivered by civil Court — Possession though symbolical is effective as against person dispossessed and latter's actual possession is disturbed—Bengal Land Revenue Sales Act (11 of 1859), S. 29—Civil P. C., O. 21, R. 95.

If on a given date any person has been put into possession by the civil Court however inefficiently or irregularly, there, on that date, that person shall be deemed to have got possession as against the person dispossessed and the latter's actual possession is broken as a matter of fact even if only for a moment. This is as true of symbolical possession, as of any other possession, though what happened at the time of delivery may well be important on the question whether the former continued in possession: *A I R 1928 Cal 610, Rel on.* [P 425 C 2]

(b) Criminal P. C. (1898), S. 145 (4), Proviso—Person forcibly dispossessed—Order forbidding disturbance of such person held correct.

The proceedings were drawn up on 18th August 1932, and the opposite party were in possession on 26th June 1932 and at some time between that date and the date of the proceedings the petitioners forcibly and wrongfully dispossessed the opposite party from the land in dispute:

Held: that, in these circumstances, the Magistrate was clearly right in declaring the opposite party to be in possession on the date on which the proceedings were drawn up and in forbidding all disturbance of their possession.

[P 426 C 1]

Nalini Kumar Mukherjee—for Petitioners.

Advocate-General, H. D. Bose and Suresh Chandra Talukdar—for Opposite Parties.

3. A I R 1932 P C 185=137 I C 529=59 I A 283=60 Cal 1 (F C).

Patterson, J.—This Rule is directed against an order by a Deputy Magistrate of Alipore under S. 145, Criminal P. C., declaring the opposite party to be in possession of certain immovable property and forbidding all disturbance of such possession. The Rule has already been discharged by us, and it only remains to indicate our reasons for discharging it. The property which forms the subject-matter of the proceedings out of which the Rule arises is known as the Tushkhali Abad and consists of a large block of land situated in the Sunderbans and measuring about 5,000 bighas in area. The petitioners are the successors-in-interest of the original lessees of this plot of land and the opposite parties are the auction purchasers at a recent revenue sale. The sale was held under the provisions of S. 6, Act of 1859 and took place on 8th January 1932. After an unsuccessful appeal to the Commissioner on 16th May 1932 the petitioners filed a civil suit with the object of having the sale set aside, and this suit is still pending.

They also obtained certain temporary injunctions from the civil Court prohibiting the auction purchasers from taking possession but these injunctions were ultimately withdrawn and on 25th June 1932 the opposite party obtained delivery of possession from the Collector. It has been suggested on behalf of the petitioners that there was no real delivery of possession, and that on 25th June 1932 all that actually took place was that the transfer to the opposite party was notified by proclamation under the provisions of S. 28 of the Act. It appears however that the order that was published in the locality on 25th June 1932 purported to be an order under S. 29, under which section the Collector is authorized to deliver possession to an auction purchaser. The Magistrate has found that possession was duly delivered to the opposite party on 25th June 1932, and there can be no manner of doubt that delivery of possession took place on that date under the provisions of S. 29 of the Act. It has further been suggested on behalf of the petitioners that even if possession under S. 29 was delivered to the opposite party on 25th June 1932, the only effect of such delivery of possession was to give them the right to possess and

that they were not placed in actual possession of the property. It has also been pointed out on behalf of the petitioners that the Magistrate has found that even after the delivery of possession on 25th June 1932, the opposite party were unable to exercise their full rights of possession and that the petitioners remained in actual possession of the abad and were collecting rents from the tenants. It is contended that, in view of this finding, the Magistrate ought to have found that the petitioners were in possession of the abad on the date on which the proceedings were drawn up and ought to have made an order confirming their possession.

As regards the petitioners' contention that the Collector did not deliver actual possession to the opposite party, and that the so-called delivery of possession merely gave them the right to possess the property, it is a sufficient answer to this contention to quote the words of Rankin, C.J., in the case of *Agni Kumar Das v. Mantazuddin* (1) (at p. 310 of 56 Cal):

"On the other hand, it is true that, if on a given date the plaintiff has been put into possession by the civil Court however inefficiently or irregularly, then on that date, the plaintiff got possession as against this defendant. The defendant's actual possession has been broken as a matter of fact even if only for a moment. This is as true of symtolical possession, improperly so called, as of any other possession, though what happened at the time of delivery may well be important on the question whether the plaintiff continued in possession, very long or was ousted in the following week. Still it is an error to hold in such cases that the decree-holder was never in possession, or to ignore the delivery to him."

These remarks, in my opinion, apply with equal force to the present case, and it must therefore be held that the opposite party on 25th June 1932 were in actual possession of the property in dispute. Then as regards the petitioner's contention that, as has been found by the Magistrate, the petitioners remained in actual possession of the property even after possession had been delivered to the opposite party, it is only necessary to refer to the first proviso to sub-S. (4), S. 145, Criminal, P. C., which runs as follows:

"If it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dis-

1. A I R 1928 Cal 610=113 I C 181=56 Cal 290 (F B).

possessed as if he had been in possession at such date."

Now, the proceedings were drawn up on 13th August 1932, and the findings of the Magistrate amount to this: that the opposite party were in possession on 25th June 1932, and that at some time between that date and the date of the proceedings the petitioners forcibly and wrongfully dispossessed the opposite party from the land in dispute. In these circumstances the Magistrate was clearly right in declaring the opposite party to be in possession on the date on which the proceedings were drawn up and in forbidding all disturbance of their possession. The precise manner in which the opposite party will, under the order that has been made in their favour, be entitled to exercise possession in the various portions of the disputed property, for example, whether they will be entitled to take khas possession or whether they will only be liable to exercise their possession by realisation of rent, this is not a matter which can be determined in the present proceedings. It may be that if the opposite party claim to be entitled to khas possession, they will have to take proceedings under S. 37 of the Act, for the annulment of any encumbrances that may exist on the land before they can actually enter on the land, and that further proceedings under S. 145, Criminal P. C., will be necessary in respect of the portions of land of which the petitioners or some of them claim to be in possession as under-tenants. Be that as it may, it is not in my opinion possible to decide those questions in the present proceedings. As has been pointed out by Mukerjee, J., in the case of *Mir Waziruddin v. Deoki Nandan* (2) (at p. 484):

"the effect of the delivery of symbolical possession is to transfer to the purchasers the possession which was in the proprietors."

It is not however possible in these proceedings to determine precisely what possession was in the former proprietors or what possession the auction purchasers are entitled to.

Panckridge, J.—I agree with the reasons given for discharging the Rule.

R.K. *Rule discharged.*

2. (1907) 6 C L J. 472.

A. I. R. 1933 Calcutta 426 Special Bench

RANKIN, C. J., PEARSON AND GUHA, JJ.
Asraf Ali, and another—Accused.

v.

Emperor—Opposite Party.

Death Ref. No. 5 and Appeals Nos. 84 and 85 of 1933, Decided on 15th March 1933.

(a) Criminal P. C. (1898), S. 298—Evidence of doubtful character—Charge to jury by Judge should contain words of caution.

Where the evidence in the case is of a doubtful character the Judge in his charge to the jury should not simply invite them to accept it but there must be some words of caution in the charge. [P 428 C 1]

(b) Criminal P. C. (1898), S. 298—Charge to jury—Effect should be to give due weight to all outstanding facts in case.

The effect of a charge to a jury by the Judge should be to give due weight to all the outstanding facts. The Judge should not put the prosecution case too strongly and fail to put the defence case as strongly as it ought to be. [P 428 C 1, 2]

(c) Criminal P. C. (1898), Ss. 374 and 418 (2)—Trial by jury and conviction—High Court can set aside conviction without remanding case if there is not sufficient evidence.

In capital sentence cases, though the High Court is not bound by the verdict of the jury, it must rely upon the jury's verdict if it answers a reasonable test. But if there is no sufficient evidence to warrant a conviction, the High Court can set aside the conviction itself without directing a retrial. [P 429 C 1]

Suresh Chandra Talukdar, Jatish Chandra Guha and Bhupendra Nath Roy Chowdhury—for Accused.

Khundkar—for the Crown.

Rankin, C. J.—The accused before us are Asraf Ali and Ananta Kumar Sarkar. They have been convicted by the unanimous verdict of a jury of seven under S. 302 read with S. 109, I. P. C., and have been sentenced to death. We have before us a reference under S. 374, Criminal P. C., and an appeal by each of the two accused. Between 9 and 10 o'clock on the night of Monday, 28th March 1932, in a village called Panchnagaon, an old man named Kalachand Banerjee, a woman called Hiran Moyee and a small girl called Sulakshana, aged about three, were hacked or stabbed to death in Kalachand's bari and his nephew's wife, Nagendrabala Debi, was very seriously injured by a sharp cutting weapon. She had an incised wound $7\frac{1}{2}$ long round the left shoulder joint cutting the head of the left humerus in two; she had an incised wound at the

back of her right wrist and another on the palm of her right hand. The case for the prosecution is that the accused Asraf Ali inflicted these wounds with a big dao in the kitchen or cookshed, and that present with him at the time was the accused Ananta. The case depends upon the evidence of Nagendrabala identifying the accused as the persons who entered the kitchen and committed the assault.

The crime was not committed for any purpose of theft. As two of Kalachand's women-folk, including a small girl of three, were brutally killed, after Kalachand himself had been killed, and Nagendrabala had been savagely attacked, the crime had all the appearances of a crime of vengeance. From the first it was accordingly associated with the fact that Kalachand had assisted the police and had given evidence on behalf of the Crown in a case under S. 400, I. P. C. (a gang case) which had lasted from 1924 to 1926. A large number of dacoits were prosecuted in that case, among them being the present accused. Both received substantial sentences. Asraf Ali was released from jail in June 1931 having served his sentence; Ananta was released on 10th December 1931 before he had completed his sentence by reason that he was suffering from phthisis. For some months therefore before the crime both had been living in the village of Panchgaon. Ananta's home was very close to Kalachand's—apparently about five minute's walk away. Asraf Ali's home is a little further; the evidence is not very clear as to the distance but I find it described by a responsible police officer as about ten minutes' walk from Kalachand's. The first information report was lodged at 7 a.m. on the morning after the occurrence, i.e., on 29th March and by next day (i.e. the 30th March) both the accused had been arrested. They, together with a few others, were arrested on the strength of their connexion with the gang case.

Asraf Ali was described by the committing Magistrate, who may have accepted his own statement, as being aged about 45 years. Before the Sessions Judge he gave his age as 50, but the learned Judge put him down as "about 35 or 40." Ananta was put down as about 65 by the committing Magistrate.

Before the Sessions Judge he stated that he was 68, but the learned Judge put his age as "about 55." Asraf Ali is of course a Mahomedan and Ananta a Hindu.

Now the only eyewitness to any portion of the crime is Nagendrabala Debi, a woman of about 24. She had been married to Kalachand's nephew in 1924. The main building of the house is a brick building running east to west, consisting of three divisions, one occupied by Kalachand, one by Hiranmoyee and one by Nagendrabala and her husband. A few feet north of this building is a corrugated iron garh, also running east to west. This is divided by a sort of fence, partly made of split bamboos. The eastern or smaller portion was used as a cookhouse, the western portion as a dining room. (After giving in detail the evidence of Nagendrabala and the statements made by her on several occasions, the judgment proceeded.) If we take the three statements of Nagendrabala made on the 29th March, it will be noticed that while in all three she says she could recognize the assailants, nevertheless in the first she speaks definitely of three persons: a man with a torch, a man with a dao and a man wearing a black vest; she only mentions two men to the daroga, and to the Deputy Magistrate at Munshiganj she says "I saw two persons. I heard the whisperings of some other persons." (After discussing the evidence regarding the identification of the accused by Nagendrabala, the judgment proceeded). There is no escaping the conclusion that on each one of the three cumulative descriptions Nagendrabala's identification does not fit in with what she said at the time. (After again discussing the circumstances under which Nagendrabala made her statements, his Lordship discussed the evidence given by Kasimuddi Haldar which seemed to support Nagendrabala and proceeded.) Now, I have two observations to make as a matter of law upon Kasimuddi's evidence. The learned Judge has not dealt in any way with the question whether that evidence could, and should, have been corroborated. He has not also warned the jury properly either in the case of Ananta, and still more noticeably in the case of Asraf Ali, as to how this evidence is to be regarded

Kasimuddi says that he told the dead man Kalachand. He also says that he told Hem Ghatak. If that be so, Hem Ghatak could, and should, have been called by the prosecution to corroborate the story under S. 157, Evidence Act. Hem Ghatak was not examined by the prosecution; he was tendered for cross-examination but was not cross-examined by the defence; both sides appear to be suspicious of Hem Ghatak. Again, it is quite true that the charge against the accused was under S. 302 read with S. 109, I. P. C. The particular form of abetment called "conspiracy" was therefore before the Court. If it were once proved that Asraf Ali was present with Ananta at the commission of the crime then, and then only, would the evidence of this conversation in which he took no part have been of importance against him. In that event, however it would be entirely superfluous. As against Ananta, evidence that he was projecting some suspicious work with others of his gang might be used as affecting the probability that Nagendrabala's identification of him was correct. There is here however room for a distinct complaint in the charge of the learned Judge which, on this point contains not a word of caution; nothing but an invitation to the jury to accept evidence of a most doubtful character. (After referring to the evidence of the chowkidar, the judgment proceeded). The charge of the learned Judge was a very clear and a very able one.

It is attacked before us on the ground that in some respects it is expressed too dogmatically. I have no fault to find with the manner in which the learned Judge deals with the question whether the criminals had masks on; with the question whether there was any lamp in the kitchen; with the argument that Nagendrabala must have pulled down her veil and that she had no time to see the assailants. I think it is true however that on certain salient points the learned Judge in addressing the jury has put the prosecution case too strongly and has failed to put the defence case as strongly as it should have been put. Of the earlier statements of Nagendrabala it was perfectly right and proper that the jury should be reminded of the pain weakness and agitation under which they were given. But I do not think

that the effect of the charge as a whole is to give due weight to the outstanding facts; that the man with the dao was the only man of whom she ever gave any description, that she told Mr. Latif that on seeing the dao she did not notice the appearance of the other man, that the description given of the man with the dao was a young Hindu without a beard—all three elements being inapplicable to Asraf Ali, and [that she identified a wrong man in circumstances in which so far as we can gather from her previous statements, she was acting recklessly. These are all strong circumstances for the defence, a case in which the identification rests entirely upon one witness. While I do not suggest that the learned Judge has not referred to these circumstances, I think that he has left them to the jury in such a way as to obscure their cumulative force.

Nagendrabala's injury and terror at the time of the occurrence and at the time of her previous statements are considerations which cut both ways, and in dealing with her evidence the learned Judge has used much too broad a brush. In my judgment he has not left properly the various items of the description of the accused and in the long run he should have told the jury that while Nagendrabala's first statements may well have been mistaken, the fact remained that her impression at the time was of two men (a) the man with the dao—a young Hindu with no beard but a small moustache whereas Asraf Ali, was a man of middle age and a Mahomedan with a small beard; (b) a man of whom she has given no description unless it is the description that he had a small beard, of whom at one time she said that she did not notice his appearance, and that Ananta had no beard. He should also have warned the jury to be most careful, in view of the identification of Barendra, to consider whether they could reasonably be satisfied that the parts attributed by her to the two accused had been attributed in the same way on 23rd April. He should have pointed out with greater force that as she was identifying men seen by the light of a tin kupi in circumstances of horror followed by grave wounds, mistake was to be accounted a grave risk. This portion of the charge is too favourable to the prosecution.

By S. 374 read with S. 418, Criminal P. C., the accused have in this Court, what the legislature has recently (S. 418 (2), described as an appeal on matters of facts as well as of law. I have no doubt that these convictions cannot stand and we have to consider whether the correct course is to acquit the accused persons or to direct a retrial of one or both of them. For this purpose we may put on one side any chance of further evidence having come to light. The question is whether if, upon proper direction, the jury on this evidence were to convict the accused persons again, and the matter were to come before this Court under S. 374, it would be possible for this Court notwithstanding that it had not seen Nagendrabala give her evidence, to let that conviction stand. In other words, now that the evidence has been taken can we, or can we not, come to a clear conclusion as regards either of the accused that he ought not to be convicted on it. In capital sentence cases, though we are not bound by the verdict of the jury, we must rely upon the jury's verdict if it answers a reasonable test. I repudiate altogether the doctrine that capital offences are tried as *res integra* on the paper-book. But if there is no sufficient evidence to warrant a conviction we have in my judgment, the obligation to say so.

As regards both of these accused I am well satisfied that if they were properly defended before a reasonable jury instructed by a fair and adequate summing up, they would never be convicted. That men who may have taken part in the murder of three persons should be acquitted because the evidence does not amount to proof, may seem to some a pity. This Court can recognize no value in such considerations. I would set aside the conviction and sentence and direct that both the accused be acquitted and discharged.

Pearson, J.—I agree.

Guha, J.—I agree.

K.S.

Accused acquitted.

A. I. R. 1933 Calcutta 429

AMEER ALI, J.

Geetarane De—Applicant.

v.

Narendrakrishna De—Opposite Party.

Application in Original Suit No. 1567-A of 1932, Decided on 29th July 1932.

(a) Will—Executor—Mortgage by executor as executor—Failure of mortgagee to scrutinize will does not amount to constructive notice.

In the case of transfer by an executor one starts with the presumption that the transfer is valid *qua* the transferee until and unless it is established that the transferee had notice that the executor was acting in breach of trust. From the mere failure of the mortgagee to scrutinize the will, it cannot be inferred that he has notice that the amount raised as loan is not necessary for the administration : *Cal O C No. 1888 of 1929, Rel on.*; 83 *Bom 1, Expl. and Dist.*; *A I R 1932 Cal 182, Dist.* [P 430 C 2]

(b) Succession Act (1925), S. 307—S. 307 gives extensive powers to executor.

Section 307, Succession Act, gives the executor powers at least as extensive as those of an executor in England before 1926; but transferee who deals with a transferor (who happens to be an executor) not as executor but as owner is not entitled to the protection which the law affords to the transferees from executors acting *qua* executor : 7 *Bom L R 407, Ref.* [P 432 C 2]

P. N. Chatterji—for Applicant.

J. C. Hazra—for Opposite Party.

Judgment.—I dismiss the application. Defendant 1 is the executor of the estate of his father, Ambikacharan De, who died on 2nd July 1925, leaving considerable property. He left him surviving defendant 1, Narendrakrishna De, a grandson and a grand-daughter, who by her next friend, her mother, the wife of defendant 1, is the applicant. In his will, the testator mentioned his debts. He also gave the present applicant a legacy of Rs. 8,000 to be spent for her marriage. Defendant 1 was residuary legatee, and also named as executor, in the alternative. He obtained probate in 1926, and, according to the allegations in the petition, he has dissipated the property, with the result that even this sum of Rs. 8,000 cannot be found to satisfy the legacy of the applicant. Among other alienations made by the executor, which are set out in para. 8 of the petition, is the transaction, now challenged, viz., a mortgage, made in January 1927, of No. 11/1, Goabagan Street, Calcutta, for Rs. 30,000 in favour of the Co-operative Insurance Society, Ltd., defendant 2, and the sole respondent to this application. The mortgagee

obtained preliminary and final decree, and the property was about to be sold when this application to stay the sale was made. I granted ad interim stay on terms. I do not propose to go further into the facts or to deal with the merits of the application, because, in my view, it is based upon a misconception of the law.

The mortgage in question (Ex. "B" to petition) was clearly by Narendrakrishna De, as executor. It is sought to affect the transferee on grounds set out in para. 10 of the petition, the material allegations being that defendant 2 had or ought to have had full knowledge that the said loan was required by Narendrakrishna De for his own personal and private purposes. That is an allegation of actual notice or constructive notice. Counsel for the applicant put his case of notice in the following way : that it was the duty of the mortgagee to scrutinize the will. Had the mortgagee so scrutinized the will he would have noticed that the amount of debts left by the testator, according to his own statement, was small though the estate was large ; and, secondly, that there was a legacy or a bequest to the present applicant. It was argued from this that not only must notice be inferred, but also fraud of the mortgagee in accepting the mortgage and in bringing the suit. It was not suggested that the mortgagee had any actual notice. It was argued that, according to law, an executor cannot create a mortgage which is valid so far as outsiders are concerned, unless the amount raised was actually necessary and utilized for the purpose of the estate, and, in support of such argument, counsel relied upon the case of *Manindra Nandi v. Sudhirkrishna Banerji* (1). Now, I think it necessary to point out that this decision establishes nothing of the kind. The question before the learned Judges was entirely one of unsecured loans to an executor continuing the business of the testator. On this question the judgment contains a most careful and complete summary of the law. The question of transfers by way of mortgage or sale by executors was in no way before them. In two places the learned Judges point that out. At p. 228 (of 59 Cal.) they say :

"We are speaking here of simple cases of loans on promissory notes or hatchitis or other contracts, that is to say, cases where no charge has validly been created on the estate;" and, again, at p. 230, they refer to this aspect of an executor's activity, possibly, in language, too restricted. That however was a matter with which they were not dealing. In the case of *Shishirkumar Kar v. Direndrachandra Kar* (2) the two aspects of the matter fell to be dealt with : (a) unsecured loans and (b) transfers by executors. In giving judgment in that case I pointed out that in these two matters the law starts with entirely different considerations : (a) In the case of unsecured loans to an executor the executor is personally liable, and the creditor only obtains a right to proceed against the estate by a circuitous and artificial route, viz., subrogation, for which purpose he has to prove that the loan was necessary, that it was properly applied, and so forth. The mortgagee or transferee has to prove nothing of the sort. (b) In the case of a transfer by an executor one starts with the assumption that the transfer is valid *qua* the transferee, until and unless it is established that the transferee had notice that the executor was acting in breach of trust. The portion of the judgment in *Shishirkumar Kar v. Direndrachandra Kar* (2) dealing with transfers by executors reads as follows :

"With regard to mortgages by executors, disclosed as executors, the principles appear to me to be as follows : (i) An executor *qua* executor may make a mortgage for purposes of administration. He may not do so for any other purpose, i.e., for his private purposes (or for carrying on a business left by the testator); (ii) he is however when mortgaging presumed by law to be mortgaging for purposes of administration, and a mortgagee is not bound to see to the application of the money ; (iii) if the mortgagee has notice that the executor is not mortgaging for purposes of administration, i.e., if he has notice that the executor is borrowing for his own private purposes, he becomes a transferee with notice of breach of trust, and he gets no better title."

Thereafter the cases in support of those propositions are set out. In this case, no ground for notice is suggested except that the lender should have scrutinized the will, and from that gathered that there was no necessity for this loan. In my view there is no authority for such a proposition, and, that being the state of the law, I must refuse

1. A I R 1932 Cal 182=59 Cal 216 = 186 I C 838.

2. O O No. 1888 of 1929, decided on 15th February 1932 by Ameer Ali, J.

the application. The application must be dismissed with costs.

The following will supplement my judgment in this matter delivered on Tuesday last, 26th July 1932. I then dismissed the application of the plaintiff, a legatee under the will of Ambikacharan De, for stay of sale of certain property belonging to the estate mortgaged by the executor, her father. I dismissed the application without going into the merits because, in my opinion, the proposition of law upon which it was based was misconceived. Shortly put, the only ground upon which the transaction vis a vis the transferee was assailed was that the transferee should have considered the will and gathered from it that there were no debts to be discharged, and that therefore the executor was mortgaging for his own private purposes. I was unable to accept this proposition. At the time, counsel for the applicant relied upon the case of *Manindra Nandi v. Sudhirkrishna Banerji* (1). Subsequently, counsel for the applicant asked for an opportunity to place before me a ruling which in his view was directly in point, viz. *Coolam Hoosein Somji v. Bank of Bombay* (3), affirmed on appeal to the Privy Council under the name of *Bank of Bombay v. Suleman Somji* (4). I will call it *Somji's case* (3). I had not overlooked this case. In the judgment in *Shishirkumar Kar v. Dhirendrachandra Kar* (2), I treated *Somji's case* (3) as typical of that class of case where an executor transfers, but is not known to the transferee in the transaction as an executor. The significance of this will, I hope, become apparent from what follows.

In the report of the case, before Sir Lawrence Jenkins, there are many passages which, taken by themselves, are undoubtedly encouraging to counsel for the applicant, but I regret that again I must disappoint him in my view of the law. It is only fair however that I should state my reasons in detail. The essential facts of *Somji's case* (3) were as follows: In 1885 Somji Parpia died leaving a will. To his four sons by his first wife, whom he made executors, he left the whole of his estate subject to a legacy of Rs. 35,000 in favour of his four

sons by his second wife. The four executors and residuary legatee continued to carry on the family business under the name of Somji Parpia & Co. Many years later in 1899 they were indebted to the Bank of Bombay in respect of this business on hundis or bills of exchange, in the name of the firm. As security for this indebtedness they deposited with the bank by way of mortgage the title deeds of certain property which had formed part of the estate of the testator. When taking this deposit, the bank were unaware that these four sons, the mortgagors, were executors, and were unaware of the provision of the will. The bank dealt with the mortgagors as being entitled in their own right to the property mortgaged. There were three points in *Somji's case* (3), viz.:

First.—That the mortgage was not made by the mortgagors as executors:

"We start with the fact that the bank admittedly did not deal with the first four defendants as executors, but as owners of the property mortgaged."

This passage occurs in that portion of the judgment which deals with the question whether the mortgagee took with notice that the executors were acting improperly (see below). It would, in my opinion, have been more logical to treat this fact as a matter dehors the question of notice, by itself constituting a fundamental distinction between such a case and a case when the mortgagee deals with the mortgagor as executor.

Second.—That, even regarded as a mortgage by an executor, the mortgagee was affected by notice. Sir Lawrence Jenkins held that notice was established on two grounds: (i) the ground already mentioned, viz., that the bank was in point of fact not dealing with the mortgagor as executor; (ii) that the mortgage being clearly to secure advances to the mortgagors, the bank had notice that the executors were not acting for purposes of administration, bringing the case directly within the decision of *Hill v. Simpson* (5).

Third.—The third point was the contention (raised by the bank) that notwithstanding the above considerations by reasons of the fact that the mortgagors were not only executors but also residuary legatees, therefore on the prin-

3. (1905) 7 Bom L R 407.

4. (1909) 33 Bom 1 = 35 I A 199 = 1 I C 369 (P O).

5. (1802) 7 Ves 152.

ciple of *Graham v. Drummond* (6), the transaction could not be impeached. The principle of *Graham v. Drummond* (6) is shortly stated as rule No. 6 in Williams on Executors, 12th. Edn., 572. As regards this aspect of the case, Sir Lawrence Jenkins, while accepting *Graham v. Drummond* (6) as good law, distinguished the case before him on the ground that the claimants were not merely creditors but legatees. In the case before me the claimant is also a legatee, and the executor is also a residuary legatee, but it is not necessary for the transferee to resort to this last line of defence, and I therefore have not to consider the effect or applicability of *Graham v. Drummond* (6). The Judicial Committee took the same view of the applicability of *Graham v. Drummond* (6). Their Lordships agreed that the bank had constructive notice of the will and of its provisions: vide *Bank of Bombay v. Sulman Somji* (4); but the importance of the ruling is that it is based substantially on the Irish case *Queale's Estate* (7), the facts of which they considered to be similar. As the report of this case may not be generally available, I quote the material passage in full:

I will consider, in the first instance, how the position of John William Queale, as executor, independent of his position as residuary legatee, affects the case. The power of an executor to deal with personal estate is, I need hardly say, wellknown. He has full power to sell and mortgage it, not only as against pecuniary legatees, but also as against specific and residuary legatees; and dealing with the property qua executor, a bona fide purchaser and mortgagee is not under any obligation, and has no right, to require the executor to show that what he is doing is required for the purposes of administration. But the case is different where the purchaser knows that the executor is abusing his position; and if an executor, being merely executor, mortgages for his own private debt, such a transaction, being mala fide, cannot stand. In the present case, I do not see how the bank can be considered as having dealt with John William Queale as executor. If they did, the fact of the debt secured, being the private debt of Queale to the bank, would destroy their title.

Then the Judge goes on to say:

"But the strength of the argument for the bank was that Queale dealt with them as absolute owner, that as residuary legatee he was such absolute owner"

and so forth. In my opinion, the real decision in *Somji's* case (3) was that a

transferee who deals with a transferor (who happens to be an executor) not as executor but as owner, is not entitled to the protection which the law affords to transferees from executors acting qua executors. It is not contended that there is any difference, which would operate in the applicant's favour, between English and Indian law. In my view, S. 307, Succession Act, gives the executor powers at least as extensive as those of an executor in England before 1926. I should have mentioned that the will contains no restriction on the ordinary powers of an executor. Mr. Chatterji, for the applicant, as a last resort, has argued that in the present case the mortgage was not by the executor qua executor. I do not agree. Although the mortgagor is described as:

"Narendrakrishna De in his personal capacity and in his capacity as executor," the rest of the document makes it perfectly clear that he was mortgaging qua executor. I do not again propose to deal with the merits of the application. In too many cases there is devastavit by the executor. This may be one of those cases. In some cases there is collusion between the executor and the applicant. In still a greater number of cases there is a mixture of devastavit and collusion, a common proportion, I should say, being two of devastavit to one of collusion. But assuming that this is a case solely of devastavit, in my view of the law I must refuse interlocutory relief. This being the case, it is not necessary for me to consider an aspect of the matter which appears to have been overlooked by counsel for the applicant. Even if the plaintiff be right in law, it does not necessarily follow that this mortgage will be set aside. She may have a charge on the property for her legacy of Rupees 8,000. This charge may take precedence on the security of the mortgage, the latter may be perfectly valid subject to such prior charge. My previous order dismissing the application for stay of sale will therefore stand. In further protection of any possible rights of the plaintiff I direct that the application for payment out by the purchasers will be made on notice to the plaintiff.

K.S.

Application dismissed.

6. (1896) 1 Ch 958=65 L J Ch 472=44 W R 596=74 L T 417.

7. (1886) 17 Ch D 861.

A. I. R. 1933 Calcutta 433 (1)

GUHA, J.

Kaluram Daga—Appellant.

v.

Emperor—Opposite Party.Criminal Appeal No. 1109 of 1932,
Decided on 3rd March 1933.**Child Marriage Restraint Act (1929), S. 11 (1)**—Failure to record reasons for not requiring complainant to execute bond is material irregularity not curable by Criminal P. C. (1898), S. 537.

The provision contained in S. 11 (1), Child Marriage Restraint Act, is imperative and failure of a Magistrate to record any reason for not requiring the complainant to execute a bond is a material irregularity which cannot be cured by S. 537, Criminal P. C. [P 433 C 1]

Probodh Chandra Chatterjee and Bireswar Chatterjee—for Appellant.*Khondkar and Anil Chandra Roy Chaudhury*—for the Crown.

Judgment.—The appellant in this case has been convicted by the learned Chief Presidency Magistrate, Calcutta, under S. 6, Child Marriage Restraint Act, 1929 and has been sentenced to pay a fine of Rs. 500, in default to undergo simple imprisonment for a month. So far as the proceedings before the learned Magistrate was concerned, there has been a material irregularity in the matter of compliance with the provisions of the law under which the accused, appellant, was prosecuted on the complaint of a person who was the secretary of an Association described as the *Balya Bibaha Birodhini Samiti*. The Child Marriage Restraint Act provides for the taking of security from the complainant, and S. 11 (1) of the Act is as follows:

"At any time after examining the complainant and before issuing process for compelling the attendance of the accused, the Court shall except for reasons to be recorded in writing require the complainant to execute a bond with or without sureties, for a sum not exceeding Rs. 100 as security for payment of any compensation which the complainant may be directed to pay under S. 250, Criminal P. C., 1898; and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed."

The provision is imperative, and the learned Chief Presidency Magistrate has not recorded any reason why the complainant in this case was not required to execute a bond. The irregularity in the proceeding could not be cured by anything contained in S. 537, Criminal P. C., and the conviction of the accused is liable to be set aside for the reason of this material irregularity, seeing that

the right of the accused to get compensation was not kept in view, when the learned Magistrate proceeded with the trial in entire disregard of the provision contained in S. 11, Child Marriage Restraint Act. The procedure adopted by the learned Magistrate is open to this comment, that at the very inception the Court was convinced of the truth of the complainant's case. As the learned advocate for the appellant did not lay very great stress on the irregularity in the procedure referred to above, I do not propose to pursue the matter further. (After discussing the evidence, the judgment concluded.) On the whole the evidence on the record does not establish the case for the prosecution; and the inclination of my opinion as indicated above is that the defence version of the case is supported by the oral evidence in the case; the evidence afforded by the birth certificates produced in the case by the complainant is of an inconclusive nature, of which full advantage may be taken by the defence. In the above view of the case the appeal is allowed; the conviction of the appellant and the sentences passed on him by the learned Chief Presidency Magistrate under S. 6, Child Marriage Restraint Act, 1929, is set aside, and the appellant is acquitted. The fine imposed if realized must be refunded to the appellant.

K.S.

*Conviction set aside.**** A. I. R. 1933 Calcutta 433 (2)**

PEARSON AND PATTERSON, JJ.

S. N. Mukherjee—Petitioner.

v.

Krishna Dassi and others—Opposite Parties.

Criminal Revn. No. 786 of 1932, Decided on 1st March 1933.

(a) Companies Act (1913), S. 171—Prohibition in S. 171 does not override Criminal P. C., S. 145.

The provision in S. 171, Companies Act, that when a winding up order has been made no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court is not meant to override an express enactment in S. 145, Criminal P. C., by which a Magistrate, if satisfied that a dispute likely to cause a breach of the peace exists, is bound to call on the parties to attend his Court and put in their claims as regards actual possession. [P 484 C 1, 2]

(b) Criminal P. C. (1898), S. 145—Liquidator as such party to proceedings under S. 145—He is personally responsible for ac-

tion of his men although he be acting on behalf of the company.

Where the party to the proceeding is not the company, but liquidator, and though he happens only to be a party to the proceedings by reason of the fact that he is clothed with that character, for the purposes of a proceeding under S. 145 he is to be regarded as a separate personality responsible for the action of his men, though he may be in fact acting on behalf of the company. [P 434 C 2]

Santosh Kumar Basu and Satindra Nath Chatterji—for Petitioner.

Debendra Narain Bhattacharji and Apurba Charan Mukerji—for Opposite Parties.

Pearson, J.—This rule is directed against orders of the Magistrate passed in respect of proceedings under S. 145, Criminal P. C. The petitioner Mr. S. N. Mukherjee is the Official Liquidator of the Karatipara Mazumdar Estate, now in liquidation. The winding up order was passed by this High Court on 20th April 1931. The land in question is a small plot of which the first party Krishna Dassi was given a lease very shortly before the winding up order. Disputes came to a head in December 1931, when the liquidators' men started to put up a fence. Possession has been found to be with the first party, but objection is taken that the first party was out of possession for more than two months before the proceedings were drawn up. The Judge however points out that no such contention appears to have been raised in the first Court, and moreover the finding is that the first party was in possession and there was no dispossession.

A further argument before us was that the Magistrate had no jurisdiction to draw up proceedings against the liquidator without first obtaining the permission of the High Court. This argument is based on S. 171, Companies Act, which provides that when a winding up order has been made no suit or other legal proceeding shall be proceeded with or commenced against a company except by leave of the Court. That is a provision intended to safe-guard the company's assets against wasteful or expensive litigation in regard to matters which are capable of determination more expeditiously and more cheaply in the winding up. It would hardly seem reasonable to suggest that a prohibition of that kind is meant to override an express enactment in S. 145, Criminal

P. C., by which a Magistrate, if satisfied that a dispute likely to cause a breach of the peace exists, is bound to call on the parties to attend his Court and put in their claims as regards actual possession (the words are mandatory). If it were so, the result would be that in such cases the Magistrate would be powerless to prevent a breach of the peace. It is not a question of making an order disturbing the possession of the liquidator and consequently open to interference by the company Court on that ground. The question is whether the liquidator is in possession at all. He may be or may not be; but he claims that he is. It may also be that the prohibition in S. 171, Companies Act, is not in question here because it is not a case of a legal proceeding against the company. The party to the proceeding is not the company, but the liquidator, and although Mr. Mukherjee happens only to be a party to these proceedings by reason of the fact that he is clothed with that character, it may be that for the purposes of a proceeding under S. 145 he is to be regarded as a separate personality responsible for the action of his men in erecting the fence, though of course he was in fact acting on behalf of the company. It might be said that he is liable to such proceedings in his private capacity if it is his or his servants' action that raises the likelihood of a breach of the peace, and the Magistrate is not bound to look further to see what representative character he may have. I am of opinion however that we need not enter on a discussion of those considerations in the present matter.

When the dispute arose between the parties it appears that not only the other party, but also the liquidator and his party went to the police. He is equally responsible for the proceedings being initiated, and in effect invited the intervention of the police and the magisterial proceedings which followed. The liquidator in such case may be a party to the proceedings, but I am not satisfied that proceedings instituted in this manner can be said to be against the company. In that case he will be much more in the position of a man who has taken action in order to get the proceedings instituted, and if he had not the power to take such steps under the

order appointing him liquidator, it would be his own duty to go to the company Court under S. 179 for leave to institute or join in those proceedings for the protection of the interests of the company or he might have applied to the company Court for directions in the matter, for which the order-sheet shows there was ample time between the drawing up of the proceedings and the final hearing. In my opinion therefore in the circumstances of the present case the objection based on S. 171, Companies Act, also fails. The rule is discharged.

Patterson, J.—I agree.

R.K. *Rule discharged.*

A. I. R. 1933 Calcutta 435
Special Bench

RANKIN, C.J., PEARSON AND
MUKERJI, JJ

on difference between

MITTER AND M. C. GHOSE, JJ.

Jiban Krishna Chakrabarty—Plaintiff
—Appellant.

v.

Abdul Kader Chowdhury—Defendant
—Respondent.

Appeal No. 47 of 1932, Decided on 13th March 1933, against order of Dist. Judge, Chittagong, D/- 10th July 1931.

(a) Bengal Tenancy Act (as amended by Act 4 of 1928), S. 48 (c)—Under raiyat without written lease—Notice to quit served before coming into force of amending Act but agricultural year expiring only after coming into force of amending Act—Amending Act does not apply.

An under-raiyat without any written lease was served with a notice to quit by the landlord on 12th April 1928 so that he became liable under S. 49 of the old Act to be ejected on 13th April 1929, i.e., on the expiry of the agricultural year 1928-29. The amending Act 4 of 1928, which came into force on 21st February 1929, repealed S. 49 and a new S. 48 (c) was introduced. In a suit by the landlord for ejectment of the under-raiyat on the expiry of the agricultural year, the tenant contended that the amending Act applied and that he was not liable to be ejected.

Held: that the amending Act was not retrospective, that it did not affect the rights of the parties under the tenancy acquired before the amending Act and that the landlord was entitled to eject the tenant on the expiry of the agricultural year. [P 440 C 2]

(b) Bengal Tenancy Act (1885), S. 49—Failure to specify period within which under-raiyat should quit does not make notice bad.

A complete failure to specify the period within which the under-raiyat is required to quit does not make the notice bad: 29 Cal 231;

1 C W N 133; 28 Cal 308; 19 I C 537; A I R 1924 Cal 520 and A I R 1918 Cal 917, *Ref.*

[P 440 C 1]

(c) Interpretation of Statutes—Retrospective effect should not be given to statute so as to impair existing rights unless language of statute expressly says so.

Per Mitter, J.—A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only: AIR 1927 P C 212 and *Colonial Sugar Refining Co. v. Irving*, (1905) A C 369, *Rel. on.* [P 437 C 1]

Radhabenode Pal and Narendra K. Das—for Appellant.

Gopendra Nath Das—for Respondent.

Mitter, J.—This is an appeal against an order of the Additional District Judge of Chittagong remanding a suit to the Court of the Subordinate Judge of that district for retrial in accordance with law. The suit in which this appeal arises was brought by the plaintiff, now appellant, for a declaration of plaintiff's raiyati right to the lands mentioned in the plaint and for eviction of the defendant from the same. There is also a prayer for recovery of the rent in kind with damages and mesne profits. Plaintiff alleged that there was a service of notice upon the defendant under S. 49, Ben. Ten. Act, but as the defendant refused to vacate, the present suit has been brought. The defence to the suit is that no notice was served on him and that the defendant had acquired permanent rights in the under-tenancy. Several issues were framed in the suit and the Court of first instance found that as the pottah granted by the plaintiff creating a kaimi dar raiyati right in the defendant offended against the provisions of S. 85, Ben. Ten. Act, as it stood before the amendment by Act 4 of 1928 (B.C.), it must be treated as non-existent and the under-raiyati must be regarded as one without a written lease. He held further that there has been proper service of notice under S. 49 and the tenancy was thereby determined. He accordingly decreed plaintiff's suit in part declaring his raiyati title to the disputed lands and directing recovery of khas possession; plaintiff's claim for price of bhag paddy was also decreed.

On appeal the lower appellate Court was of opinion that the suit should have

been decided under S. 48.C of the amended Bengal Tenancy Act and not under old S. 49 (b) of the Act as it stood before the amendment. He held that the learned Subordinate Judge having based his decision on an absolute section of law there was no proper trial of the appeal before him and the suit should be remitted to the Subordinate Judge for retrial. Against this order of remand the plaintiff has preferred the present appeal and it is contended that the notice under S. 49 (b) having been given on 13th April 1928 before the new amended S. 48.C came into force the tenancy was determined on 13th April 1929 although by that time the Bengal Tenancy Amendment Act had come into operation. It is argued that no retrospective operation can be given to a Statute unless retrospective operation is either expressly given or is to be inferred by necessary implication. I am of opinion that this contention must prevail. S. 49 (b) runs as follows:

"An under-raiyat shall not be liable to be ejected by his landlord except when holding otherwise than under a written lease for a term at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord."

The notice given under this section expired at the end of the agricultural year, i.e., on 13th April 1929. The right to evict accrued in the plaintiff as soon as a proper notice to quit was given although the right could not take effect in possession till 13th April 1929 when the new Act came into operation. Once a notice is given the tenancy will inevitably be determined upon its expiration and Courts have gone so far as to hold that when the notice to quit is given by the landlord or tenant the party to whom it is given is entitled to insist upon it and it cannot be withdrawn without consent of both: see *Taylor v. Wildin* (1). As Baren Bramwell has put it in the same case:

"A tenant from year to year has an interest in the land for so long as neither party gives a six months' notice to quit, when that is done the estate is determined."

These observations of Bramwell, B., have been approved of in *Freeman v. Evans* (2) (at p. 46) Warrington, L.J., said:

"Bramwell, B. put the point in the neatest and

most precise terms that could be used. He said if the notice to quit is given the tenancy is at an end."

On the expiration of the agricultural year plaintiff's right would take effect in possession but he had vested right to evict the moment the notice was given i.e., 13th April 1928. The great jurist, Austin, in his lectures on Jurisprudence has drawn prominent attention to two classes of vested rights and it is instructive to reproduce here what the learned jurist says on this topic, for it is pertinent to the matter under consideration in this appeal:

"Before I proceed to contingent rights, or to chances or possibilities of rights, I must remark that vested rights or rights properly so called, are divisible into two classes: first present or vested rights which are coupled with a, present right to enjoyment or exercises: secondly present or vested rights which are not coupled with a right to present enjoyment or exercise: For example: If I am absolute owner of land or a moveable not subject to a right in another of limited duration, I have not only a present right to or in the subject, but also a right to the present possession of it, that is to say, a present right to enjoy or exercise my present right of ownership. But if the subject be left to another, I have a present right of ownership without a present right to exercise my right of ownership. I have merely a reversion, expectant on the determination of the lease, and which till the lease determine, cannot take effect in possession: see Austin's Jurisprudence, Vol. 2, p. 857."

The right of the landlord in the present case falls within the second class of vested rights. The plaintiff has a right to the reversion expectant on the determination of the under-tenancy. The under-tenancy is determined on the expiration of the period of the notice which is one year from the date of service. The legal effect of the notice to quit under S. 49-B, Ben. Ten. Act, is to determine the tenancy on the expiration of the agricultural year. The landlord has a vested right to require the tenant to abandon possession at the end of the agricultural year following the year in which notice is given and the legislature cannot interfere so as to impair this vested right unless the legislature intended the amending Act to be retrospective in its operation either by express enactment or necessary intendment. A vested right is one in respect of which all the events necessary to bring it into existence and vest it in a party has happened. Notice to quit has been duly given under the old Act and the right to evict the under-tenant

1. (1868) 9 Ex 308=37 L J Ex 178=16 WR 1018=18 LT 655.

2. (1922) 1 Ch 86=31 LJ Ch 195=125 LT 722.

on the expiration of the notice has vested in the landlord from the moment of the notice, and cannot be affected by change of legislation before the expiration of the period of notice.

It was not a mere contingent right as on the expiration of the agricultural year the tenancy will inevitably be determined. So also *Foa on Landlord and Tenant*, Edn. 6, 683. The coming into operation therefore of the amended Bengal Tenancy Act, 1928 could not take away from the right of the plaintiff landlord to evict on expiration of the notice. The next provisions of S. 48-C, Ben. Ten. Act, cannot touch the right of the landlord to evict the tenant at the expiration of the agricultural year, a right which was in existence at the passing of Act 4 of 1928 as it is not in accordance with sound principles of interpreting Statutes to give them a retrospective effect: see the observations of Lord Lindley in *Mohammad Abussamad v. Kurban Husein* (3). No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In a recent decision of *Delhi Cloth and General Mills Co. v. Income-tax Commissioner* (4), their Lordships of the Judicial Committee approved of this rule of construction and observed as follows:

"The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the *Colonial Sugar Refining Co. v. Irving* (5) where it is in effect laid down that while provisions of a Statute dealing merely with matters of procedure may properly unless that construction be textually inadmissible have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment: see also *Oadar Ali v. Doliluddin* (6), *Nepra v. Sajar Pramanik* (7)."

3. (1904) 26 All 119=31 I A 80 (P O).

4. A I R 1927 P O 242=54 I A 421=106 I O 156 (P O).

5. (1905) A O 869=74 L J P O 77=21 T L R 518=92 L T 738.

6. A I R 1928 Cal 640=56 Cal 512 (FB).

7. A I R 1927 Cal 768=55 Cal 67=103 I O 662.

I have examined the provisions of S. 48-C and I can find nothing in this section to justify the conclusion that it was intended to touch existing rights. A reference has been made to Cl. (d) and Prov. 2, Cl. (2), S. 48-C by the learned advocate for the respondent as justifying an inference that the provisions were retrospective. I cannot agree with his contention. It has further been argued by him that the landlord acquired no rights till after the expiration of notice. I have already answered this contention in an earlier part of my judgment. The learned advocate for the respondent has relied on *R. v. Magwan* (8). That was no doubt the former view. As is pointed out by Maxwell in his Interpretation of Statutes that where an Act expired or was repealed it was formerly regarded in the absence of provision to the contrary, as having never existed except as to matters and transactions past and closed. Where therefore a penal law was broken the offender could not be punished under it if it expired before he was convicted although the prosecution was begun while the Act was still in force, and *R. v. Magwan* (8) is cited in support: Maxwell 728, Edn. 6. But the learned author points out that since then under the provisions of 38 (2), Interpretation Act of 1889 and repeal by that Act or any subsequent Act, unless the contrary intention appears does not affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, and these are precisely the words of S. 6, Cl. (b) or Cl. (c), General Clauses Act of 1897, by which the present case is governed. *R. v. Magwan* (8) is therefore not good law now either in England or India as Maxwell points out that that was the former view.

Under S. 6 (b), General Clauses Act of 1897, the operation of the notice duly given under the previous enactment cannot be affected by any new enactment under S. 6, Cl. (c), nor can it affect any right to determine the tenancy acquired under the Tenancy Act before its amendment by Act 4 of 1928 (B. C.). For the above reasons this appeal should be al-

8. 8 A & E 496.

lowed and the case should be sent back to the Additional District Judge in order that he may rehear the other questions raised by the appeal before him and proceed to determine the same in accordance with law. The appellant is entitled to costs of this appeal. We assess the hearing-fee at one gold mohur. I regret very much I have to differ from my learned brother, but after the best consideration that I have been able to give to the case I can come to no other conclusion than that reached by me.

M. O. Ghose, J. — This appeal arises out of a suit by the plaintiff landlord to recover khas possession by evicting the defendant under-raiyat after a notice under S. 49 (b), Ben. Ten. Act, as it was in 1928. The notice was served on 13th April 1928, the cause of action arose on 13th April 1929 and the suit was brought on 15th April 1930. The primary Court decreed the suit. The lower appellate Court has set aside the decree of the primary Court and remanded the case for retrial in accordance with the amended Bengal Tenancy Act. The relevant words of S. 49 (b) are these :

"An under-raiyat shall not be liable to be ejected by his landlord except at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord."

This section was repealed on 21st February 1929. The question is what the effect of the repeal is in the circumstances of this case. The learned advocate for the plaintiff has argued that the right to evict the tenant accrued to the plaintiff as soon as he served the notice and although S. 49 (b) was repealed before the notice ran its course the notice having been given would inevitably upon its expiration determine the tenancy. The case of *Taylor v. Wildin* (1) was quoted in support of the argument. I am of opinion that the facts of that case are different from the facts of this case. There one Morgan was a yearly tenant of the plaintiff and in consideration of the plaintiff continuing Morgan's tenancy of the farm, the defendant gave the plaintiff a guarantee for the rent of the farm in the occupation of Morgan. Afterwards Morgan fell into arrears and the plaintiff gave him notice to quit the farm on the expiration of the current year's tenancy. But before the expiration of the notice the arrears were paid by Morgan and the plaintiff withdrew the notice. The fol-

lowing year Morgan was again in arrear of rent. The plaintiff sued the defendant on the above guarantee. Their Lordships held that the old tenancy was determined by the notice to quit, that the guarantee applied only to the tenancy which existed at the time when it was given, that that tenancy having expired by the notice the defendant was not liable on the guarantee. In that case the law remained the same during the period of the notice. In this case however the enactment upon which the notice was based was itself changed before the expiration of the notice. It is urged for the respondent that the operating point of time was not the date when the notice was given but the date when the notice was due to expire and as the enactment was changed before the date of expiration the notice was of no effect. The learned advocate for the respondent has quoted Craies on Statute Law, Edn. 3, p. 345, where it is stated :

"In order to decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was complete or incomplete at the time the Act was repealed. Thus, if an Act gives right to do anything, the thing to be done, if only commenced but not completed before the Act is repealed, must upon the repeal of the Act be left in statu quo. If by virtue of some statute a right becomes vested upon the completion of some certain transaction, but not before, no right whatever will have been acquired if the statute in question is repealed before the transaction is complete : *Mac Millan v. Dent* (9)."

It was urged by the learned advocate for the plaintiff-appellant that the amendment should not be allowed to have retrospective effect, and that no amendment should be allowed to touch a vested right. I am of opinion that a vested right means a right which a person has acquired or which has accrued to him. The question here is on what date did the plaintiff acquire the right to evict the tenant. S. 49 (b) is quite clear that the right to evict does not arise except at the end of a year after service of notice. Therefore no right had accrued to the plaintiff on the date when S. 49 (b) was repealed. S. 6, General Clauses Act, provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed or affect any legal proceeding or remedy in respect of such right. In this case the right to evict the tenant was not

due to be acquired until after the repeal of the enactment. On these grounds I am of opinion that the judgment of the lower appellate Court is correct. I would dismiss the appeal with costs.

On this difference of opinion, the following question was referred to a Bench of three Judges. A notice was given by the landlord to an under-tenant under S. 49 (b), Ben. Ten. Act, before its amendment by Act 4 of 1928 (B. C.) to quit at the end of the agricultural year following the year in which notice is given and before the period of the notice expires. S. 49 (b) is substantially altered by Act 4 of 1928. The question is whether the new Act which is not retrospective in its operation can affect the effect or operation of the notice. One of us thinks that the right to evict the under-tenant vests in the landlord from the date of the notice although the right does not take effect in possession till after the expiration of the period of the notice, and that this right is not affected in view of 6 (b) and (c) of the General Clauses Act, 1897; the other of us thinks that the right to evict the under-tenant vests in the landlord not on the date of the notice but on the expiration of the notice. If the former view is right then the amending Act 4 of 1928 does not apply; if the latter, then the amending Act applies. The question is which view is right?

Judgment.

Rankin, C. J.—In this case the learned Judges of a Division Bench hearing the appeal have differed in opinion upon a question of law which has been stated and referred to us under Cl. 36, Letters Patent. The suit was a suit for ejectment and for certain other reliefs with which we are not now concerned. It was found by the trial Court that the plaintiff was a raiyat and that though he had purported to grant a permanent interest to the defendant by a registered patta this instrument was, at the date of its execution, invalid by reason that it offended against the provision of S. 85, Ben. Ten. Act, so that for purposes of ejectment the position of the defendant was that he was an under-raiyat without any written lease; and that accordingly, under S. 49, he was liable to be ejected at the end of the agricultural year, provided that in the previous agricultural year the plaintiff had served upon him a

notice to quit. The facts alleged by the plaintiff and found by the trial Court to have been proved are: that before the end of the agricultural year 1927-28, namely, on 12th April 1928, the defendant was duly served with a notice to quit, so that he became liable under S. 49 to be ejected on 13th April 1929, that is to say, on the expiry of the agricultural year 1928-29.

The foregoing references to the Bengal Tenancy Act refer to that Act as it stood before it was amended by Bengal Act 4 of 1928 which came into operation on 21st February 1929, about two months before the date on which the plaintiff became entitled to evict the defendant under the previous law. By the amending Act, S. 49, together with certain other provisions governing the ejectment of under-raiyats, was repealed and was replaced by a new section, viz., S. 48-C. In lieu of the provision that an under-raiyat shall not be liable to be ejected by his landlord, when holding otherwise than under a written lease except at the end of the agricultural year next following the year in which notice to quit is served upon him by his landlord, the provision under the amending Act is that an under-raiyat shall, subject to the provisions of this Act, be liable to ejectment on the ground that the tenancy has been terminated by his landlord by one year's notice expiring at the end of the agricultural year when he holds the land otherwise than under a written lease, provided that an under-raiyat shall not be liable to be ejected on this ground if he has been admitted in a document by the landlord to have a permanent and heritable right to his land, or been in possession of his land for a continuous period of 12 years or has a homestead thereon. Moreover, under the new Act, he cannot be ejected, even if he does not come within the terms of this proviso, unless the landlord satisfies the Court that he requires the land for his own homestead or for cultivation by himself or by members of his family, or by hired servants, or with the aid of partners. The amending Act does not contain any provision giving to it retrospective effect.

In the trial Court the case was treated as arising under the old law and on the assumption that the new Act did not affect it. The lower appellate Court held

that the case must be governed by the provisions of the new Act and remanded it to the trial Court to be dealt with thereunder. In this Court Mitter, J., has taken the view that the new Act does not apply to the case. M. C. Ghose, J., is of opinion that the new Act does apply to the case. This is the question for our opinion. Now it will be noticed that Cl. (d) of the new S. 48-C is expressed somewhat differently from Cl. (b) of the old S. 49. S. 49 did not prescribe that the notice should be a notice for any given period; as long as it was a notice to quit, and whether it specified any period or not, the landlord would be entitled at the end of the following agricultural year to eject the tenant, but in no circumstances could the tenant be ejected before that time. A complete failure to specify the period within which the under-raiyat was required to quit did not make the notice bad: *Mohendra v. Biswanath* (10), *Naharullah v. Madan Gazi* (11), *Dwarka Nath v. Rani Dassi* (12), *Harifullah v. Binode* (13), *Purna v. Ali Mahammad* (14) and *Chandi Charan v. Somla Bili* (15). It seems to me that the new Act cannot safely be interpreted in the same way. What the landlord has now to give is one year's notice expiring at the end of the agricultural year. It is more than probable that many notices were given in the course of 1928 which would not be held to be good notice under the new law. The clause having been re-drafted, I do not think that in the absence of express provision, we can hold that after February 1929 no under-raiyat is to be ejected on the ground of notice to quit unless he has had the notice which the new Act requires. If the new provision as to notice had been exactly the same as the old, it may well be that a different view could be taken; it may well be also that the case of a written lease for a definite term expiring after the commencement of the new Act, that is, the case contemplated by the old S. 49, Cl. (a) and new S. 48, Cl. (c) will require to be decided upon other lines. On this point I desire to say that when that question comes up for decision, I am not, as at

present advised, prepared to say that the reasoning of Mitter, J., in the present case will conclude the matter. I am of opinion however that in the case before us, whatever be the form of the notice which was actually given by the plaintiff to the defendant, the amending Act does not affect the rights of the parties and I would therefore agree with Mitter, J., in his conclusion and in the order which he proposes to make. I propose that the costs of the hearing before us be made costs in the appeal. Hearing fee three gold mohurs.

Pearson, J.—I agree.

Mukerji, J.—I agree.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 440

RANKIN, C. J. AND MUKERJI, J.

Assam Bengal Ry. Co., Ltd.—Appellants.

v.

Hari Mohun Pal and others—Respondents.

Letters Patent Appeal No. 25 of 1932, Decided on 13th March 1933, from judgment of Patterson, J., in Appeal No. 617 of 1930, D/- 8th July 1932.

Registration Act (1908), S. 49 — Unregistered lease can be referred to for collateral purpose.

Where the terms of a lease are incorporated in a letter by reference to the earlier lease-deed and if the new lease is a fresh lease altogether, the old one, even though unregistered can be referred to for a collateral purpose, for example, to show that the new arrangement was subject to same period of notice as the old. [P 441 C 1]

D. L. Kastgir and Sudhir Kumar Kastagir—for Appellants.

Upendra Kumar Roy—for Respondents.

Rankin, C. J.—Dinanath, father of the defendants held the land in suit on what I will assume to be a lease. He held it under an instrument dated 11th September 1919 which was not registered though it purported to be for a period of ten years (subject to three months' notice on either side) from 14th July 1917. Dinanath died in November 1918 and the defendants as his heirs continued his possession. On 7th December 1926 the defendants applied for a temporary lease and offered to pay in advance the annual rent to be fixed by the agent. They deposited Rs. 25, as advance rent with their proposal form as well as Rs. 10, for stamps for their new agreement. Their proposal form

10. (1902) 29 Cal 281=6 C W N 183.

11. (1897) 1 C W N 183.

12. (1901) 28 Cal 308.

13. (1918) 19 I C 557.

14. A I R 1924 Cal 520=70 I C 999.

15. A I R 1918 Cal 917=44 I C 254.

made no reference to the lease of Dinanath. On 1st April 1927, that is before the original term of Dinanath had expired, they received from the plaintiffs a letter saying:

"the lease granted to your father Dinanath Pal which was subsequently cancelled has again been given to you at an annual rent of Rs. 25 for ten years."

It may be doubted whether this was in strictness an acceptance of the defendant's proposal, but I will assume that it was an acceptance and not a new offer. On 18th June 1927 the plaintiffs sent to defendants a bill for rent from 19th May 1927 to 31st March 1928 at the rate of Rs. 125 per annum giving credit for Rs. 25 as paid in December 1926. The defendants refused to pay rent at this rate and on 8th September 1927 the plaintiffs gave notice to quit at the end of three months' from the last day, September 1927. The notice recites that the defendants are in occupation as heirs of Dinanath and purports to terminate his "license."

The letter of 1st April 1927 was put in evidence by the defendants. If it can be received as evidence of a fresh tenancy, the question arises whether the terms of Dinanath's lease can be referred to to show that the new arrangement was subject to three months' notice. I am of opinion that they can and that want of registration of the original lease does not prevent this. The terms are incorporated in the letter by reference to the earlier document and if the new lease was a fresh lease altogether as defendants contend, the old one can be referred to for a collateral purpose. The defendant's case before us is that they were not holding under the old lease at all, but under a new one. To find the terms of the new one, so runs the argument in this Court, we cannot look at the letter because it is not registered. The question is, can the defendants on this evidence, not as an abstract possibility, but on this evidence, prove a fresh tenancy without the letter? In my opinion they cannot. The proposal form by itself proves nothing. The repudiated bill of 18th June 1927 is against them. There is no proof that Rs. 25 was accepted as a year's rent under a new tenancy save the letter of 1st April 1927. That cannot be taken as proof of a new tenancy save upon terms which put the

defendants out of Court. It is idle to say that as proof of acceptance of rent it is proof of a new tenancy contrary to its terms.

I agree with the Subordinate Judge that the notice to quit is not on any view rendered invalid by reason of the recital. If it be said that the plaintiffs cannot proceed on the terms of the original tenancy as to notice, because these are not proved for want of registration of the instrument of 11th September 1919, the answer is that this argument was disclaimed before us by the defendant's advocate, and for good reason. The pleadings were badly drawn, but the original terms were not denied on the pleadings, nor were they questioned by the issues and they need not be proved now. I would allow the appeal with costs before us and before the learned Judge and restore the decree of the Subordinate Judge.

Mukerji, J.—I agree.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 441

RANKIN, C. J. AND MUKERJI, J.

Panchanan Maity and others—Appellants.

v.

Priyanath Maity and others—Respondents.

Letters Patent Appeals Nos. 15 to 19 of 1932, Decided on 2nd March 1933.

Bengal Tenancy Act (1885), S. 29—Reclamation lease to plaintiff for 40 years at progressive rent—Plaintiff settling lands on tenants for fixed rent—Contract by tenants to pay rents whenever increased by Government in addition to rent fixed—S. 29 does not debar plaintiff from claiming such amount from tenants.

Government gave a reclaiming lease to plaintiff for 40 years on progressive rent. He settled the land on tenants under kabuliyaat whereby the tenants were to pay him a certain rent. It was also provided that whenever he had to pay more rent to the Government, the tenants were, in addition to rent fixed, liable to pay such rent also. In a suit by the plaintiff for recovery of such rent:

Held: that S. 29 did not apply to the case, as the claim of plaintiff was not in conflict with Cl. (b) and as Cl. (c) did not prevent him from entering into a second contract, as in this case, to recover the lease amount. [P 443 C 1]

Sarat Chandra Basak and Sarat Chandra Janah—for Appellants.

Sarat Chandra Bose, Santosh Kumar Paul and Saroj Kumar Maity—for Respondents.

Rankin, C. J.—In this case the landlord, plaintiff in the five rent suits, has appealed from the decision of my learned brother M. C. Ghose, J., sitting in second appeal. The lands in question are in the Sunderbans and it appears that in 1900 the Government gave a reclaiming lease to the appellant for 40 years at a progressive rent. It was to be rent free for 15 years, after 1915 and until 1920 the landlord was to pay the Government 2 annas per bigha and from 1921 until the end of the term 1940 the landlord was to pay the Government 4 annas per bigha. Now, the landlord settled the land or part of the land which he had taken with the defendants among others in 1907 and as regards the five cases before us in all those except the one with which Letters Patent Appeal No. 18 is concerned, there are kabuliyats. It appears that the tenants may have been inducted before the date of the kabuliyats but the kabuliyats were taken. It is contended for the landlord that the meaning of Cl. 8 of the kabuliyat is that a certain amount in each case is to be paid, to begin with, as rent, and that the stipulation is that when the time comes and the landlord has to pay to Government 2 annas or 4 annas, as the case may be, the tenants will pay that in addition to the rent first mentioned. It is contended on the other hand by Mr. Bose for the respondents that the clause has no such meaning but that it is directed to possible events that might happen on the determination of the landlord's lease, that is to say, after 1940.

As regards that I am satisfied that the construction which has been put upon this clause by all the Courts is right and that the only reasonable meaning is that as and when the landlord becomes liable to pay the Government 2 annas or 4 annas per bigha the proportionate amount shall be added to the amount of rent mentioned above, the result being that the amount fixed in the kabuliyat is always to go to the landlord as profit. On that assumption the matter has been discussed and the question is whether the landlord can now claim to get an addition to the rent mentioned (in each case 4 annas per bigha) from the tenant. It is contended on the part of the tenants that S. 29, Bengal Tenancy Act, interferes with the contract and prevents the landlord from making this

claim and the first question which we have to consider is whether S. 29 applies in this case at all. Now, the facts are that at the date of the contracts for the tenancies these defendants were not occupancy raiyats at all; that it was not until after 1912 that these lands were declared to be a village, and these tenants came to begin to acquire occupancy rights; and it was not until later, 1925, when retrospective effect was given to what took place in 1912 that the date on which they can be deemed to be occupancy raiyats was fixed as 1919. So that we may take the facts of this case to be that until 1919 these defendants were not occupancy raiyats but that by virtue of retrospective legislation they must now be treated as having been occupancy raiyats from 1919. It is clear enough therefore that S. 29 had no bearing upon the matter prior to 1919. In 1916 therefore the contract for 2 annas more was a perfectly good contract so far as S. 29 is concerned and the amount payable by the tenant under the contract was 2 annas in addition to the sum mentioned in the kabuliyat. Now to that two objections have been taken. First of all, it is said that in point of fact there is a dispute whether 2 annas was exacted when it became due in 1916. To that, it seems to me, the obvious answer is that it does not matter whether it was exacted or not. So far as the tenants who have given kabuliyats are concerned it became payable and it was the rent which they owed to the landlord in that year.

The next point is this: There is a finding of fact from the final Court of fact that the extra two annas was exacted in 1916. The learned Judge in this Court has set aside that finding on the ground that it is contrary to the landlord's own statement in his plaints, he being under the impression that in these plaints or in some of them there is an express statement that the landlord did not receive this rent from the year 1916. We have had these plaints examined and it appears that the learned Judge was misinformed. In one case there is a clear and satisfactory statement, that is in Suit No. 655, that two annas was exacted at or about this time. In others there is no explicit statement to that effect because the pleader drafting the plaint goes straight to the later position

when 4 annas became payable but in no case is there anything in the body of the plaint to show that the amount of 2 annas extra was not exacted in 1916. The result is that in 1916 the rent due was 2 annas more than the lump sum and that was the position when in 1919 these tenants became occupancy raiyats. Is there therefore any reason either under S. 29, Bengal Tenancy Act, or otherwise why in 1921 or thereabout the tenant should not be made liable to pay 2 annas more, the landlord having to pay 2 annas more to the Government? Now the only clause in S. 29 which is said to bar this is Cl. (b) which prevents the rent being enhanced by contract by more than 2 annas in the rupee. If we take the basis of the rent as it existed in 1919 and add 2 annas per higha, it is clear enough that the limit put by Cl. (b) is not exceeded at all. In my judgment S. 29 has no application whatever to these cases. But assuming that it has application to these cases as in 1919, the only clause which is called in aid of the defendants is Cl. (b) and the claim of the landlord does not conflict with Cl. (b). As regards Cl. (c) what the statute deals with is not a second contract by an occupancy raiyat to enhance his rent. What it says is this :

"The rent fixed by the contract shall not be liable to enhancement during the term of 15 years."

It does not prevent a man from making another contract but prevents the landlord from insisting upon any further enhancement. That is the meaning of the clause. For these reasons I am of opinion that in those cases other than the Letters Patent appeal No. 18 the Letters Patent Appeals should be allowed with costs and the decision of the learned Subordinate Judge restored. As regards Letters Patent Appeal No. 18 the position is most unsatisfactory as it appears from the record. It appears that the plaintiff put forward a kabuliyat and gave some evidence to show that this kabuliyat was entered into by the tenant or his predecessor. The Munsif however was not apparently satisfied with that evidence though he does not mention the matter in his judgment but merely says that he is not satisfied that it is proved that this tenant paid the rent he is alleged to have paid in 1916. He does not seem to deal with the ques-

tion at all beyond that. When the cases came before the lower appellate Court the lower appellate Court dealt with them on the footing that it was admitted that all the five tenants paid rents under kabuliyats. As regards this matter we have it further that the tenant himself was called into the witness-box and he said that he paid rent at the rate of Rs. 6-2-5 and this rent the Munsif decreed. It is just possible that there was some admission before the lower appellate Court but if so it has not been properly recorded. The learned Judge in this Court, did not think it fit to send the case back. So in that view this Letters Patent appeal is dismissed with costs.

Mukerji, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 443

MALLIK AND JACK, JJ.

Bankim Chandra Dutta and others—
Appellants.

v.

Khagendra Nath Ganguli and others—
Respondents.

Appeal No. 49 of 1933, Decided on 7th March 1933, from decree of Addl. Dist. Judge, Hooghly, D/- 23rd November 1932.

(a) Bengal Municipal Act (1884), S. 27—
Vacancy caused by resignation of chairman
—Person who has so resigned is disqualified from bye-election.

Section 27 clearly excludes the person whose resignation or removal caused the vacancy that is to be filled up and that being so it is clearly a disqualifying section, disqualifying from the bye-election the person by whose resignation or removal the vacancy was caused. [P 444 C 2]

(b) Bengal Municipal Act (1884), Ss. 22 and 27—"Elected or re-elected in S. 22 means elected or re-elected except at bye-election under S. 27—Interpretation of Statutes.

It is a recognized rule of interpretation that the words of a statute should be so construed as would bring them in harmony with the other provisions of that statute, provided of course the interpretation does no violence to the meaning of which they are naturally susceptible. The apparent inconsistency between Ss. 22 and 27 can be removed if the term "elected" or "re-elected" is taken in a somewhat limited sense, in the sense that it means "elected" or "re-elected" except at a bye-election under S. 27. [P 445 C 2]

(c) Bengal Municipal Act (1884), S. 27—
Expression "another person" excludes person who has resigned.

The expression "another person" in S. 27 excludes the person whose resignation or removal has caused the vacancy to be filled up. [P 445 C 1]

(d) Bengal Municipal Act (1884), — Business Rules of Howrah Municipality, R. 34-B — Two persons validly proposed and seconded as candidates for chairman's place—One of them disqualified under S. 27—Other candidate cannot be deemed to be elected unless declared to be elected at meeting to be held subsequently.

Two persons were validly proposed and seconded as candidates for chairman's place at a bye-election. Objection was raised that one of them was disqualified as the vacancy had arisen owing to his own resignation. The meeting was adjourned to a later date. In a suit filed before date of meeting to have the other candidate declared elected:

Held: that he could not be declared to have been elected as the meeting was not yet over and as the objection raised was not disposed of and as the chairman had not declared him to be elected: *John Pritchard v. Mayor Alderman and Citizens of Borough*, (1898) 18 A C 241; *Harford v. Linskey*, (1899) 1 Q B 862 and *King v. Bridge*, 105 E R 29, *Ref.*

[P 445 C 2]

Amarendra Nath Bose, Jatis Chandra Banerjee and Parimal Mukherjee — for Appellants.

Manmatha Nath Roy, Surjya Kumar Aich, Atul Chandra Gupta and Prem Ranjan Roy Choudhuri — for Respondents.

Mallik, J.—This appeal arises out of a certain proceeding of the Municipality of Howrah, held on 18th April 1932. One Mr. B. P. Pain who was the Chairman of the Municipality, resigned on 4th March 1932. His resignation was accepted by the Local Government on the 24th of that month. Thereafter, on 18th April 1932, there was a general meeting of all the commissioners for the purpose of electing a new Chairman in the vacancy caused by the resignation of Mr. Pain. At that meeting three commissioners were proposed and seconded. They were Mr. B. C. Dutt, Mr. B. P. Pain and S. N. Kar. Mr. S. N. Kar withdrew. A question was raised by one of the commissioners that Mr. Pain having resigned, was no longer eligible for being re-elected in view of the provisions of S. 27, Bengal Municipal Act 1884. After some discussions the meeting was adjourned to 18th May 1932. Before the adjourned meeting could be held the plaintiffs who are eight of the commissioners, instituted a suit on 16th May 1932 against the remaining twenty-two commissioners, in the Court of the Munsif at Howrah for a declaration: (1) that Mr. Pain who was defendant 1 was not eligible for re-election in the vacancy

caused by his own resignation; (2) that Mr. B. C. Dutt plaintiff 1, should be declared to have been elected Chairman under S. 34-B of the business rules of the Howrah Municipality; and (3) for an injunction restraining the defendants from putting forward Mr. Pain as a candidate for re-election as Chairman in that vacancy and from voting for him at any meeting for filling up that vacancy. The Court of first instance held that Mr. Pain was not eligible and it granted the injunction that was prayed for. It held also that Mr. Dutt, plaintiff 1 could not be declared to have been duly elected as Chairman. An appeal was taken before the District Judge against the decision of the Munsif on the second point and a cross-objection also was filed before him. The lower appellate Court reversed the decision of the trial Judge on the first point and held that Mr. Pain was eligible and made the consequential order that the meeting for re-election should go on. The learned District Judge agreed with the Munsif in the view that Mr. Dutt could not be declared to have been duly elected. Against this decision of the learned District Judge the plaintiffs have come up to this Court in second appeal.

It appears that there was a certain amount of controversy in the lower appellate Court over the relationship between S. 23 (2) and S. 27, Bengal Municipal Act, and the District Judge held, and in my opinion rightly held, that S. 23, sub.S. (2) is the real section which confers upon the commissioners the right to elect a Chairman either at an original election or at a bye-election, the latter being governed by the particular provisions of S. 27 of the Act. On behalf of the respondents it was said that S. 27 only lays down a procedure and is not a disqualifying section. There is no authority however for saying so. S. 27, as it stands, clearly excludes the person whose resignation or removal caused the vacancy that is to be filled up; and that being so, it is clearly a disqualifying section, disqualifying from the bye-election the person by whose resignation or removal the vacancy was caused. Now S. 27 runs thus:

"If any Commissioner, Chairman or Vice-Chairman shall be unable to complete his full term of office or shall avail himself of leave granted under S. 26-B, the vacancy caused by his resignation, or removal, or death or absence

on leave, shall be filled by the appointment or election as the case may be of another person . .

The chief controversy between the parties is whether the expression "another person" that is to be found in S. 27 really excludes the person whose resignation or removal has caused the vacancy to be filled up. The learned District Judge is of opinion that it does not; herein, in my opinion, he is clearly wrong. He thinks that the expression "another person" was put in by the legislature inadvertently without any realization of the inconsistency that it would, in view of S. 22, create, and in that view he has practically thrown out the expression altogether from the statute. This, in my opinion was a very violent thing to do, especially in view of the fact that by putting a certain interpretation a restricted meaning on one or two words in S. 22 of the Act from which the inconsistency arises, inconsistency may, as I will presently show, be removed and the two sections may be harmonized. S. 27 says that a Commissioner, Chairman or Vice-Chairman whose removal or resignation has caused the vacancy, can under no circumstances be elected at a bye-election. S. 22 says that a Commissioner (who I may observe at this stage, may become a commissioner either by appointment or election) who has been removed on certain grounds cannot be elected or re-elected without the consent of the Local Government, implying thereby that there would be no bar to his election or re-election when the consent of the Local Government is obtained.

This is not quite consistent with S. 27, at least so far as it relates to a Commissioner. But this inconsistency can, in my opinion, be removed if the term "elected" or "re-elected" is taken in a somewhat limited sense, in the sense that it means "elected" or "re-elected" except at a bye-election under S. 27. It is a recognized rule of interpretation that the words of a statute should be so construed as would bring them in harmony with the other provisions of that statute provided of course the interpretation does no violence to the meaning of which they are naturally susceptible. To put only a narrow and limited meaning to a word and to interpret the words "elected" or "re elected" in S. 22 as

meaning elected or re-elected except at a bye-election, would not, in my opinion, be doing any such violence. In this connexion, namely, what the true interpretation of the words "elected" or "re-elected" in S. 22 is, it is significant that the expression "at any time," which was to be found in the old S. 22, was deleted when that section was amended by the legislature in 1894. I would therefore hold, disagreeing with the learned Additional District Judge, that the expression "another person" in S. 27 of the Act has its ordinary grammatical meaning, that it would operate as a bar against Mr. Pain and that Mr. Pain is not eligible for election at the bye-election to fill up the vacancy caused by his own resignation.

As regards the second point in the case, viz., whether Mr. Dutt should have been declared to have been duly elected as Chairman at that meeting of 18th April 1932, a point which was found against the plaintiffs by both the Courts below, it is necessary to consider R. 34-B of the Rules of Business of the Howrah Municipality. The relevant portion of the Rule runs thus:

"If only one candidate for the office of Chairman is properly proposed and seconded the President shall declare such candidate to be elected."

On behalf of the appellants it was contended that as Mr. Pain was not eligible, the President of the meeting had before him only one candidate for the office of Chairman and as that one candidate was Mr. Dutt, the President should have declared him to have been duly elected. This contention, in my opinion, is not of much substance and in my opinion it should fail and that on more than one ground. In the first place it is to be observed that the meeting of the 18th was not brought to a completion and instead of being completed it was adjourned to 18th May. Then it cannot be said that the President in the present case had before him only one candidate properly proposed and seconded. Both Mr. Pain and Mr. Dutt had been proposed and seconded according to the provisions of the first portion of R. 34-B and the proposing and seconding of both of them were therefore perfectly valid in form and therefore proper: *John Pritchard v. Mayor, Alderman and Citizens of Borough (1), Harford v. Linskey* 1, (1895) 18 A C 241.

(2) and *The King v. Bridge* (3). The second prayer of the plaintiffs was therefore, in my opinion, rightly refused.

Then as regards the injunction, the trial Judge granted the prayer restraining the defendants from putting forward Mr. Pain as a candidate for re-election as Chairman, from voting for him at any meeting for filling up the vacancy caused by Mr. Pain's resignation. In view of what I have held on the first point in the case, the injunction was, in my judgment, perfectly justified. The result therefore is that the appeal will be allowed in part and the decree of the Court of first instance restored. In view of the nature of the case and the circumstances the parties will bear their own costs throughout.

Jack, J.—This appeal has arisen out of a suit by Mr. B. C. Dutt and seven others, Commissioners of Howrah Municipality for a declaration (1st) that Mr. B. P. Pain who has resigned his Chairmanship of the Municipality is not eligible for re-election to fill up the vacancy caused by his resignation; (2nd) that Mr. Dutt should be deemed to have been duly elected Chairman at the meeting held on 18th April 1932, and (3rd) for a permanent injunction restraining the defendants from putting forward Mr. Pain as a candidate for re-election as Chairman.

The Court of first instance held that the plaintiffs were entitled to the declaration that Mr. Pain was ineligible for re-election as Chairman and that they were entitled to the injunction asked for, but that they were not entitled to a declaration that Mr. Dutt had been duly elected. The lower appellate Court dismissed the suit entirely. The principal question in issue depends on the interpretation of S. 27, Bengal Municipal Act, which is as follows :

"If any Commissioner, Chairman or Vice-Chairman shall be unable to complete his full term of office, or shall avail himself of leave granted under S. 26-B, the vacancy caused by his resignation, or removal or death or absence on leave shall be filled by the appointment or election, as the case may be, of another person; . . ."

The defendants contend that this section only relates to procedure and that under S. 23 (2) of the Act, it is open to

the Commissioners to elect anyone in the vacancy and they are not debarred from re-electing the ex-Chairman. S. 23 (2) is as follows :

"The Commissioners of every municipality, the name of which is not included in the said schedule, shall at a meeting, elect one of their members to be Chairman, or may, whenever a vacancy occurs, at a meeting attended by not less than two-thirds of the Commissioners, request the Local Government to appoint a Chairman, and such a Chairman shall be appointed by name."

Reading these two sections together it is clear that between them they provide the means of filling up vacancies. When a vacancy occurs the Commissioners may act under the second part of S. 23 (2) and request the Local Government to fill up the vacancy or they may proceed under S. 27 to elect a Chairman to fill the vacancy, and in the latter case it is open to them to elect another person to fill the vacancy. The first part of S. 23 (2) has obviously nothing to do with filling up vacancies. There is no ambiguity whatsoever in the wording of these sections and where the meaning of a Statute is plain its wording cannot be altered on the conjecture that the legislature must have meant something else unless the adoption of the plain meaning would lead to an absurdity or manifest inconsistency. It is contended that S. 27 as it stands is inconsistent with S. 22 inasmuch as under the latter section an appointed or elected Commissioner who has been removed is eligible with the sanction of the Local Government for election or re-election, but under S. 27 he is not so eligible. S. 27 however does not make him ineligible but only prevents his re-election for the remainder of that term of office to fill up the vacancy. There is therefore no inconsistency in the two sections for "re-elected" in S. 22 does not necessarily mean elected in a vacancy, the words "elected" or "re-elected" corresponding to "appointed" or "elected" in S. 19. There being no inconsistency between S. 22 and S. 27 there is no possible excuse for altering the plain meaning of the Statute in S. 27.

The legislature obviously made no provisions for the case of a Chairman who resigned and immediately afterwards sought re-election; possibly the intention was to discourage this practice, but it is useless to conjecture why he was

2. (1899) 1 Q B 852=68 L J Q B 699=15

T L R 306=63 J P 203=47. W R 653=80

L T 417.

3. 105 E R 29.

made ineligible for re-election for that term of office. If he merely changed his mind and wanted to continue as Chairman the simple way was to withdraw his resignation. The plaintiffs are therefore entitled to the declaration that Mr. Pain is ineligible for re-election. They are obviously not entitled to a declaration that Mr. Dutt has been duly elected under S. 34-B of the Municipal Rules on the ground that no other candidate was properly proposed and seconded. Admittedly the meeting adjourned without the President of the meeting pronouncing anyone duly elected because he did not definitely decide the objection to Mr. Pain's candidature, the meeting being adjourned at that stage to let the Commissioners who voted for Mr. Pain, reconsider their position in view of the opinion of the Advocate-General that Mr. Pain was ineligible. When the meeting is resumed it should be open to the electors to put forward if they choose another candidate instead of Mr. Pain upon which there must be a fresh election. This they are entitled to do since they were not informed before the election that Mr. Pain was ineligible. As to the injunction it follows that the plaintiffs are entitled to the injunction asked for. The appeal is allowed in part and the decree of the Munsif is restored. The parties to bear their own costs throughout.

K.S. *Appeal partly allowed.*

A. I. R. 1933 Calcutta 447

PANCKRIDGE AND PATTERSON, JJ.

Fanindra Kumar Das—Complainant
—Petitioner

v.

Rahat Bux Choudhury, and others—
Accused—Opposite Parties.

Criminal Revn. No. 737 of 1932, Decided on 13th March 1933.

Criminal P. C. (1898), S. 202—Complaint referred to Magistrate for inquiry—Magistrate can examine person complained against but not permit him to be represented by lawyer and dismiss complaint after hearing argument.

A Magistrate to whom a complaint was referred for inquiry examined the accused and two other witnesses. The accused was permitted to be represented by a lawyer and after hearing the argument the Magistrate dismissed the complaint.

Held: that though the Magistrate did not act illegally in examining the accused, and witnesses, he was not justified in allowing the accused to be represented by lawyer and hearing

arguments, that the complainant was entitled to cross-examine the witnesses in a formal trial and that the order of dismissal should be set aside: *AIR 1928 Bom 290; 40 Cal 444; 88 I C 828 and AIR 1928 Cal 198, Ref.* [P 448 C 2]

J. C. Gupta, Hira Lal Ganguly, Bhagirath Chandra Das, Hari Das Gupta and Jnananath Borah—for Petitioner.

Khundkar and Anilendra Chandra Roy Choudhury—for the Crown.

Panckridge, J.—This Rule was issued on 15th August 1932 and calls on the District Magistrate of Midnapore and the opposite parties to show cause why the order of the Additional District Magistrate dated 13th June 1932, dismissing the petitioner's complaint under S. 203, Criminal P. C., should not be set aside. The opposite parties are described as:

"Rehat Bux Choudhury, Sub-Inspector of Police, and Sheikh Kalu, Police Constable, and two other Police Constables of Midnapore Thana."

On 30th April 1932 Mr. Douglas, the District Magistrate was assassinated at Midnapore. At about 11 p. m. that night the petitioner who describes himself as a "home internee" was arrested and taken to the Midnapore Thana. It is admitted that he was then to all appearance in good health. He was produced before a Deputy Magistrate on 1st May, and on 2nd May remanded by the Additional District Magistrate to police custody until 5th May. Later in the evening of 3rd May the Civil Surgeon, Captain Drummond, was summoned to the thana to attend the petitioner. He found the petitioner in a hysterical condition and exhausted. There were also some bruises visible on his person. They were not severe nor did they require treatment, but according to Captain Drummond they must have been due to some sort of violence. The petitioner on that occasion made no complaint against the police. The next morning, 4th May, Captain Drummond saw the petitioner again and found him suffering from fever. At 6 p. m. the petitioner was removed to hospital where he developed pneumonia. He was discharged from hospital on 21st May 1932. On that day he filed a written petition of complaint in Bengali and was examined in support of it on solemn affirmation. He stated that he was severely beaten at the thana on the evening of 3rd May by "one Daroga known as Choudhury Sahab and three

Sepahis." The Additional District Magistrate referred the complaint under S. 202, Criminal P. C., to the Sub-divisional Officer for inquiry and report. For reasons that are not material the inquiry was eventually held by Mr. Islam, Deputy Magistrate, who submitted his report on 27th May. On 13th June the Additional District Magistrate dismissed the petitioner's complaint under S. 203, Criminal P. C. On 25th June 1932 the Sessions Judge of Midnapore refused to interfere with the order of dismissal.

The first ground on which the Rule has been issued is that the Deputy Magistrate acted illegally in examining the first accused and the police witnesses in the absence of the petitioner and his lawyers and in calling for a report from the Superintendent of Police. Mr. Islam's report shows that on 25th May he examined Bhupendra Nath Banerjee, the officer in charge of the Midnapore Police Station, Rahat Bux Choudhury, the Sub-Inspector of Police, Narayangarh, and Kiran Charan Raha, Circle Inspector. It is said that Rahat Bux Choudhury was examined on solemn affirmation but this is denied, I think rightly, by the opposite parties. The story told by these deponents was that Rahat Bux Choudhury was in Midnapore by chance on 3rd May. Bhupendra Nath Banerjee asked him to assist in the investigation into the murder of Mr. Douglas by examining the petitioner. Rahat Bux Choudhury consented, but while he was questioning the petitioner the latter became violent and hysterical and assaulted Rahat Bux, who called to the constables to secure the petitioner. This was done but the petitioner's struggles were so violent that he sustained injuries. Ice was sent for, and the Circle Inspector communicated with the Superintendent of Police, Mr. Evans, who saw the petitioner in the company of the Civil Surgeon. The procedure adopted by the Magistrate has been vigorously criticized by learned counsel for the petitioner. We have been referred to *Baidya Nath Singh v. Muspratt* (1), *Bhim Lal Sah v. Emperor* (2), *Balai Lal Mukherjee v. Pasupati Chatterjee* (3) and *Chandi Charan Mitra v. Manindra Chandra Roy* (4). It

is suggested that a Magistrate to whom a complaint is referred for inquiry acts illegally if he examines or questions the person complained against. I cannot agree with this; no such limitation is suggested in the language of the section and I see no reason to dissent from the view expressed in *In re Virbhan Bhagaji* (5) that such a procedure is not illegal. It appears to me that to prevent the Magistrate from questioning the person complained against, at any rate for the purpose of ascertaining what is the answer to the charge, if he has one, would be in many cases to render the inquiry futile. It is easy to imagine cases where information that the accused alone can furnish will conclusively prove the falsity of the complaint.

But to hold this is not to hold, that it is right for a Magistrate to examine the accused and then after argument to make up his mind which of two rival stories he will accept. I consider that although the Magistrate was justified in examining the three police witnesses including the first accused, he was wrong in permitting the accused to be represented by lawyers and to argue that the complaint should be dismissed. This seems to me to be precisely the course that has been condemned in *Bhim Lal Sha v. Emperor* (2), *Balai Lal v. Pasupati Chatterjee* (3) and *Chandi Charan v. Manindra Chandra* (4). In my opinion the petitioner may justly urge that he is entitled to test the evidence of the two police witnesses, other than the first accused, by cross examination, and this he can only do satisfactorily in a formal trial.

The Additional District Magistrate states in his order that he leaves out of his consideration the evidence of the three witnesses to whom I have referred. He however, as appears from the order sheet, permitted a lawyer to address arguments to him on the accused's behalf. The Additional District Magistrate states that the case depends on the uncorroborated statement of the complainant himself. This is true if by that is meant that the complainant is not in a position to produce any eyewitness in support of his story. But the case is one in which from its nature the production of an eyewitness is not to be

1. (1887) 14 Cal 141.
2. (1913) 40 Cal 444=18 I C 845=14 Cr L J 57.
3. (1917) 17 Cr L J 396=35 I C 828.
4. AIR 1923 Cal 198=72 I C 173=24 Cr L J 333.

5. AIR 1928 Bom 290=112 I C 68=29 Cr L J 975=52 Bom 448.

expected. The failure of the petitioner to name his assailants at an early stage seems significant to the Magistrate. In my opinion little importance should be attached to this, for it is admitted that it was on the orders of the first accused that the constables forcibly restrained the petitioner. Moreover I do not understand that it is denied that Sheikh Kalu was one of those constables. In the proceedings strong comment is very properly made on the fact that neither on 3rd May nor 4th May did the petitioner complain of maltreatment to the Superintendent of Police or to the Civil Surgeon. This is an aspect of the matter that demands the most careful consideration, but in my judgment the petitioner should be given an opportunity of meeting this point and he will have such an opportunity if cross examined in Court. I do not consider that without any explanation on his part his conduct in this respect so clearly demonstrates the falsity of his complaint that he should be refused process. For the reasons I have given I hold that the order of dismissal complained against should be set aside and a further inquiry directed into the petitioner's complaint.

The Rule is made absolute. It is desirable that the inquiry should be held by some Magistrate who has not yet been concerned with the case.

Patterson, J.—I agree.

K.S. *Rule made absolute.*

* A. I. R. 1933 Calcutta 449

C. C. GHOSE AND S. K. GHOSE, JJ.

Jotindra Nath Roy Chowdhury — Defendant—Appellant.

v.

Raj Lakshmi Debi—Plaintiff — Respondent.

Appeal No. 254 of 1930, Decided on 5th December 1932, against decree of Sub-Judge, Third Court, 24-Pargannas, D/. 30th August 1930.

(a) Practice—Effect of findings of fact of trial Court should not be minimized.

The High Court should not in any way overlook or minimize the effect of the findings of the Court of first instance which has an opportunity of seeing witnesses for itself. [P 452 C 1]

(b) Will — Onus of proof is on party propounding will.

Where a will is propounded the onus probandi is on the party who propounds the will. It is for him to show that it is the act of the testator.

[P 452 C 1]

(c) Will—Non-existence of will at time of death of testator — Presumption is that it is revoked.

If a will is not in existence on the date of the testator's death, the ordinary *prima facie* presumption is that it was destroyed by the testator with intention to revoke. This presumption is one which is always rebuttable by the production of further and other evidence. [P 452 C 2]

(d) Will — Mental capacity of testator at time of execution of will challenged — Duty of Court indicated.

Where the mental capacity of the testator is challenged by evidence to the effect that it is very doubtful whether the testator's state of mind at the time of the execution was such that he could have "duly executed" the will in question, the Court must be satisfied before granting probate that the testator was of sound disposing mind and did know and approve the contents of the will. [P 452 C 2]

* (e) Will — "Due execution"—Mode of proof—At least one attesting witness should be produced.

Ordinarily a party propounding a will is bound to call one at least of the attesting witnesses if he can be produced. But if such witness fails to prove due execution the propounder is bound to call the other attesting witness or witnesses although the propounder may know that the other witness or witnesses are adversely disposed to the propounder. He is not under any obligation to prove the execution by calling all the attesting witnesses. [P 452 C 2]

* (f) Will—Granting of probate—Duty of Court stated.

The Court must be satisfied that the testator knew and approved of the contents of the will at the time he signed the same, and if the circumstances be as excite one's suspicion, the fact of "due execution" of the will by the testator is sufficient to prove that he knew and approved of its contents. But this last proposition is subject to qualification, namely, that although the testator did know and approve of the contents of the will, the will may yet be refused probate if it be proved that any fraud or "undue influence" had been practised or exercised on the testator in obtaining the execution of the will. Further a will produced by a party who is benefited by it is not void, but this circumstance forms a just ground of suspicion against the document and calls upon the Court to be vigilant and jealous, and unless clear and satisfactory proof be given that the will contains the real intentions of the testator such will will not be admitted to probate. [P 453 C 1]

* (g) Will—Construction — Will is not to be presumed a forgery primarily from consideration of its contents.

In considering whether a will should be admitted to probate or not it is of the very first importance to remember at all times and always that a will is not to be presumed a forgery primarily from a consideration of its contents, nor is it permissible to hold that the contents of the will are so extraordinary that the Court may safely allow that circumstance to over-balance the direct or positive evidence as regards the execution of the will. Indeed it is not permissible for the Court to do what Courts are often invited to do on behalf of objectors, namely, to make up their minds about the iniquitous character of

the contents of a will and then to look at the positive or direct evidence in favour of the execution of the will from that standpoint.

[P 454 C 1, 2]

Sarat Chandra Roy Chowdhury, Kali Kinkar Chakravarty, Radhika Charan Chatterjee, Radhabinode Pal and Prem Ranjan Roy Chowdhury—for Appellant.

Rashindra Nath Sarkar and Narayan Chandra Kar—for Respondent.

C. C. Ghose, J. — This is an appeal against the judgment and decree of the learned Subordinate Judge, Third Court, 24-Pargannas, dated 30th August 1930, by which he granted probate of the will of one Jogendra Nath Roy Chowdhury of Behala. The will is dated 23rd April 1910. The testator died on 17th August 1928. The application for probate was filed by his widow Sm. Rajlakshmi Devi in Court on 22nd April 1929. The will in question is a registered will and it appears from the Sub-Registrar's endorsement that it was registered on the day of its execution. It appears that the testator had been married four times and the present applicant Sm. Rajlakshmi Devi was his fourth wife. The other wives of the testator had all died before the testator's marriage with Rajlakshmi. But there was a son by the third wife, named Jatindra Nath Roy Chowdhury. This last named person is the present objector in these proceedings.

In the said will the testator stated that Jatindra had been residing as a member of the family of his younger brother Rajendra Nath Roy Chowdhury and had throughout been disobedient and had not given him any satisfaction whatsoever by his conduct. The testator however thought it proper to bequeath to Jatindra one-half of his share in the ancestral ejmali dwelling house including tanks, etc., as also the entirety of his interest in a joint garden known as Ranir Bagan and all his interest and share in all other ancestral immovable property except Mouzah Kandberiah being Touzi No. 347 in the Collectorate of 24-Pargannas. As regards his wife, Sm. Rajlakshmi Devi, the testator stated that she had been living with him and had been nursing him and that she was the proper person to be appointed executrix under his will and to be allowed to remain in charge after his death of all his properties except those given to

the son and the sister's sons mentioned in para. 2 of his will. The executrix was empowered to sell a portion of the self-acquired properties of the deceased for the purposes of paying off certain debts if the amount of the debts could not be paid off from the income of the self-acquired properties and was further empowered to redeem certain pledged ornaments by paying off the amount of money raised on pledge. Various other directions were given such as that the debt to the mother-in-law of the deceased should be paid off, that there should be a payment of a sum of Rs. 100 to the paternal Guru or spiritual guide and a sum of Rs. 50 to the priest and so on. The executrix was also to pay a sum of Rs. 10 a year for the worship of the family idol during the turns of worship of the deceased and the said sum was to be made over to the sister's sons Brojendra Nath Mukhopadhyaya and Narendra Nath Mukhopadhyaya for the worship of the idols, and if the latter failed to worship then the money was to be utilized in the best way possible by the executrix.

It appeared further from the terms of the will that the testator had been helped considerably in his family affairs by his brother-in-law Haridas Bando-padhyaya. Haridas had died leaving an unmarried daughter who was placed in charge of the testator and the testator thought it proper to make provision for the marriage of the girl by allotting a sum of Rs. 1,000 for the expenses of her marriage. It also appeared that the testator wanted to establish the idol Siva in a temple and directions were given to the executrix in that behalf, the temple to be created in a house purchased by him and all expenses of the worship were to be defrayed from the income of the properties that would remain after defraying the expenses mentioned in the earlier portion of the will. He further gave directions that the said income was to be treated as debutter and was to be spent for the worship of the idol Siva, the executrix being the first shebait. The executrix was given power as shebait to nominate her successor from his sister's sons or sapindas or from his descendants provided that the successors was considered to be a religious person.

On this present application for probate being made the objector Jatindra Nath Roy Chowdhury put in a petition of objection and thereupon the suit became a contentious one. Jatindra objected to the grant of the probate on the ground that the will was an inofficious and unnatural one as the bulk of the properties had been given to the wife of the deceased, the objector being given only a nominal share in the properties left by the testator and that the circumstances relating to the execution of the will were such that a probate Court could not but look upon the will with very considerable suspicion. It was further contended that at the time of the execution of the will the deceased was not in a sound disposing mind and had no capacity whatsoever to understand the extent of his properties and the nature of the claims of those who were near and dear ones upon his bounty. Jatindra further contended that he was practically excluded from all participation in the benefits of the properties belonging to the testator and that was because the testator suffered from mental disorders from and after 1905 and that he was so seriously ill in 1910 at the time when the will was alleged to have been executed or shortly before that date, that he could not understand anything and he could not exercise his free and unfettered judgment in making a testamentary disposition of his properties.

The learned Judge had all the witnesses before him and after a very careful inquiry he came to the conclusion that the will could not be described to be an inofficious and unnatural will and that if one examined the provisions of the will carefully it was impossible to say that the terms of the will were such as must necessarily excite suspicion. The learned Judge came to the conclusion that the applicant for probate had shown conclusively that the testator was in a sound disposing mind at the date of the execution of the will and that such execution was made with full understanding of what he was doing. The trial Judge's findings on the specific points raised before him were as follows. (After giving the findings of the trial Judge, the judgment proceeded.) In the end the trial Judge granted as has been indicated above probate of the said will.

Now at the hearing of the appeal

before us the learned advocate Mr. Sarat Chandra Roy Chowdhury, who appeared on behalf of the objector made it quite clear that he did not propose to argue before us that the will had been executed under "undue influence" exercised by Sm. Rajlakhmi Debi although such question had been raised in the Court below. But Mr. Rai Chowdhuri's main contentions were that the will had been propounded under the circumstances of such grave suspicion that probate thereof should not and could not be granted. It was argued that it had not been established affirmatively that there was any bad feeling between the father and the son and there was no reason whatsoever why the objector should have been treated by the father in the way in which he had been done. It was also argued that the Sub-Registrar who registered the will had not been called.

In Mr. Rai Choudhuri's submission there was therefore no evidence worth the name for the purpose of establishing what was the state or physical condition of the testator at the time when the will was registered. It was also argued that as during the said long period of 18 years there had been several changes as regards the financial condition of the testator or as regards the properties which belonged to the testator it was reasonable to assume that if the testator had knowingly executed the will or had at any time since the date of the execution of the will been made aware that a will had been executed he would certainly have altered the provisions of his will. In support of this last argument reliance was placed on the fact that the testator during this long period of 18 years had not taken any steps whatsoever towards the establishment of the deity mentioned in his will nor had he taken any steps whatsoever towards the liquidation of the several debts mentioned in his will. Further, the learned advocate laid considerable stress on the fact that although it appeared from the evidence that a draft of the will had been prepared by a pleader named Jnan Babu, such draft had not been produced and that the entire evidence looked at fairly and squarely showed to demonstration that the testator was so seriously ill at the time of the execution of the will, assuming that the will was executed by the testator, that no probate Court would

grant probate of the said will. The questions raised in this appeal before us are all questions of fact. No doubt certain questions of law have been elaborately canvassed before us. But those questions of law depend for their solution on the view we take on the questions of fact raised. It is, to start with, impossible for us to overlook or minimize in any way the effect of the findings of the Court of first instance which had an opportunity which has been denied to us of seeing the witnesses for itself and for coming to a conclusion one way or the other as to whether or not the will had been executed in such circumstances as would entitle the applicant to obtain probate. From what has been stated it is not to be understood for one single instant that the present appellant is not entitled to invite us to come to our own conclusions independently of what has been stated by the learned Judge. We have therefore very carefully considered the evidence in this case, we have taken time to consider the terms of our judgment and during this interval we have read and re-read the evidence several times. But we are bound to state that in our own view there is sufficient material on the record to enable us to say that in this case the conclusions arrived at by the Court below must be affirmed and in this connexion it may be stated at once that as our judgment will be one of affirmance we do not propose to go through the evidence of the various witnesses in detail or at length, but we will content ourselves by stating our conclusions within such brief limits as possible.

Where a will is propounded the onus probandi is on the party who propounds the will. It is for him to show that it is the act of the testator and the first point to be ascertained was whether the will was duly executed. What is meant by "due execution" need not detain us at length because Mr. Roy Choudhuri drew our pointed attention to the classical definition of "due execution" in a case decided by this Court [*Piggot and Banerjee, JJ., Woomes Chunder Biswas v. Bashmohini Dasi*] (1). If therefore in a case of this description "due execution" is established the next point for consideration is whether at the date of the

death of the testator the will was in existence; and if it was not, then the ordinary prima facie presumption is that it was destroyed by the testator with intention to revoke. This presumption is one which is always rebuttable by the production of further and other evidence. It is perfectly true that where the mental capacity of the testator is challenged by evidence to the effect that it is very doubtful whether the testator's state of mind at the time of the execution was such that he could have "duly executed" the will in question, the Court must be satisfied before granting probate that the testator was of sound disposing mind and did know and approve of the contents of the will. In this case the will has been produced before us, the will was registered and the will itself shows the Registrar's endorsement made on the date of the execution. Therefore all these circumstances must be given their proper weight and effect. No doubt in all testamentary acts performed in the last stages of one's life the Court looks with vigilance and jealousy to the evidence by which they are supported. In the present case those considerations do not arise because the will was executed eighteen years before the death of the testator. We shall refer presently to the circumstances that the Sub-Registrar has not been called and we will have to say something on the submission which was made by Mr. Roy Chowdhury, namely, that it cannot be disputed that the Sub-Registrar is still alive and that steps ought to have been taken to call the Sub-Registrar to the witness-box. Leaving that matter aside for the moment, it is undoubted law that ordinarily a party propounding a will is bound to call one at least of the attesting witnesses if he can be produced, to prove "due execution." But if such witness fails to prove "due execution" the propounder is bound to call the other attesting witness or other attesting witnesses although the propounder may know that the other witness or the other attesting witnesses are adversely disposed to the propounder. It is also undoubted law that the propounder is not under any obligation to prove the execution of a will by calling all the attesting witnesses. In this case out of the seven attesting witnesses the witness scribe and one attesting witness are dead. But the applicant for

probate has done what was humanly possible in the circumstance, namely, that she has called four of the attesting witnesses, and as regards the last attesting witness the same has been produced before the Court although not at the instance of the applicant. This last attesting witness is the witness named Dirghungi and who has been called by the objector. It has already been pointed out that the evidence of the witness Dirghungi has not been accepted by the trial Court. As indicated above the Court must be satisfied that the testator knew and approved of the contents of the will at the time he signed the same and if the circumstances be as excite one's suspicion, the fact of "due execution" of the will by the testator is sufficient to prove that he knew and approved of its contents. But this last proposition is subject to one qualification, namely, that although the testator did know and approve of the contents of the will, the will may yet be refused probate if it be proved that any fraud or "undue influence" had been practised or exercised on the testator in obtaining execution of the will. Further a will procured by a party who is benefited by it is not void, but this circumstance forms a just ground of suspicion against the document and calls upon the Court to be vigilant and jealous and unless clear and satisfactory proof be given that the will contains the real intentions of the testator such will will not be admitted to probate. In stating the above propositions we have merely paraphrased what has been stated by eminent Judges from time to time since the dates of the early cases reported in 2 Moore's Privy Council cases. In coming to our conclusions on the evidence adduced in this case we have not been unmindful of the rules of law as laid down in the cases cited by Mr. Roy Chowdhury at the Bar. (After discussing the evidence, the judgment proceeded.) In our opinion the fact that the testator executed the document in question cannot be challenged. There is no evidence to suggest to any unbiassed mind that the testator was suffering continuously from mental disorders from and after 1905 or even that he was in an unconscious state when the will in question was alleged to have been executed. The fact that the will was registered by the testator on the day of

its execution completely negatives in our opinion the theory that it had been executed and registered while the testator was in an unconscious state.

As we indicated above Mr. Roy Chowdhury made some comment on the Sub-Registrar not being called; it was suggested at the Bar that there is no evidence to show that the Sub-Registrar had died; in fact the information at the disposal of the appellant was to the effect that the Sub-Registrar was still alive; but in this matter we must point out at once that this point was never taken in the Court below. It was not suggested in the Court below that the Sub-Registrar was still alive, it was not suggested that what was stated on behalf of the applicant, namely, that the Sub-Registrar could not be found was untrue and it follows from what has been stated that we cannot go into this question now at this stage. To embark upon an elaborate inquiry as to whether the Sub-Registrar was alive or not or whether he was still drawing his pension from the treasury would be to embark upon an inquiry where he would be obliged to take additional evidence. Such a course as has often been pointed out by their Lordships of the Judicial Committee would be entirely inconsistent with the ordinary procedure which regulates proceedings of this nature. We therefore propose to pay no attention whatsoever to what was argued before us, namely, that the applicant had not produced the entirety of the evidence bearing on the question of the due execution and registration of the will. In our opinion, if we may repeat once more, it has been amply proved that the testator had duly executed the will. No doubt the will does not indicate generosity on the part of the testator towards his only son, but one has known of such instances in the past and we are unable to say in the circumstance of the present case that that circumstances by itself throws suspicion on the due and proper execution of the will. Admittedly the feelings between the father and the son were very bitter. See in this connexion the evidence of Prionath, Chintamani and Akshoy. Whether there was any justification whatsoever on the part of the testator to entertain feelings of enmity and bitterness towards his only son is a problem which pertains more to the dq-

main of psychology than to the domain of law.

There is, in our opinion, no evidence to suggest that the present applicant Sm. Rajlakshmi Devi although she was the fourth wife of the testator was in any way responsible for the terms of the will. In other words, there is no evidence to show that Rajlakshmi had procured the will for her own benefit knowing that the terms of the will were as they would be found in the will and that those terms showed that for all practical purposes the only son had been disinherited. We are further of opinion that no safe or proper conclusion can be drawn from the fact of the non-alteration of the terms of the will by the testator during a period of 18 years since the date of the execution of the will. Mr. Roy Chowdhury drew our attention to the properties which had been given to the son and to the properties in respect of which the applicant had been given disposing power by the testator. We were invited by Mr. Roy Chowdhury to go into the question of valuation of the respective properties. There again it was a matter which should have been properly gone into by the Court of first instance. It is too late at the appellate stage of an appeal to go into questions of this description. But we should not have hesitated to go into these questions if they became necessary for the determination of the question as to whether the will had been duly executed; we would not have hesitated if it were the case that the respondent admitted that such valuations were just and free from objections. But the respondent strenuously objected to these matters being brought to our notice as they were not to be found within the four corners of the record before us. In these circumstances we must refuse to embark on an inquiry of this nature. Further, in our opinion no conclusion adverse to the applicant can be drawn from the fact of the non-establishment by the testator during his life time of the debt mentioned in his will or from the non-liquidation of the debts specified in his will. Now, there is one observation which we shall permit ourselves to make and it is this: that in considering whether a will should be admitted to probate or not it is of the very first importance to remember at the

time and always that a will is not to be presumed to be a forgery primarily from a consideration of its contents, nor is it permissible to us to hold that the contents of the will are so extraordinary that the Court may safely allow that circumstance to over-balance the direct or positive evidence as regards the execution of the will. In other words, if we may paraphrase what has been said by Judges of the eminence of Lord Davey, Lord Watson, and Lord Dunedin, that it is not permissible for the Court to do what Courts are often invited to do on behalf of objectors, namely, to make up our minds about the iniquitous character of the contents of a will and then to look at the positive or direct evidence in favour of the execution of the will from that standpoint. Such a course has been condemned by their Lordships of the Privy Council and in the circumstances of the present case and on the record before us it is sufficient to say that we are in entire agreement with the trial Judge in his findings and in his view or survey of the entire evidence adduced before him. The observations that we have made in our opinion sufficiently meet the arguments advanced before us and it is unnecessary to burden the record by any further observations. Taking therefore into consideration the entire evidence on the record we are of opinion that this appeal must fail and be dismissed. As regards the costs we think and we have come to this conclusion after a very careful and anxious consideration that the appellant may be excused for having carried the matter to this Court and in the circumstances we are of opinion that there should be no order as regards the costs of this appeal.

S. K. Ghose, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 454

MITTER AND M. C. GHOSE, JJ.

Khudiram—Appellant.

v.

Shomnath Banerjee and others—Respondents.

Appeal No. 107 of 1932, Decided on 28th February 1932, against order of Sub-Judge, Birbhum, D/. 6th January 1932.

(a) *Transfer of Property Act. (1882), S. 6 (e)*—Transfer of property which is sub-

ject-matter of litigation—Transfer is not of mere right to sue.

Where a transfer is made of the property which is the subject-matter of the litigation and if the transfer is for good consideration it cannot be said that a mere right to sue is transferred.

[P 456 C 1]

An ex parte rent decree was passed and a sale in execution of it was held. After the confirmation of this sale some of the defendants transferred the property to present plaintiff who applied to have the decree and sale set aside:

Held: that the transfer was not of a mere right to sue, but of the property which was the subject-matter of litigation, that the transfer necessarily carried with it the right to sue and that plaintiff was entitled to sue: 35 Cal 420 and *Dickinson v Burrell*, (1866) 1 Eq 337, *Rel on*; AIR 1929 Cal 719, *Ref*, [P 456 C 1; P 455 C 2]

(b) Civil P. C. (1908), O. 21, R. 92—Sale in execution of decree confirmed — Subsequent suit to set aside decree and sale on ground of decree being obtained by fraud lies—Effect of setting aside decree on sale stated.

When a sale held in execution of a decree is confirmed, a subsequent suit to have the decree and sale set aside on the ground that the decree was obtained by fraud lies. If the fraud is established and if the purchaser has purchased benami colluding with the decree-holder, the sale also falls along with the decree, but if the purchase is made by a third party auction-purchaser without notice of the fraud, the sale does not fall on the setting aside of the decree: 26 Bom 513 and 33 Cal 622, *Ref*. [P 456 C 1, 2]

Rupendra Kumar Mitter—for Appellant.

Surajit Chandra Lahiri and *Hari-prosanna Mukherji*—for Respondents.

Mitter, J.—This is an appeal by defendant 6 and arises out of a suit brought by the several plaintiffs in the suit for setting aside an ex parte rent decree and the sale held in execution of the said decree. The allegation of the plaintiffs in substance is that no rent was due to the landlords at the time the rent suit in question was decreed ex parte against the tenants excepting defendant 7 who made a confession of the knowledge of the judgment. It is further alleged that there was a fraudulent suppression of notice on all the defendants. It is further alleged that the sale proclamation and other processes in the execution proceedings were fraudulently suppressed; and the important part of the allegation is that the judgment-debtor No. 7 purchased the property in the name of his son who is the appellant before us in collusion with the decree-holder, in the suit. The defence taken by the defendants is that the suit is not maintainable. That defence prevailed with the

Court of first instance which dismissed the suit.

Against that decision an appeal has been taken to the Court of the Subordinate Judge of Birbhum who was of opinion that the suit was maintainable and has remanded the case to the Court of first instance for a trial of the suit on merits. The learned Subordinate Judge has made certain observations towards the end of his judgment at p. 6 of the paper book which is objected to on both sides and should not have been made. Against that decision of the Subordinate Judge the present appeal has been preferred by defendant 6 and it is contended that so far as plaintiffs 2 to 6 are concerned, as the transfer in their favour was a mere right to sue which is not transferable under the provisions of S. 6 (e), Transfer of Property Act, those plaintiffs cannot maintain the suit. The point made is that the transfer in favour of plaintiffs 2 to 6 by defendant 1 and defendant 10 was made after the sale had been confirmed some time in the year 1926, it being alleged that the transfer took place in 1927 which is after the confirmation of the sale and which event must have happened at any rate after 6th September 1926. The Subordinate Judge in coming to the conclusion that plaintiffs 2 to 6 could prosecute the suit to set aside the sale relied on the decision in the case of *Monmotha Nath Dutt v. Mati Lal Mitra* (1) and it is contended in view of that decision that as the right of the transferors had been extinguished by the confirmation of the sale what was transferred was the bare right of action or a mere right to sue. It appears to us however that the transfer was made by a deed of 1927 of the property which forms the subject-matter of the litigation. The transfer was not of mere right to sue, but of the property, which is the subject-matter of the litigation. That transfer necessarily carried with it the right to sue. In support of this view we may refer to the decision which has been cited to us on behalf of the respondents in the case of *Dickinson v. Burrell* (2). There from the facts recited it appears that A having executed a conveyance of real estate to B, which was liable to be set aside on equitable

1. AIR 1929 Cal 719=122 IC 220.

2. (1866) 1 Eq 337=12 Jur (ns) 199=35 LJ Ch 371=14 WR 412.

grounds, afterwards made a voluntary settlement of the same property in trust for himself for life, with remainder to his children as he should appoint, and in default of appointment to all his children who should attain 21, or (being daughters) should marry in equal shares. It was held that the infant children of A could maintain a bill, making A and the trustees of the settlement defendants to set aside the conveyance of B. With reference to the argument that such a bill was not maintainable Lord Romilly, M. R., in delivering the judgment said this:

"If James Dickinson had sold or conveyed the right to sue to set aside the indenture of December 1860, without conveying the property or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A B, to maintain this bill, but if A B had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed, nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it."

We are of opinion therefore that where a transfer is made of the property which is the subject-matter of the litigation and if it appears that the transfer was one for good consideration it cannot be said that a mere right to sue is transferred. We are of opinion having regard to the decision of this Court and the decisions of the Judicial Committee that the law in India does not prevent persons from transferring the subject-matter of the suit in order to obtain the means of prosecuting it. We may refer in this connexion to the decision of their Lordships of the Judicial Committee in the Privy Council case of *Bhawat Dayal Singh v. Debi Dayal Sahu* (3). That is exactly what has happened in this case. We are therefore of opinion that the Subordinate Judge was right in coming to the conclusion that the suit is maintainable at the instance of plaintiffs 2 to 6. The next ground taken is that it is not open to the transferors from defendant 10 to apply to set aside the sale as the sale had already been confirmed having regard to the provisions of O. 21, R. 92, Civil P. C. The answer to that contention is that the suit is rested on the allegation of fraud in obtaining a decree and in such circumstances if the allegation is established

it necessarily follows that the sale falls along with it as it is alleged that judgment-debtor No. 7 himself has purchased the property. If on the other hand the plaintiffs are not able to establish the allegation that the purchase of defendant 7 was in the benami of his son the true legal position is that the sale would not be set aside even if it was tainted with fraud. If any authority is needed on the proposition reference may be made to the case of *Chitambar Shrinivasbhat v. Krishnappa* (4) which is cited by this Court in the decision of the case of *Pareesh Nath Mallick v. Hari Charan Dey* (5). There Sir Lawrence Jenkins, C. J. pointed out that if a sale is set aside and the decree is held to be fraudulent, but the purchase is made by a third party auction purchaser without notice of the fraud the sale does not fall on the setting aside of the decree.

It appears to us that it was not necessary for the Subordinate Judge to make the observations which occur from line 10 at p. 6 of the paper book up to the word "maintainable" at the end of the same page. Both the appellant and respondents seem to think that the observations made there may prejudice them as the facts have not yet been investigated. We accordingly order that the portion just referred to, that is, the portion of the judgment of the learned Subordinate Judge from line 10 at p. 6 of the paper book to the end of the page, will be deleted. The rest of the judgment will stand. There will be no order as to costs.

M. C. Ghose, J.—I agree.

K.S.

Order accordingly.

4. (1902) 26 Bom 543=4 Bom L R 249.

5. (1911) 38 Cal 622=10 I C 361.

A. I. R. 1933 Calcutta 456

GUHA, J.

Emperor

v.

Satish Chandra Dutta—Accused,

Criminal Ref. Case No. 17 of 1933, Decided on 20th March 1933, from order of Addl. Sess. Judge, Dacca.

Medical Degrees Act (1916), Ss. 4 and 5—Accused leading people to believe that his college was allopathy college and issuing allopathic diploma is guilty under S. 5.

Where the accused led people to believe that his college was an allopathic college and awarded certificates as allopathic diplomas and granted

3. (1908) 35 Cal 420=35 I A 48=7 CLJ 335 (PD).

'M.M.B.' degree, implying that the holder was qualified to practise western medical science.

Held: that the accused was guilty under S. 5. [P 457 C 2]

D. N. Bhattacharya—for the Crown.
Bhupendra Nath Roy—for Accused.

Order.—This is a reference by the learned Additional Sessions Judge, Dacca, under S. 438, Criminal P. C., recommending that an order of the Deputy Magistrate of Dacca, convicting the accused Satis Chandra Dutta under S. 5, Indian Medical Degrees Act (Act 7 of 1916), and sentencing him to pay a fine of Rs. 100 or in default to undergo simple imprisonment for one and half months, should be set aside by this Court for reasons stated in the letter of reference. The facts of the case giving rise to this reference have been set out in detail in the judgment of the trial Court; and the main question for determination in the case was whether the accused issued diplomas giving the persons to whom they were granted to understand that he (the accused) was conferring degrees in allopathy whereby one would be entitled to practise western medical science, within the meaning of S. 4, Indian Medical Degrees Act. S. 4 of the Act provides that no person, save as provided by S. 3 conferring right to confer degrees, diplomas, licenses and certificates upon authorities as mentioned therein, shall confer, grant or issue or hold himself out as entitled to confer, grant or issue any degree, diploma, license, certificate or other documents stating or implying that the holder, grantee or recipient is qualified to practise western medical science.

Section 5 of the Act makes contravention of S. 4 punishable in the manner provided by the section. It appears to be clear from the evidence in the case, and upon the findings arrived at by the Deputy Magistrate who tried the case that the M.M.B. degree could be given only after the candidate for the degree had gone through what is described in the prospectus issued by the accused to be the senior course, which is an allopathic course. The defence version of the case that there was nothing mentioned in the diploma granting M.M.B. degrees that one was entitled to practise western medical science, and that there was nothing stated in the

diploma which indicated that the degree was an allopathic degree, cannot be accepted in view of the prospectus of the institution issued at the instance of the accused. The trial Court has found on evidence, to which detailed reference has been made in its judgment, that the accused led people to believe that his college styled as "The Dacca Medical College" was an allopathic college, which could award allopathic diplomas.

The learned Deputy Magistrate has further found that the accused issued the certificates, Exs. 2 and 5 in the case, as allopathic diplomas and that he granted M.M.B. degree to Syed Muhammad of Lucknow, implying that the said Syed Muhammad was qualified to practise western medical science. On the evidence in the case, and regard being had to the findings on evidence arrived at by the trial Court, the reason given by the learned Additional Sessions Judge that the language used in the certificate portion of the diploma given to Syed Muhammad could not be said to state or imply that the holder was qualified to practise western medical science, does not appear to me to be sound. The words used in the diploma admitting a particular candidate as a Member of the Medical Board (M.M.B.) have to be taken along with the prospectus issued by the accused, and the representation made by that prospectus, namely, that the granting of the M.M.B. degree could only follow after a candidate for the same had read the senior course, which was an allopathic course. In the above view of the case the recommendation made by the learned Sessions Judge for the acquittal of the accused person cannot be given effect to.

The reference is rejected, and the conviction of and the sentence passed on the accused Satis Chandra Dutta by the Deputy Magistrate, under S. 5, Indian Medical Degrees Act, are affirmed. The decision of the learned Magistrate is, in my judgment, a correct decision on the materials placed before the Court.

K.S.

Reference rejected.

A. I. R. 1933 Calcutta 458

PANCKRIDGE AND PATTERSON, JJ.

Jitendra Lal Banerjee — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 176 of 1933, Decided on 21st March 1933.

Press Emergency Powers Act (1931), S. 2 (6) — "Public news" — Meaning explained—Information conveyed by photographs regarding Chittagong armoury raid was held to be public news and person in whose possession they were found for distribution was held guilty.

Information is "public news" within the meaning of S. 2 (6) if it concerns a matter of public and topical interest as contrasted with purely historical interest. (P 458 C 2)

Accused was found in possession of card photographs of person killed in the Chittagong armoury raid case and they were kept for distribution. The legal proceedings were not terminated and the emergency measures rendered necessary in the District of Chittagong were still in operation.

Held: that the information regarding the raid was public news, that the photographs were documents containing public news and therefore news sheets within the meaning of S. 2 (6) and that accused was guilty. [P 458 C 2]

S. C. Taluqdar and Mahendra Kumar Ghose—for Petitioner.

D. N. Bhattacharjee—for the Crown.

Panckridge, J.—The petitioner in this case has been convicted under S. 18, Press Emergency Powers Act, 1931, of keeping for distribution unauthorized news sheets. The facts are that the petitioner's house was searched on 7th June 1932. In the course of the search were found among other things sixteen small card photographs. The photographs represented persons killed in the course of the Chittagong Armoury Raid. Below the photographs are given their names and ages and the places where they met their deaths. Moreover, in the case of one of them there is also a statement that he committed suicide to escape arrest. Both the Courts below have found as a fact that the photographs were kept for distribution and we have no doubt that this finding is correct.

The only ground upon which the petitioner has obtained this Rule upon the Crown to show cause against the order of conviction is that the articles seized are not unauthorized news-sheets within the meaning of the section. It is common ground that if the photographs are

news-sheets they are unauthorized news-sheets. By S. 2, sub-S. (6) of the Act "news-sheet" means any document other than a newspaper containing public news or comments on public news or any matter described in sub-S. (1), S. 4. By S. (2), sub-S. (5) "newspaper" means any periodical work containing public news or comments on public news. By S. 2, sub S. (2) it is provided that "document" includes any painting, drawing or photograph or other visible representation. Mr. Bhattacharjee on behalf of the Crown argues that the photographs convey information and must be regarded in the same light as verbal descriptions of the physical characteristics of the persons depicted. In addition they contain the statements to which I have referred. In my opinion, this argument is sound but it does not of itself dispose of the matter since I am not disposed to hold that all information is public news. "News" is thus defined in the Oxford English Dictionary:

"Tidings, the report or account of recent events or occurrences, brought or coming to one as new information, new occurrences, as a subject of report or talk."

Having regard to the purpose and general scheme of the Act I am of opinion that information is public news if it concerns a matter of public and topical interest as contrasted with purely historical interest. The information conveyed by the photographs satisfies this test, for although they were discovered more than two years after the raid the legal proceedings arising out of it had not terminated and the emergency measures rendered necessary in the District of Chittagong in consequence of it were still in operation. It seems to me that information regarding the armoury raid is public news whereas information regarding an event of purely historical importance such as the storming of the Bastille might not be public news. This being so, I consider that the photographs are documents containing public news and therefore news-sheets within the meaning of S. 2, sub-S. (6). It is not necessary to consider whether they are news-sheets as containing matter described in sub-S. (1), S. 4. It follows that the Rule must be discharged and the conviction affirmed. If on bail the petitioner must surren-

der and serve out the remainder of his sentence.

Patterson, J.—I agree.

K S.

Rule discharged.

A. I. R. 1933 Calcutta 459

MUKERJI, J.

Basanta Kumar Sarkar and another—
Plaintiffs—Appellants.

v.

Panch Cowri Mandal and others—
Defendants—Respondents.

Appeals Nos. 1891, 1892 and 1893 of 1930, Decided on 23rd November 1932, from appellate decrees of Addl. Dist. Judge, 24-Parganas, D/- 20th March 1930.

Bengal Tenancy Act (1885), S. 49—Suit for ejectment after notice under S. 49 on ground that defendants are under-raiyats—Onus is on defendants to prove the right of occupancy or permanent right and not on plaintiff to prove that they are under-raiyats—Evidence Act (1872), S. 101.

Where in a suit for ejectment of the defendants after service of notice under S. 49 if the plaintiffs' title is established or admitted the onus is on the defendants who claim to remain on the land to prove the existence of a right of occupancy or a permanent right, and not of the plaintiff to show the under-raiyati character of the tenancy of the defendants: *AIR 1920 PC 67* and *AIR 1921 PC 65, Rel. on.*

[P 459 C 2]

Bimla Charan Deb and Tarakeshwar Nath Mitra—for Appellants.

Apurba Charan Mukherjee and Provas Chandra Basu—for Respondents.

Judgment.—These three appeals have arisen out of as many suits as were instituted by the plaintiffs for ejectment of the defendants after service of notice to quit under S. 49, Ben. Ten. Act, on the footing that the defendants were under-raiyats. The trial Court dismissed the suit in so far as it related to khas possession. The plaintiffs thereupon preferred appeals which were heard by the Additional District Judge who dismissed the said appeals and affirmed the decisions of the trial Court.

The plaintiffs have then preferred these second appeals. The relevant finding of the trial Court on the question of khas possession was that the defendants have raiyati right to the lands of the respective holdings and that therefore they could not be treated as under-raiyats and proceeded against in ejectment after service of notice under S. 49, Ben. Ten. Act. The Additional District Judge has recorded a finding in

his judgment which goes to indicate that he was inclined to take the same view; for he observes thus:

"Circumstances certainly would go to favour the defendants' version that the lands in suit are held by them in raiyati right and that the plaintiffs are tenure-holders."

The difficulty however of holding that the decision of the learned Additional District Judge is based upon this finding of his is that he had dealt with the whole question that arose before him as if it was a question in regard to which the onus of proof was entirely upon the plaintiffs. He has expressly said so in several places in his judgment. He has observed in the first place that it is on the plaintiffs to show that the tenancy is ejectable and to make out the validity of the notice, and it is for them to establish the under-raiyati character of the tenancy of the defendants. In another place in his judgment also he has remarked that, in any case, as the plaintiffs have failed to show that the tenancy is ejectable and that there is a valid notice to quit they are not entitled to ejectment of the defendants. It may be stated here that as regards service of the notices the finding of the learned Additional District Judge is in favour of the plaintiffs. It is now well settled that in a case where the plaintiff's title is established or admitted the onus is on the defendants who claim to remain on the land to prove the existence of a right of occupancy or a permanent right. This proposition has been affirmed by the Judicial Committee of the Privy Council in the cases of *Seturatnam Ayer v. Venkatachela Goundan* (1) and *Nampillai Marakayar v. Ramanathan Chettiar* (2). The onus therefore must have been upon the defendants to prove that they have a right to remain on the plaintiffs' land. If I could hold that notwithstanding this erroneous view on the question of onus the decision of the learned Judge could be taken to have rested entirely upon his finding as regards the status of the defendants, I would have been prepared to affirm the decision. But I regret I am unable to do so.

In these circumstances, I think, the proper course for me to adopt, would be

1. A I R 1920 P C 67=56 I O 117=47 I A 76=48 Mad 567 (P C).
2. A I R 1924 P C 65=82 I C 226=51 I A 88=47 Mad 837 (P C).

to allow those appeals and to set aside the decision complained of and to send the cases back to the Court of the learned Additional District Judge in order that the appeals before him may be re-heard, bearing in mind the view on the question of onus that has been expressed above. Costs of these appeals will abide the result of such hearing before the learned Judge.

K S.

*Appeals allowed.***A. I. R. 1933 Calcutta 460**

MUKERJI AND GUHA, JJ.

Barkatulla Pramanik—Petitioner.

v.

Ashutosh Ghose and another—Opposite Parties.

Civil Rule No. 460 of 1932, Decided on 29th August 1932, from order of Second Munsif, Bogra, D/- 30th January 1932.

(a) Bengal Tenancy Act (1885), Ss. 26-F and 188—Application by one of cosharer landlords under S. 26-F for exercise of right of pre-emption—Other cosharers not made parties—Application is incompetent and defect cannot be allowed to be remedied in High Court.

In an application under S. 26-F by one of cosharer landlords for exercise of the right of pre-emption the names and shares of the other cosharers were mentioned, but they were not made parties to the proceedings.

Held: that the application was incompetent and not fit to be entertained, that this was not a case of mere defect of parties which may be allowed to be remedied, but a question of competency of the application itself, that by the mere mention of the names and shares of the other cosharers in the body of the application, the application could not be regarded as being in order and that the bar imposed by S. 188 was not merely meant for the benefit of the cosharer landlords, but that the tenants were entitled to take the plea: *A I R 1928 Cal 146, Rej.*

[P 460 C 2]

(b) Bengal Tenancy Act (1885), Ss. 26-F and 188—S. 26-F contemplates application which is not otherwise barred.

Section 26-F contemplates an application which is not otherwise barred. Hence an application under S. 26-F which is barred under S. 188 is incompetent even though the condition as to deposit under S. 26-F has been complied with.

[P 461 C 1]

*Subodh Chandra Sen—for Petitioner.**Surajit Chandra Lahiri—for Opposite Parties.*

Order.—The facts of this case were as follows: In respect of an occupancy holding there are three cosharer landlords, Ashutosh Ghose, Sudhansu Bhusan Ghose and Indu Bhusan Ghose, each of the first two owning a four annas share

and the last one the remaining eight annas share. In execution of a decree for the eight annas share of the rent due to Indu Bhusan Ghose the holding was sold; and eight annas thereof was purchased by the judgment-debtor's wife and the other eight annas by the petitioner Barkatulla Pramanik. The judgment-debtor then applied to set aside the sale under S. 174, Ben. Ten. Act, but the application was rejected. The sale took place on 24th April 1930. On 2nd April 1931 Ashutosh Ghose applied under S. 26-F, Ben. Ten. Act, to exercise his right of pre-emption. The Munsif held that so far as the purchase of the eight annas share by the judgment-debtor's wife is concerned there was really no transfer, and so there could be no pre-emption, but that as regards the other eight annas purchased by the petitioner the application for pre-emption should succeed. The petitioner has then moved this Court and obtained this Rule. The application under S. 26-F was filed by Ashutosh Ghose alone. In the body of the application it was stated that the other two persons were cosharers landlords and their shares and interest were also specified.

But the said cosharers were not made parties defendants to the proceedings that were to follow, nor was the application framed in such a way as to give them an opportunity to join in the application as co-applicants. In our opinion such an application was incompetent and not fit to be entertained at all in view of the provisions of S. 188 of the Act. Several arguments have been advanced to support the maintainability of the application. It has been argued that the proceedings were not contested by the petitioner in the Court below and that if this objection was taken there, the applicant could have immediately remedied the defect, and that therefore the applicant should now be permitted to amend the application. S. 22, Lim. Act, not applying to the case, we are not prepared to accede to this argument or prayer, because in our view this is not a case of mere defect of parties which may be allowed to be remedied, but a question of the competency of the application itself. The application, as framed, was not fit to be entertained at the time it was filed, and if it is now presented in a form which is acceptable it will be

an application filed long out of time. It has next been argued that when the names and other particulars of the co-sharers are to be found in the body of the application, the application should be regarded as being in order, though the necessary prayers were not embodied in it. This argument has been sought to be supported by the analogy of cases under Ch. 10 of the Act of the type of *Bir Bikram v. Ambika Charan* (1) and *Shiba Kumari v. Doshi* (2).

We do not think this argument is well founded, because unlike those cases the present case is one in which the applicant must, in view of S. 188 of the Act, be held to be incompetent to make such an application. Thirdly, it has been argued that the bar imposed by S. 188 of the Act, is meant for the protection of the cosharer landlords who are not parties to the suit or proceeding, and if they do not object, but purport to waive the objection it is not open to the tenant to take this plea in bar. We are not prepared to agree in this contention. Lastly, reference has been made to the provisions of S. 26-F as indicating that if the condition as to deposit has been complied with, the application must be treated as being in order. But we think the section contemplates an application which is not otherwise barred, and S. 188 clearly imposes such a bar. The result is that in our judgment, the rule should be made absolute and we order accordingly. The order of the Court below is set aside and the application under S. 26-F referred to above is dismissed. There will be no order for costs.

K.S. *Rule made absolute,* —

1. A I R 1926 Cal 1037=97 I C 142.

2. A I R 1923 Cal 146=106 I C 836.

*A. I. R. 1933 Calcutta 461

MUKERJI, J.

Rajeswar Saha and others—Plaintiffs
—Appellants.

v.

Sheik Yadali and others—Defendants
—Respondents.

Appeal No. 1914 of 1930, Decided on 23rd November 1932, from appellate decree of Sub-Judge, 4th Court, Dacca, D/. 13th January 1930.

* (a) Transfer of Property Act (1882), S. 6 (e)—Transfer of right to recover money collected by agent as rent is not mere right to sue.

A transfer of right to recover from an agent

money already collected by him as rent is a right to recover money had and received and as such is not a bare right to sue. But a right to sue the agent for damages for not collecting the rent is a mere right to sue and transfer of such a right comes within S. 6 (e). It is not necessary that in the former case the money should be an ascertained one on date of transfer. It is enough if it is ascertainable: 42 IC 390, *Foll*; AIR 1924 Cal 1047, *Diss from*; 89 Mad 188 and 16 All 286, *Ref*. [P 462 C 1, 2]

(b) Accounts—Account suit—Account books in possession of defendant—Procedure to be followed indicated—Evidence Act (1872), S. 114.

In a suit for money to be ascertained on a reference to account books in the possession of the defendant, the latter should be called upon to produce them and the plaintiff must be allowed inspection thereof to make out his case and to allege and prove specifically the money due; should they be not produced by the defendant the plaintiff will have to prove by independent evidence and with the aid of the presumption under S. 114, Evidence Act, what is the amount likely to be in the hands of the defendant and it will then be for the defendant to claim and prove any deductions which he may be entitled to: 52 Cal 766 *Ref*. [P 462 C 2]

Deblal Sen—for Appellants.

Abinash Chandra Ghose—for Respondents.

Judgment.—The Courts below have dismissed the suit which the plaintiff instituted for what has been considered by them as a suit for accounts. The main ground of their decision is that the plaintiff's right is based upon an assignment which he obtained from the pro forma defendants of what has been held to be a bare right to sue within the meaning of S. 6 (e), T. P. Act. The plaintiff purchased from the pro forma defendants certain immovable properties together with certain rights which were described in these words:

"Sheikh Deanat Hossein of Lakshmipur and Sheikh Yadali of Nayadanga have both been working under us as Tahsildars in respect of the properties described in Sch. 1—10; you will take from them to your satisfaction, either amicably or by suit, all papers relating to the collection of the properties sold, and the accounts for the period of their service, and the moneys that may be found due from them on the basis thereof."

The question which arises for consideration which arises for consideration in this case presents some difficulties in view of the fact that there are two decisions of this Court, *Khetra Mohan Das v. Biswanath Bera* (1) and *Churamani Mandal v. Rajendra Kumar* (2), which are in conflict with each other. With

1. AIR 1924 Cal 1047=82 I C 411=51 Cal 972.

2. (1917) 42 IC 390.

the utmost respect for the learned Judges who decided the case of *Khetra Mohan Das v. Biswanath Bera* (1), I must say I am unable to agree with the decision. That case makes no distinction between a right to recover damages for the negligence of an agent in failing to collect rents or in other ways and the right to recover moneys belonging to the principal which the agent may have collected as rents and which should be presumed to be in the hands of the agent until accounted for. Indeed, referring to the case of *Varaha Swami v. Ram Chandra Raja* (3) which was mainly relied upon in that case, the learned Judges observed:

"It was held that a mere right to recover damages for the negligence of an agent in not collecting rent is not assignable. There does not seem to be much difference between failure to collect rent and failure to pay rent collected."

I am unable to assent to the proposition thus laid down. The distinction, in my opinion, is well marked; one is an action for damages and the other for recovery of moneys had and received. The distinction is clearly pointed out in the case of *Madho Das v. Ramji Patak* (4). In that case it was observed thus:

"There can, in our opinion, be no doubt that money or a balance in the hands of an agent, which he has received from or holds for his principal to be applied to certain purposes can be recovered from that agent as money had and received to the use of the principal, if the agent fails to apply it, or if the agent having applied part of it, a balance remains in the hands of the agent; and the fact that when the principal brings his suit to recover such balance he may, until the agent's accounts are produced, be unable to specify the particular amount of the balance remaining in the agent's hands and due to him does not prevent such balance being a debt due to the principal. Such balance is a sum of money which the agent is bound on principles of justice and equity to pay over on demand to his principal, although there may have been no actual but only an implied agreement to repay such balance."

It has been argued before me that in the present case the amount was not ascertained at the date of the transfer. But I do not think that that makes any difference, so long as it is ascertainable. So long as the transfer is limited to the right to sue for the money which may be found to be in the hands of the agent and is not meant to include a right to sue for damages on account of negligence or in the sense of moneys which

ought to have been in his hands were he diligent, I do not think the transfer can be said to be in respect of a mere right to sue. I therefore prefer to follow the decision of this Court in the case of *Churamani Mandal v. Rajendra Kumar Sinha* (2). The appeal is therefore allowed and the decisions of the Courts below being set aside the case is remanded to the trial for further trial. Costs of all the Courts will abide the final result of the suit.

Care must be taken in the trial of the suit to keep the aforesaid distinction in view. As regards the account books and papers there can possibly be no objection to a decree for their recovery, should a case for such decree be made out on the facts. If it is found that they are with the defendant, he should be called upon to produce them and the plaintiff will be allowed inspection thereof to make out his case and to allege and prove specifically what money is still in the hands of the defendant. Should they be not produced by the defendant, the plaintiff will have to prove by independent evidence and with the aid of the presumption contained in S. 114, Evidence Act, what is the amount likely to be in the hands of the defendant on account of collections which he made and it would then be for the defendant to claim and prove any deductions which he may be entitled to. The attention of the Court, which will have to try the suit, is invited to the principles laid down by this Court in the case of *Bharat Chandra v. Kiran Chandra* (5). The findings of the Subordinate Judge on the question of the period during which the defendant was in service as agent will stand and will not be allowed to be re-opened at the trial. Leave is granted to the appellants to prefer an appeal under the Letters Patent.

K.S.

Appeal allowed.

5. AIR 1925 Cal 1069=90 IC 944=52 Cal 766.

A. I. R. 1933 Calcutta 462

C. C. GHOSE AND S. K. GHOSE, JJ.

Khajeh Habibullah and others—Petitioners.

v.

Abdul Karim Abu Ahmed Khan and others—Opposite Parties.

Civil Rule No. 104-F of 1931, Decided on 18th November 1932.

3. (1915) 38 Mad 138=18 IC 520.

4. (1894) 16 All 286=1894 A W N 84.

Limitation Act (1908), S. 5—Extension of time—Held on facts that time cannot be extended.

A memorandum of appeal was filed out of time by two days. The explanation given for the delay was that in accordance with the long-standing practice the clerk of the Government Pleader's office inquired of the stamp reporter as to the last day for filing of appeal, and believing in good faith his calculation to be correct the appeal was filed.

Held: that the stamp reporter or any body in his office was not under any obligation to inform litigants or their advisers as to last date for filing appeals, that the litigant or his legal adviser (i. e., the Government Pleader or his assistant in this case) was responsible for making such calculations, that the mistake in this case was not of a legal adviser or his clerk but of somebody who was in no better position than a man in the street and as such the discretion under S. 5 could not be exercised. [P 463 C 2]

Sarat Chandra Basak and Syed Nasim Ali—for Petitioners.

*A. K. Roy, Amarendra Nath Bose and Prokash Chandra Pakrash—*for Opposite Parties.

Judgment.—This is a rule calling upon the opposite party to show cause why the time for filing the appeal in this case should not be extended and the appeal registered though filed out of time and why such other and further order should not be made as to this Court may appear fit and proper. The present applicants filed an appeal in this Court against the judgment and decree of the Subordinate Judge of Mymensingh, First Court, on 30th January 1931. The memorandum of appeal was not accepted in the office because the appeal had been filed out of time by two days. The explanation given is as follows: It is said that about the end of November 1930 in accordance with a long-standing practice in the office of the Government Pleaders in this Court the clerk of the said office inquired from somebody in the office of the stamp reporter about the last day for filing the said appeal. It is further said that one Hari Sadhan De, an assistant in the office of the stamp reporter, made certain calculations on a slip of paper in pencil and told the Government Pleader's clerk that the 6th February 1931 was the last date for filing the appeal. It is also said that the clerk believing in good faith that the calculation made by the said Hari Sadhan De was correct filed the appeal on 30th January 1931. The slip of paper on which the calculation was made has been produced and marked Ex. "A" to the application on which the

present rule was issued. On these facts we are invited to exercise our powers under S. 5, Limitation Act, and allow extension of time to file the appeal in question.

Now it may be stated at once that neither the stamp reporter nor anybody attached to his office is under any obligation to inform litigants or their advisers as to the last dates for filing appeals in this Court. The litigant or his legal advisers (in this case the Senior Government Pleader or the Assistant Government Pleader) is responsible for making calculations of the nature referred to above and no one can be allowed to fasten responsibility on any of the clerks attached to the office of the stamp reporter in cases of this description. The mistake such as it was was not of the legal adviser or his clerk but of somebody else who is in no better position than the man in the street. We have very carefully considered the submissions made by the Senior Government Pleader, but it strikes us that this is not a case for the exercise of our discretion under S. 5, Lim. Act. As far as one can make out from the papers before us, it appears that the matter of filing the present appeal was left to the very last moment, and that apparently the papers were in the hands of the Senior Government Pleader as far back as November, 1930. It is apparent therefore that sufficient time had been given to the legal advisers of the litigant concerned to do everything necessary for filing the appeal in time, but nobody seems to have taken any interest in the matter and a policy of drift was apparently allowed to be followed. In our opinion, it would be an extremely dangerous precedent if we were to allow any extension of time for filing the present appeal. It would not be a sound exercise of discretion on our part and we feel that we have no other alternative but to direct that this rule should be discharged and that the appeal be not registered. The rule is discharged with costs three gold mohurs.

K.S.

Rule discharged.

A. I. R. 1933 Calcutta 464

MUKERJI, J.

Dwarikanath Par—Defendant — Appellant.

v.

Krishna Barai and another—Plaintiffs — Respondents.

Appeal No. 1423 of 1930, Decided on 26th July 1932, from appellate decree of Addl. Sub-Judge, Khulna, D/- 16th January 1930.

(a) Appeal—Joint decree in favour of two persons declaring title to eight annas share as against another—Latter cannot challenge decree only as against one of joint decree-holders and to the extent of his four annas share.

Where a joint decree has been made in favour of two plaintiffs declaring their title to an eight annas share and giving them possession in respect of the eight annas share as against another, the latter cannot challenge the validity of that decree in the absence of one of the plaintiffs and only to the extent of a four annas share: *AIR 1929 PC 58, Expl and Dist*; *AIR 1929 Cal 519, Dist.* [P 465 C 2]

(b) Civil P. C. (1908), O. 21, R. 92—Notice of application to set aside sale not issued to party affected by order — Sale set aside — Order cannot be attacked by such party collaterally in another proceeding.

An order setting aside a Court sale cannot be treated as a nullity merely because notice of the application for setting aside the sale was not issued to a party who was affected by the order and that if such a party does impugn the validity of the order in a proceeding directed against the order he cannot attack it collaterally in any other proceeding. [P 465 C 2]

Birendra Chandra Das and Rajendra Nath Das—for Appellant.

Nirode Bandhu Roy — for Respondents.

Judgment.—Defendant 1 against whom a decree for confirmation of possession after declaration of plaintiff's title to an 8 annas share of a certain jama has been made by the Courts below, has preferred the appeal. The facts of the case are not at all complicated. They are, in so far as it is necessary to be stated here, the following: The jama belonged originally to two persons of the names of Nritya Bewa and Feli Bewa. They held it in equal shares. Feli Bewa's sons are the two plaintiffs in the suit, one of whom is Krishna Barai and the other is a minor of the name of Debi Charan Barai. Nritya Bewa had a son who died leaving a widow named Damayanti Bewa who is defendant 2 in the suit. Nritya Bewa's interest devolved on defendant 2 and Feli Bewa's on the plaintiffs. Feli Bewa and defendant 2

jointly executed a usufructuary mortgage in respect of the entire jama in favour of defendant 1. It is also said that subsequent to the execution of this usufructuary mortgage defendant 2 sold his 8 annas share of the jama to defendant 1. Thereafter, there was default in the payment of the rent due on account of this jama to the landlord. For such default there was a suit for rent instituted by the landlord against the plaintiffs and defendant 2.

There was a decree obtained in that suit and in execution of that decree the landlord purchased the entire jama and thereafter defendant 1 obtained a settlement of the jama from the landlord. Defendant 1 had also got his name recorded in the record of rights as the holder of this entire jama. It is on the basis of these facts that the two plaintiffs instituted the present suit for declaration of their title to the 8 annas share in the jama, for a declaration that the entry in the Record of Rights to the effect that defendant 1 was the tenant in respect of this jama to the exclusion of the plaintiffs was wrong for a decree for confirmation of possession in the 8 annas share and also for other reliefs. It may be stated here that the plaintiffs' case also was that after the sale in execution of the rent decree had taken place and the landlord had made his purchase at such execution, the said sale had on the application of the plaintiffs, been set aside. The contention of defendant 1 was that he was not a party to nor aware of the proceedings relating to the setting aside of the sale, that he was not bound by any decision that had been made in those proceedings in plaintiffs' favour and that he had taken settlement of the land in jama right from the landlords and was lawfully in possession of the jama. The Courts below have decreed the suit, and, as already stated, defendant 1 has preferred this second appeal.

A preliminary objection was taken as regards the competency of this appeal. This objection rests on the fact that there was an order made by this Court for proper representation of plaintiff 2 who was a minor, but that order not having been complied with, the appeal, in so far as it was against that plaintiff, was dismissed, leaving it open to the appellant to proceed with the appeal as against the other plaintiff, namely, plain-

tiff 1, at the appellant's risk. A good deal of argument has been addressed to me, based upon what has subsequently transpired to be a misconception as regards the exact nature of the case and of the decree that has been made therein. The argument first of all proceeded on the footing that there have been decrees made by the Courts below in favour of plaintiff 2, and for the matter of that in favour of both the plaintiffs, declaring the entry in the Record of Rights as incorrect. On an examination of the decrees passed by the Courts below however it appears that neither of those decrees contains any such declaration.

The suit undoubtedly is based upon a prayer to the effect that it should be declared that the entry in the Record of Rights, to the extent that it affects the property concerned in the suit, namely, the 8 annas share in the jama, was wrong; but that declaration evidently was asked for as ancillary to the other reliefs which the plaintiffs prayed for and have been granted by both the Courts below, namely, a declaration of their right and confirmation of possession. The maintainability of the appeal is also disputed on behalf of the respondents on the ground that the appeal arises out of a suit for correction of an entry in the Record of Rights under the provision of Chap. 10, Ben. Ten. Act. This argument also is not well founded, because the suit for correction of an entry in the Record of Rights is entirely different from a suit of the present nature in which declaration of title to and confirmation of possession of property is made, based though the suit may be upon a prayer in the nature of an ancillary declaration that the entry in the Record of Rights is incorrect.

The real point of view from which the matter has got to be considered is whether having regard to the fact that a joint decree has been made by both the Courts below in favour of the two plaintiffs declaring their title to an 8 annas share in the jama and giving them possession in respect of the said 8 annas share as against defendant 1, it is open to defendant 1 to challenge the validity of that decree in the absence of one of the plaintiffs and only to the extent of a 4 annas share which the other plaintiff may have out of the 8 annas share in the jama. I am clearly of opinion that

the appellant is not entitled to proceed with the appeal on such a basis. I am of opinion that if the appeal is allowed to proceed on that basis the result will be that defendant 1 will be allowed to get rid of his liability under the decrees of the Courts below to the extent of 4 four annas share out of the eight annas share in the jama in respect of which a joint decree has been made in favour of the two plaintiffs and which decree will always stand good so far as the minor plaintiff against whom the present appeal had been dismissed is concerned. The two decrees therefore will be utterly inconsistent with each other. Because plaintiff 2 will be entitled to realize that decree as against defendant 1 by applying for its execution and obtaining jointly with plaintiff 1 possession in respect of the eight annas share of this jama as against defendant 1, whereas, on the other hand, defendant 1 will have in his favour declaration to the effect that in so far as four annas share of plaintiff 1 is concerned out of the said eight annas share he is not liable to make over possession of that share to anybody. These decrees will be in conflict with each other and will never be allowed to stand. For this reason, I am of opinion that the present appeal cannot succeed.

My attention has been drawn on behalf of the appellant to a number of cases as supporting the view that notwithstanding what has happened the appeal should be allowed to continue. One of these cases is the decision of the Judicial Committee in the case of *Mohammad Wajid Ali Khan v. Puran Singh* (1). That was a case in which in a suit for pre-emption and recovery of possession a decree had been obtained by several plaintiffs in the Court below. On appeal the defendant in the suit challenged the validity of the decree of the trial Court, but one of the plaintiffs who had obtained such decree was not properly on the record. It was held by the Allahabad High Court that the appeal had abated as against all the plaintiffs and therefore was not maintainable. Their Lordships of the Judicial Committee, while holding that the representatives of the deceased respondent could not be bound by the decree that would be passed on such an appeal by

1. AIR 1929 PC 88=114 I O 601=55 I A 80=51
All 297 (PC).

the appellate Court and would still have the right to pre-empt the whole property under a decree of the first Court, held that it was not a correct view to take that in those circumstances the whole appeal had abated, but that it was possible for the appellant to proceed effectively against the surviving respondents. His case, in my opinion, does not support the appellant's contention in any way and for the simple reason that even though the representatives of the deceased respondent were not parties to the appeal and by reason of the decree which stood in their favour as having been passed by the trial Court they would be competent to pre-empt and obtain possession of the properties, such a decree in their favour would not be inconsistent with a decree which the appellate Court might pass negating the right of the other two plaintiffs who were properly parties to the appeal.

A decree for pre-emption, as pointed out by their Lordships, was a decree in favour of each of the cosharers to pre-empt in respect of the entire property leaving the said cosharers to adjust their shares and properties amongst themselves. Their Lordships' decision, in substance, was that the persons who would be entitled to pre-empt on the strength of the decree made by the trial Court would be competent to do so even though other persons who were properly parties to the appeal would be precluded from doing so by reason of the decree which the appellate Court might pass. This case therefore in my opinion has no application to the position which the appellant desires to maintain. Another case has been referred to and that is the case of *Hari Charan v. Kalipada Chakravarty* (2). The facts of that case also stand on a very different footing. There several plaintiffs had instituted a suit for ejection. They had failed in the trial Court. Then they preferred an appeal before the lower appellate Court, and when that appeal was pending one of the plaintiffs-appellants died and his heirs did not come forward to be substituted in the place of the deceased. The question that arose was whether in those circumstances it was open to the other plaintiffs-appellants who were on the record to proceed with the appeal. It was held that by an amendment which

ought to have been allowed in that case the latter should have been allowed to proceed with the appeal in order to get a somewhat different form of relief from that which he had originally claimed. There was no question of any conflicting decrees resulting. In the present case the position is entirely different and the appeal cannot, in my opinion, proceed. This is my view as regards the maintainability of the present appeal. But the case has been argued in very great detail, and upon the merits the one question of importance that arises is whether defendant 1 is bound by the proceedings relating to the setting aside of the sale and the order that was passed in those proceedings.

It appears that under O. 21, R. 90, of the Code, if an application is made for setting aside a sale, notice of such application should be given to all parties who may be affected by the sale being set aside. That is what is stated in O. 21, R. 92 of the Code, which lays down that no order for setting aside a sale should be made without notice to the parties affected thereby. The question is whether if such an order is made without notice being given to parties who may be affected by the setting aside of the sale the order may be regarded as one passed without jurisdiction and entirely a nullity or whether it should not be held that the order is a good one though in certain circumstances it may not be binding on the party to whom such notice has not been given. Now the decision which has been relied upon by the Court of appeal below for the view that such an order cannot be regarded as one passed without jurisdiction and as a nullity, the learned advocate for the parties could not produce before me. I have subsequently found that it was one of my own decisions. I held in that case that an order setting aside a Court sale cannot be treated as a nullity merely because notice of the application for setting aside the sale was not issued to a party who was affected by the order and that if such a party does impugn the validity of the order in a proceeding directed against the order he cannot attack it collaterally in any other proceeding. I see no reason to change my view expressed in that case.

In that view of the matter the question that arises is as to whether defendant 1 can rely upon his title as against the plaintiffs. Defendant 1 was a usufructuary mortgagee both in respect of the eight annas share which the plaintiffs claimed and in respect of the other eight annas share which belonged to Nritya Bewa. As regards the alleged purchase under the kabala from defendant 2 that did not relate to the eight annas share which formed the subject-matter of the suit. And the other title on which defendant 1 relied was the one which he derived from the landlord after the latter had made his purchase at the sale which was subsequently set aside. In these circumstances, the purchase which defendant 1 is alleged to have made from defendant 2 does not require any consideration in this suit. As regards the usufructuary mortgage the finding of the trial Court is that defendant 1 himself was bound to pay the rents due to the landlord and that this finding is correct appears from the very terms of the mortgage deed itself which is on the record. That being the position, any settlement which defendant 1 may have obtained from the landlord on a sale held in execution of a decree which had been brought about by the non-payment of the rent which defendant 1 was bound to pay under the terms of this document must enure to the benefit of the plaintiffs. It is quite true that the Subordinate Judge has not come to any finding with regard to this matter. But there is a finding to the above effect in the judgment of the trial Court, and inasmuch as it is, more or less, a finding on a legal position which in my opinion is correct, I do not see why I should not uphold it. The result is that, in my opinion, the appeal fails and must be dismissed with costs.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 467**

GUHA AND BARTLEY, JJ.

Makhan Lal Laha and another — Plaintiffs—Appellants.

v.

Nagendra Nath Adhicary—Defendant —Respondent.

Appeal No. 495 of 1931, Decided on 19th July 1932, against order of Addl. Sub-Judge, Howrah, D/- 30th September 1931.

(a) Partition Act (4 of 1893), S. 4—Transfer used in same sense as in Transfer of Property Act (1882), S. 5.

The word "transfer" in the Partition Act has been used in the same sense and in the same way as it has been used in the Transfer of Property Act, under which enactment transfer includes sale, mortgage, lease, exchange and gift, so far as vesting of title is concerned. [P 468 C 2]

(b) Interpretation of Statutes—Technical language has technical meaning.

When the legislature uses technical language in its statutes, it is supposed to attach to it, its technical meaning unless the contrary manifestly appears: *Durton v. Rees*, 10 M & W 307; *Laird v. Briggs*, (1881) 19 Ch D 22 and *Attorney General v. Mitchell*, (1881) 6 Q B D 548, *Ref.* [P 468 C 1]

(c) Partition Act (4 of 1893), S. 4—Surrender means falling of lesser estate into greater—Surrender by tenant of non-transferable tenancy is not transfer within meaning of S. 4.

A surrender is a yielding up an estate for life to him that hath an immediate estate in reversion or remainder wherein the estate for life or years may merge by mutual agreement; it is the falling of a lesser estate into a greater. Though a surrender may under certain circumstances amount to a transfer and operate as such, surrender of an interest in a tenancy which is non transferable does not amount to a transfer.

[P 468 C 2]

Of three tenants who were holding under the plaintiff, under a lease which gave no transferable right to the tenants who were members of an undivided family two of them surrendered their undivided two-thirds share to the plaintiffs who were not members of that family. Plaintiff filed a suit for partition:

Held: that the surrender did not operate as a valid transfer, that S. 4, Partition Act, had no application and that the property was liable to partition: 82 I C 232, *Dist.*; A I R 1919 Pat 120, *Diss. from.* [P 469 C 1]

*Rupendra Kumar Mitter—*for Appellants.

Amrita Lal Mukherji — for Respondent.

Guha, J.—This appeal is directed against the decision of the learned Additional Subordinate Judge, Howrah, setting aside a decree for partition, passed by the Munsif, 1st Court, Howrah in title Suit No. 358 of 1928, and remanding the case with a direction that the defendant in the suit should be "allowed to avail himself of the advantage under S. 4, Partition Act" (4 of 1893), as he had undertaken to buy the two-thirds share of the plaintiffs who were the transferees in respect of that share of the property in suit. Upon the findings arrived at by the Courts below, the plaintiffs were the holders of the superior interest in the property in question, which is a dwelling house in the sense that it is homestead land.

with huts standing thereon. Of the three tenants holding under the plaintiff, under a lease which gave no transferable right to the tenants, who were members of an undivided family, two of them surrendered their undivided two-thirds share to the plaintiffs who are not members of that family. The plaintiffs thereafter instituted the suit out of which this appeal has arisen, for partition, and the plaintiffs' claim in that behalf was resisted by the defendant as a member of an undivided family, who had an undivided share in the property sought to be partitioned. The issue raised by the parties on this part of the case was this:

"Is the property liable to partition in view of S. 4, Partition Act.

The trial Court gave its decision in favour of the plaintiff, and held that S. 4, Partition Act, had no application to the case. The Court of appeal below, on appeal by the defendant, reversed the decision of the trial Court, and has remitted the case to that Court, with the direction to which reference has already been made. The plaintiffs have appealed to this Court. The question arising for consideration in this appeal is whether the surrender of the two-thirds share by the tenants was a transfer within the meaning of S. 4, Partition Act, which speaks of a share of a dwelling house belonging to an undivided family being transferred to a person who is not a member of such family of such transferee suing for partition, and of a member of the family being a share-holder undertaking to buy the share of such transferee. The word "transfer" has not been defined in any statute law applicable to this country; it has long been recognized to be a technical term of law by the legislature and by the Courts of Justice. As pointed out by Parke, B., in *Burton v. Reeve* (1) when the legislature uses technical language in its statutes, it is supposed to attach to it, its technical meaning unless the contrary manifestly appears: see also *Laird v. Briggs* (2) and *Attorney General v. Mitchell* (3). As it has been said, the use of technical terms and technical language is necessary for the purpose of obviating the difficulty that

arise by the use of popular expressions in regard to legal subjects. So far as the use of the word transfer in the Partition Act is concerned, the reasonable view to take is that it has been used in the same sense and in the same way as it has been used in the Transfer of Property Act, under which enactment transfer includes sale, mortgage, lease, exchange and gift, so far as vesting of title is concerned. It is worthy of note that the word surrender is used in the Transfer of Property Act in connexion with determination of a lease (S. 111 of the Act) and there is no indication in the enactment that a surrender is a mode of transfer. It may also be noticed that under the Bengal Tenancy Act, transfer, of a holding by a tenant has not been placed on the same footing as a surrender of the same in favour of the landlord. The term surrender as distinguished from transfer is very well known in law; a surrender is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder wherein the estate for life or years may merge by mutual agreement; it is the falling of a lesser estate into a greater: (see Co. Litt. 337 B, 338 a). In our judgment, it is not possible to hold that surrender by a tenant is transfer as contemplated by S. 4, Partition Act: there is no accrual of title so far as the landlord is concerned by an act of surrender on the part of the tenant, surrender having only the effect of merging the lesser estate of the tenant into the greater estate of the landlord. The decisions of the Patna High Court referred to in the judgment of the Court of appeal below, do not rest upon the interpretation of S. 4, Partition Act, and they do not interpret the word transfer as used in that section. In *Jumra Prosad v. Basdeo Singh* (4) one of the cases referred to, it was observed by the learned Judges of the Patna High Court that the surrender by Hindu widow, of a raiyati holding of which she was for the time being in occupation, to her landlord, was a "giving up of a right or interest," and was a transfer of her limited interest in the holding. If the observation of the learned Judges go against the meaning attaching to the word surrender so far as legal interpretation of the word is concerned, and

1. 16 M & W 307=11 Jur 71=16 L J Ex 85.

2. (1881) 19 Ch. D 22=45 L T 238.

3. (1881) 6 Q B D 548=50 L J Q B 406=45 J P 619=44 L T 590=29 W R 638.

4. AIR 1919 Pat 120=50 I O 872.

if they go against the meaning of the word transfer as far as that meaning can be gathered from the statutory provisions contained in enactments relating to transfer of property, we dissent from those observations. There can be no doubt that a surrender in certain circumstances may amount to a transfer and operate as such. The case of *Abdul Karim Mean v. Miajan Mianji* (5), decided by this Court is a typical case of that description. The learned Judges deciding that case, proceeded on the footing that the surrender of a portion of a joint holding by one of the tenants was not a valid surrender, and such surrender was given effect to as a transfer in favour of the landlord. The question was not therefore decided that a surrender was a transfer in all cases. In the case before us the validity of the surrender by the tenants is not in question: it is a valid surrender of an interest in a tenancy which was non-transferable by the terms of the document creating the tenancy. It could not therefore be said as it was said in *Abdul Karim Mean's* case (5), referred to above, that the surrender operated as a valid transfer in favour of the landlord. The surrender in the case before us was not a transfer as contemplated by S. 4, Partition Act. In the above view of the case the decision arrived at by the Court of appeal below, and the order of remand passed by that Court, must be set aside; and we direct accordingly. The decree passed by the Court of first instance is restored, as we hold that S. 4, Partition Act has no application to this case. The parties are to bear their own costs in this Court, and in the Court of appeal below.

Bartley, J.—I agree.

K.S.

Order accordingly.

B. (1916) 32 I O 232.

A. I. R. 1933 Calcutta 469

RANKIN, C. J. AND PEARSON, J.
Government of Bengal—Petitioners—
Appellants.

v.

Alimandi and others—Accused—Respondents.

Government Appeal No. 1 and Criminal Reference Nos. 28 and 75 of 1932,
Decided on 17th November 1932.

Penal Code (1860), Ss. 186, 99 and 52—

Nazir ordered to give possession of land to decree-holder—Failure of judgment-debtor to remove hut standing on land—Removal effected by nazir's men—Objection by judgment-debtors—Accused have no right of private defence and are guilty under S. 186—Civil P. C. (1908), O. 21, R. 95.

A nazir who was ordered to give possession of land to decree-holder asked the judgment-debtor to remove the hut standing on the land. The latter refused and insisted that if they were to be removed they should be removed by the nazir's men. Thereupon the nazir's men began to remove the huts by cutting down posts instead of digging and taking them out. The accused obstructed the nazir and his men and in so doing, threatened and chased them. Their defence was that they did this in private defence to the mischief committed by the nazir and his party to his property.

Held: that the nazir and his party acted in good faith, that the accused had no right of private defence under the circumstances and that accused were guilty under S. 186, I. P. C.

[P 471 C 1, 2]

Khundkar—for the Crown.

Debendra Narain Bhattacharjee and Hementa Kumar Biswas—for Accused in Reference No. 75 of 1932.

Rankin, C. J.—In this case we have before us, first of all an appeal preferred by the Government against an order of acquittal passed by the Subdivisional Officer of Netrokona. That officer had before him a number of accused persons who were prosecuted out of the circumstances that arose when the nazir of the civil Court went with a large party of the auction-purchaser's men to give possession of certain land under R. 95, O. 21, Civil P. C. It appears clear and it is accepted by the trying Magistrate that on 4th April 1931 the nazir with his peons and with these men of the auction-purchaser went in the morning to the land in question. The nazir allowed a substantial time for the employees of the auction-purchaser to come to terms with the judgment-debtors. After a while according to him after 2½ hours he refused to wait any longer and told the judgment-debtors' party to remove their women and chattels. The women and the chattel were removed from the huts. Thereupon, Alimuddin certainly and it may be others of the respondents also objected to the taking down of the huts. They objected apparently on the ground that the writ was only to give delivery of possession of the land and was not to give delivery of possession of the huts. There was however nothing in this objection and it

was necessary to remove the huts in order to give delivery of possession of the land.

It is quite clear upon the evidence that the judgment-debtor's party which was a large party present on the land was given every opportunity to remove the huts themselves. They refused to do so and thereupon the nazir said that the decree-holder's people should remove the huts and they proceeded to take down the huts some of which were covered with corrugated iron sheets. When these people were removing Alimuddin's hut, Alimuddin gave orders and it is proved that each and every one of the accused before us except perhaps Darogali on the order of Alimuddin chased the nazir, his peons and the decree-holder's men with lathi, dao and other weapons and drove them from the place thereby not only committing assault but obstructing further processes of the Court. The nazir wrote his report the next day and it was filed on 7th April. This story and the complicity of each of the accused as stated above is clearly made out on the evidence and the evidence of the occurrence as I have endeavoured to describe it was satisfactory to the trying Magistrate. It may here be added that as regards the accused Darogali, it was proved that at the time when the party of the nazir was being driven from the site this accused set fire to one of the huts which contained some straw which was easily inflammable. It is quite clear that the idea was that by setting fire to one of these huts the accused would be able to make out that the nazir and his party had committed some excess in the course of the execution. The trying Magistrate was satisfied of this and he convicted this accused Darogali under S. 193, I. P. C., for fabricating false evidence and sentenced him.

As regards the other accused and also as regards Darogali on the other charges, however, the trying Magistrate arrived at the verdict of acquittal and the reasons which led him to that verdict, are these: He says that as regards one of the huts at least which was in the shape of a gable roofed hut some of the sheets of corrugated iron were bent and that the posts which supported the chal had not been properly and carefully dug out and uprooted but had been cut

through two or three feet from the ground. He says that this was not done with any improper motive but it was a careless way of proceeding to demolish the hut. As he says that this was done with want of due care therefore under S. 52, I. P. C., he thinks the absence of sufficient care and attention means that the huts were not demolished in good faith. Thereupon he goes on further to say that the party of the nazir were committing mischief by carrying out this execution. That being so he further says that there was a right of private defence on the judgment-debtors' party and, on the basis that there was a right of private defence on the judgment-debtor's part, the last step in his reasoning is that S. 99, I. P. C. did not in any way disentitle these accused persons from using force against the nazir and his people. S. 99 says

"there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done or attempted to be done by public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law" and that

"there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done or attempted to be done by the direction of the public servant acting in good faith under colour of his office."

In my judgment there was no want whatsoever of good faith on the part of the nazir in giving instructions to have these huts removed. The circumstances that the judgment-debtors refused to remove the huts themselves for which they were given an opportunity and insisted that if they were to be removed they should be removed by the nazir's men with his authority means that it is quite unreasonable to complain that the utmost degree of skill was not utilized in taking down the huts so as to give the decree-holder possession of the land. What is suggested is that there was a better way of taking down these huts than by cutting the posts near to the ground and that a more elaborate process would have avoided some slight bending of the corrugated iron sheets. I have no doubt at all that in giving direction that the huts must be taken down the nazir acted in good faith. I cannot agree with the trial Magistrate that there was any question of private defence available to the accused persons

in the present case; neither can it be said for a moment that because the ordinary writ under O. 21, R. 95, Civil P. C. does not particularly mention delivery of huts or removal of huts the huts cannot be removed. The auction-purchaser is entitled to get the property without the property being burdened with those huts. As a part of delivering possession the taking down of these huts does not appear to have been done with any disregard to any right of the judgment-debtors which they had under the proper procedure. In those circumstances the reasons which the trying Magistrate has given for finding not guilty a large body of persons who attacked the nazir and his party with armed weapons seem to me to be without any substance.

I have carefully considered and all the more carefully in view of the fact that the accused persons in this appeal have not been represented before us the evidence as regards each individual person. That Alimuddin the person who gave the order was the leading spirit is abundantly clear. It is also clear that each of the others except perhaps Darogali took part in chasing the nazir and his party. I take it on this evidence that the nazir and his party on being threatened retired and escaped any actual battery, though, of course it may be said that every one of the accused persons is guilty of assault. Still what happened was that by threat of force and immediate threat of force the nazir and his party were driven out of the field. In these circumstances the charges against each of these individual accused are of unlawful assembly of obstructing a public officer in the discharge of his duty and of assaulting a public officer in the discharge of his duty. As we are dealing with this case here and in the absence of the accused, I do not propose to take action against them under S. 143, I. P. C. No doubt they would be technically guilty of unlawful assembly the moment they started chasing the nazir. On the other hand they were living at the spot and they all congregated at the place necessarily and it would be a somewhat technical view of the matter to punish them for unlawful assembly. In the same way while they are technically guilty of assault, as there is no very detailed evidence as to the weapon with which each person was

armed or what he actually did in this connexion, I do not propose to find them guilty on that charge or to impose any separate sentence. The real substance of this matter is that they prevented the nazir from giving possession of the land, that they obstructed him in the discharge of his duty and that they did so by force and by a threat of force.

As regards Darogali however I am not quite sure about his participation in this. But as he has already been convicted and sentenced under S. 193, I. P. C., his case may be left out of consideration. The appeal as against him will be dismissed. In these circumstances it appears to me that we should treat this case as a case under S. 186, I. P. C., and in my judgment it will be sufficient if we convict each of the accused except Darogali on the charge under that section. As the offence under S. 186, I. P. C., is of a somewhat grave character, Alimuddin as the principal person must be sentenced to three months' rigorous imprisonment and each of the other accused except Darogali will be sentenced under the same section to two months' rigorous imprisonment. It remains then to say that this matter came before the learned District and Sessions Judge who made a reference to this Court under the provisions of S. 438, Criminal P. C. (Reference No. 28 of 1932) asking us to set aside the verdict of acquittal and to direct a further inquiry. In view of the matter having been brought to a conclusion in Government Appeal No. 1 of 1932, just now dealt with, it will not be necessary to make any order on that reference except to say that in my judgment it was a very proper reference to make.

The learned Sessions Judge had also to deal with another aspect of the matter. It appears that just before the civil Court made its complaint to the Magistrate against this treatment of the nazir, on 8th April a complaint was made to the Magistrate on the part of the judgment-debtors. In the end the Magistrate issued summonses upon two persons of the auction-purchaser's party namely, Ramesh Chandra Dutta and Nathu Singh, the complaint against these people being of causing mischief by burning down huts. This complaint was brought by Hatimuddin and was against the two persons I have named,

As it has now been found in a proceeding in which Hatimuddin is a party and in which he had had the advantage of being in the position of defendant, the burden of proof being on the prosecution that the burning of the huts and the attack upon the nazir's party was the act of the judgment-debtors' party, it seems to me that this counter case is one which ought not to be allowed to go further. The learned Sessions Judge has made a reference to this Court (No. 75 of 1932) recommending that the order made for issue of summonses on these two persons Ramesh Chandra Dutta and Nathu Singh of the decree-holder's party be set aside and that the proceedings against them be quashed. In my judgment that reference ought to be accepted and the order which the learned Sessions Judge has recommended ought now to be made.

Pearson, J.—I agree.

K.S.

Order accordingly.

A. I. R. 1933 Calcutta 472

PANCKRIDGE AND PATTERSON, JJ.

Emperor

v.

Makhan Lal Garodia and another—
Accused.

Jury Ref. No. 69 of 1932, Decided on 3rd February 1933.

Criminal P. C. (1898), S. 307 — Disagreement with opinion of jury is one of conditions precedent to making reference.

A disagreement with the opinion of the jurors is one of the conditions precedent to make a reference; and a Judge is not justified in referring the case to the High Court where his quarrel with the jury's verdict is not that the persons who were found guilty should in fact have been found not guilty, but that logically other persons who have been found not guilty should have been found guilty as well. [P 474 O 1]

Radhica Ranjan Guha—for the Crown.

Shyama Prasanna Deb—for Accused.

Order.—In this case the learned Sessions Judge of the Assam Valley Districts has referred the case of two persons, Makhan Lal Garodia and Debi Dutt (Serangi) alias Kopa Driver, to us under S. 307, Criminal P. C. The accused were tried together with three other persons, namely, Bhuban Bijoy Singh, Sew Prasad Agarwalla and Sew Pujan, in the following circumstances: There is an unmarried girl whom the medical evidence shows to be of about 20 years of age, who at the time of the events in

question was living with her brother-in-law Gaziram Kooch in Dibrugarh. There is a Marwari shop keeper in Dibrugarh of the name of Lachiram Agarwalla. It is an admitted fact that Lachiram formed an illicit connexion with the girl Subhadra. It appears that Lachhiram was in the habit at first of visiting Subhadra at Gaziram's house.

In April or May 1932 according to the prosecution, Makhania, Bhuban Bijoy and his mistress an Assamese Dom named Kusum, visited Gaziram's house and obtained possession of the person of Subhadra by falsely representing that they had been sent to fetch her by Lachiram. On this the girl consented to accompany Makhania and Bhuban. But she was taken by them not to Lachiram's house but to Kusum's house where she was raped by Makhania. She was discovered by Gaziram at this house and recovered by him. His story is that he consented to compromise the matter for a sum of Rs. 100 of which Rs. 50 was paid on that occasion with a promise that the balance would be paid at a later date. He signed a document which does not support this theory but lends colour to the defence suggestion that he agreed to make over his sister-in-law to Makhania as his concubine. Whatever may be the truth as regards this part of the story, it is quite certain that Subhadra returned to Gaziram's house on or about the 10th May 1932 and that a fortnight later she was removed from that house with her consent to become the kept mistress of Lachiram. On that occasion formal documents were executed by the parties duly stamped and embodying an agreement that Subhadra should behave as an obedient and faithful wife towards Lachiram who on his side undertook to treat her properly and provide for her in a suitable fashion. Lachiram is a married man whose wife lives in the same house with him at Dibrugarh. Arrangements were accordingly made whereby Subhadra was installed in a room in a corrugated iron building in Dibrugarh belonging to a man named Dhaneswar. There were other people living in the building including a relation of Subhadra's, a man about 25 years of age named Manik Ram. Subhadra lived in that house, Lachiram visiting her there periodically, until the night of 10th August 1932.

According to the prosecution, on that night, Makhan, Bhuvan Singh and Debi Dutt who is a taxi driver, broke into the house and climbed over a partition into the room occupied by Subhadra and forcibly removed her. It is said that they carried her from the house towards Debi Dutt's taxi which was standing close at hand and that before they reached the taxi Subhadra struggled and forced them to drop her in the mud, a fact which roused the attention of Sew Dayal Hajam, P. W. 2, who claims to have recognized the three persons whom I have named. Subhadra however was put into a taxi which was driven in the direction of some cross roads. There were various people in the neighbourhood of the cross roads and a considerable number of them have given evidence. They say they heard the screams of a woman as also shouts of the male occupants of the taxi. None of them however claims to have recognized Bhuvan by sight, though one says that he recognized Bhuvan's voice. Subhadra's story is that she was taken to Kusum's house as on the previous occasion in May and there ravished by Makhan. Two days later she was removed to a village named Romai where she was kept in the house of one Sew Prasad. Within the course of the same day she was taken from Romai by one of Sew Prasad's servants, a man of the name of Sew Pujan, to another hut belonging to Sew Prasad in an adjoining village of the name of Churikata. From there she was rescued by the police and Gaziram. This was the prosecution story and charges were eventually framed against Bhuvan, Makhan and Debi Dutt under Ss. 457 and 366, I. P. C. and against Sew Prasad and Sew Pujan under S. 364, I. P. C. Bhuvan denied having had anything to do with the occurrence and having seen Subhadra on or about 10th August.

On the other hand, Makhan and Debi Dutt admitted having taken the girl away from Kusum's house to Romai on 12th August. Makhan's story was that Subhadra consented to accompany him in May, as the document signed by Gaziram on 10th May indicates, but that Lakhman had subsequently obtained possession of her by a trick. He said that on 10th August, he received a message from Subhadra asking him to remove her from Lachiram's control and

that he therefore made arrangements with Debi Dutt for the use of the latter's taxi with which he went to the house where Subhadra was living and took her away in the taxi at her request and with her consent. Similarly he admitted the removal of Subhadra from Dibrugarh to Romai on 12th August, and states that this was done with Subhadra's approval. Sew Prasad and Sew Pujan also stated that they had acted very much in the way that the prosecution alleged, but they said that the girl had approved the arrangements that were made and that she was cheerful throughout and that they had no suspicion that she was the victim of abduction. The jury unanimously found Bhuvan Singh, Sew Prasad and Sew Pujan not guilty of the charges framed against them. The learned Sessions Judge has accepted the verdict of the jury and has acquitted these three persons. The jury however unanimously found Makhan and Debi Dutt guilty under Ss. 457 and 366, I. P. C. The learned Judge has not accepted this verdict and has recorded that in his opinion it is perverse and opposed to the weight of evidence, and has also recorded that it is necessary for the ends of justice to refer their case to the High Court.

When we turn to the learned Judge's letter of reference, its terms occasion considerable doubt in our minds whether the circumstances of the case bring it under S. 307, Criminal P. C., at all. There is no statement in the letter that it is necessary for the ends of justice to refer the case to us, but having regard to what was recorded by the learned Judge at the time of the verdict, this is of trifling importance. What is however of importance is that the learned Judge states that he would have been prepared to act upon a verdict of guilty against Bhuvan, Makhan and Debi Dutt under S. 366, I. P. C. He says however that he has not recommended the conviction of all these three, because there seems to him to be a considerable element of doubt in the case, and because the verdict of the jury showed that they thought the principal witnesses capable of falsely incriminating the most important of the accused. It is clear that what has weighed with the learned Judge is not so much the opinion that the verdict of guilty with regard to these

two accused is erroneous in fact, as his view that if the jury were prepared to convict these two accused on the prosecution evidence, they should also have convicted Bhuban Bijoy. As we have had occasion to observe before, this line of reasoning is to be applied with a considerable degree of caution. It is notorious that in this country, as probably elsewhere, it is not an uncommon thing for the witnesses to give a substantially correct story but at the same time to endeavour to implicate the innocent as well as the guilty. If the Court suspects that the evidence of a witness is affected by a motive of this sort, it will be reluctant to accept any portion of that evidence; but at the same time, it is going too far to say that the jury are acting perversely, because they are of opinion that the evidence of certain witnesses proves the guilt of certain of the accused but does not prove the guilt of their co-accused, although on the face of it, it implicates the latter in an equal degree.

It appears to us that the very fact that the learned Judge was in doubt whether to recommend the conviction of Bhuban Bejoy or the acquittal of Makhania and Debi Dutt, shows that he could not be said to disagree with the verdict of the jurors within the meaning of S. 307, Criminal P. C. A disagreement within the meaning of that section is one of the conditions precedent to a reference; and we very much doubt whether a Judge is justified in referring the case to this Court, where his quarrel with the jury's verdict is not that the persons who were found guilty should in fact have been found not guilty, but that logically the persons who have been found not guilty should have been found guilty as well. However we do not desire to dispose of the reference on this ground, although we consider it a substantial ground. (After considering the case on merits also the order proceeded.) In these circumstances we feel that the reference should be rejected, and we accept the verdict of the jury and convict Makhania and Debi Dutt under Ss. 457 and 366, I. P. C. having regard, however, to the disreputable character of all the persons concerned, we do not think that a heavy sentence is called for. We therefore sentence Makhania to one year's rigorous imprisonment under S. 366 and Debi Dutt to six months' rigorous imprisonment under

that section. We pass no separate sentences under S. 457. If on bail, they will forthwith surrender to their bail bonds and serve out the sentences imposed on them.

K.S.

Order accordingly.

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GUHA AND M. C. GHOSE, JJ.

Kshetra Mohan Pal Choudhury — Plaintiff—Appellant.

v.

Tufani Talukdar and others—Defendants—Respondents.

Appeal No. 2479 of 1928, Decided on 31st May 1932.

Registration Act (1908), S. 17 —Registration of mere partition list containing list of properties is not compulsory.

A mere partition list containing a list of properties is a memorandum and does not require registration. Whether such document is or is not a deed of partition must be decided on perusal of document itself. [P 475 C 1]

Basak and Prakash Chandra Pakrasi —for Appellant.

Annada Ch. Karkoon for *Jyotish Chandra Guha* and *Amrita Lal Mukerji*—for Respondents.

Guha, J. — This appeal is directed against the decision of the Subordinate Judge, Second Court, Dacca, dated 8th June 1928, holding that the plaintiff-appellant in this Court could not maintain a suit for enforcement of a mortgage. The mortgage bond on which the plaintiff's claim in suit was based, was executed by defendant 2 and his father in favour of defendant 6. The plaintiff's case was that the loan was advanced out of joint family funds of the plaintiff and his brothers, defendants 6 and 7; that the bond was allotted to the share of the plaintiff by virtue of an award made by an arbitrator. The document conferring a title to the plaintiff to recover the mortgage money, was dated the 4th Falgun 1332, B. S. by which a list of bonds which were allotted to the share of the plaintiff and which the plaintiff received from the arbitrator was prepared. The plaintiff's claim in suit, specially his title to recover the mortgage money, was denied by defendant 6, and it was this defendant who contested the plaintiff's claim in suit. It was pleaded by him that there was no valid or competent partition between the brothers; that the dues under the mortgage bond in suit was not allotted to the plaintiff's share.

The issue raised at the instance of the contesting defendant 6 in this behalf, was whether the plaintiff could maintain the suit as framed. On this question the trial Court, as also the Court of appeal below have agreed in holding that the suit was not maintainable. According to the Courts below, the document dated the 4th Falgun, 1332, B. S. to which reference has been made above was an instrument of partition, and it not being a 'registered one, no evidence could be allowed to be given by the plaintiff in proof of the partition by virtue of which the mortgage bond in suit was allotted to the plaintiff's share. The plaintiff has appealed to this Court. We have carefully gone through the contents of the document upon which the plaintiff's title to recover the mortgage money is based, and we are not able to take the view that has been taken by the Courts below in regard to the same. The document is no doubt signed by the parties to whose shares the different bonds mentioned in the list contained in the document are allotted; but we are unable to hold that it was an instrument of partition, of which registration was compulsory, under the law. The document containing a list is a memorandum; a mere partition list containing a list of properties, does not require registration. Whether such a document is or is not a deed of partition must be decided on perusal of the document itself. It is, in my judgment, impossible to extend the provisions of the Registration Act to the document under consideration in the case before us; and we hold that want of registration of the same did not invalidate the plaintiff's title to the mortgage bond in suit. According to the purport and meaning of the document, the suit as instituted by the plaintiff was maintainable at his instance. The mortgage which was sought to be enforced having been allotted to his share, according to the award of the arbitrator, and to which award defendant 6 in whose favour the mortgage bond was executed, had expressly signified his assent, by his signing the list contained in the document.

In the above view of the case before us, the decision and decree of the Courts below dismissing the plaintiff's suit must be set aside, and the case remitted to the trial Court for determination

of the other questions, if any, arising for consideration in the suit. If the mortgagor defendants have no defence in the suit, the plaintiff would be entitled to a decree as prayed by him in the suit. In the result, the appeal is allowed and the case remanded. We make no order as to costs in this appeal and the costs in the Courts below. Parties are to bear their own costs in the litigation up to the present stage.

M. C. Ghose, J.—I agree.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 475

MUKERJI, J.

Amulya Kumar Samaddar and others
—Plaintiffs—Appellants.

v.

Annada Charan Das and others—Defendants—Respondents.

Appeal No. 263 of 1930, Decided on 13th July 1932.

Civil P. C. (1908), Q. 26, Rr. 4 and 9—Question as to whether certain structures are old or new—Commission must be issued under O. 39, R. 7 and not under O. 26—Civil P. C. (1908), O. 39, R. 7.

Where the question to be decided is whether certain structures are old or new, the proper procedure is to issue commission under O. 39, R. 7, and not under O. 26, R. 4 or R. 9. [P 476 C 2]

Nripendra Chandra Das and Nikunja Behari Roy—for Appellants.

Satindra Nath Roy Chowdhury—for Respondents.

Biraj Mohan Majumdar—for Deputy Registrar.

Judgment.—The plaintiffs who have been unsuccessful in both the Courts below in a suit which they had instituted for recovery of possession from the defendants on the ground that the latter had abandoned a raiyati holding which they held under the plaintiffs have preferred this appeal. So far as the findings of the two Courts below are concerned they are very clear and specific and if there was no error of procedure or irregularity in the proceedings the findings could not possibly have been interfered with in second appeal. Unfortunately, however owing to an erroneous procedure that was adopted the plaintiffs appear to have been put to a position of very great difficulty and that has occasioned an amount of prejudice to them which cannot possibly be overlooked. A question arose as to whether certain huts standing on the land had been recently constructed or were in existence.

from long time before. For the purpose of having this matter inquired into, the Munsif issued a commission for local investigation. The writ that was issued was in the form prescribed for a commission to examine absent witnesses which is issued under O. 26, Rr. 4 and 18, Civil P. C. This form was altered to suit a commission for holding a local inspection. The heading was altered in that way and the body of the writ was also to a certain extent altered it being stated that the Commissioner was required to hold a local inspection of the disputed lands and that the inspection would be held in the presence of all the parties or their agents in attendance. But the portion which is to be found in a writ for examination of witnesses, namely, that the parties or their agents would be at liberty to question the witnesses on the points specified etc., was not struck out. On this commission the Commissioner proceeded to the spot, held a local inspection and examined certain witnesses who were produced before him on behalf of both the parties, and then made a report. At the hearing before the Munsif objection apparently appears to have been taken to the form in which the commission was issued as also to the reception of the report and the deposition which he had recorded as evidence in the case. This objection was given effect to by the Munsif and he said in his judgment:

"A Pleader-Commissioner was appointed on the prayer of the plaintiffs to inspect the huts but his report cannot be taken in evidence as it was not proved by examining the Commissioner. After the closing of the case and of defendants' plaintiffs' pleader while arguing his case filed a petition to examine the Pleader-Commissioner in order to prove his report, but I disallowed the prayer as it would have been seriously prejudicial to the defence if the Commissioner would be allowed to be examined at that late stage."

This matter formed one of the grounds of complaint in the memorandum of appeal, which was preferred to the Subordinate Judge and appears to have been pressed before him on behalf of the appellants. The Subordinate Judge disposed of the question in this way. He says:

"From the records of the suit, it seems that this Commissioner must have been appointed under O. 39, R. 7, Civil P. C., and not under O. 26, R. 9, Civil P. C., for the mode of appointment under the latter order was not followed. Hence the report of the Commissioner, unless proved regularly, could not be evidence in

the case and as plaintiffs did not take any steps except at a stage too late, the learned lower Court did not receive the report in evidence and did not allow the plaintiffs to get it proved. In my opinion, also the learned Munsif followed the right course."

Now having regard to the purpose for which the commission was issued it is quite clear that the matter should have been dealt with not under any of the provisions of O. 26 at all, but under O. 39, R. 7, the proper procedure being for the party to apply to the Court to authorize some particular person to go upon the land or enter the structure standing on it for the purpose of making an observation with regard to the condition of things existing there and to have come back to the Court to give his evidence as regards the result of such observation. That no doubt was the proper provision of the law to be resorted to for meeting the requirements of a case of this nature. That rule evidently was lost sight of by the learned Munsif and what he did was to issue a commission which on the face of it purported to be issued under O. 26, R. 4 which rule however has got no application whatsoever to the case being a rule which enables the Court to issue a commission for the examination of absent witnesses upon certain circumstances but which may perhaps be and is indeed sought to be justified upon the provisions contained in O. 26 R. 9 of the Code.

The last mentioned rule however was not meant to cover a case of this description. It only enables the Court to depute a Commissioner to hold a local investigation for the purpose of elucidating a matter in dispute or ascertaining the market value of the property or ascertaining the amount of mesne profits or damages or annual net profits etc. The only part of this rule within which a matter of this description may be reasonably attempted to be brought is the part which says that a commission may be issued for the purpose of elucidating a matter in dispute. This commission however was not for the purpose of elucidating any matter about which the parties were at variance because there was nothing which required any explanation. What was required was a decision on the question as to whether what was asserted on be-

half of the other side namely that the structures standing on the land were recent and not old structures was a true assertion or not a matter about which the Court and the Court alone had jurisdiction to inquire into and decide upon. The whole procedure that was adopted in this case was therefore wrong. Besides all these, there was a defect in the writ which necessarily had the effect of misleading the parties. The writ by the terms contained in its body provided for the examination and cross-examination of witnesses, it never having been the intention of the Court at all to issue a commission for that purpose. It is not suggested that such witnesses as were examined by the Commissioner, in fact, in execution of this writ fulfilled the requirements mentioned in O. 26, R. 4. The whole thing therefore was misconceived and as a result of this irregularity and defect witnesses who were examined before the Commissioner were not examined before the Court and their deposition was lost. The report of the Commissioner also was of no avail to either side. I am clearly of opinion that the Courts below should not have left the matter in the state in which they have done in their judgment.

The proper course, in my judgment, to adopt in this case would be to allow the appeal, set aside the decision of the Subordinate Judge complained of and to send the case back to his Court so that he may now give the appellants an opportunity to examine the Commissioner and the four witnesses who were examined before the Commissioner or such of them as he may desire to do and after they have been so examined the respondents should be given liberty to examine such other witnesses as they may desire to do in rebuttal of the evidence adduced on behalf of the plaintiff. That being done the Court below will proceed to give the parties an opportunity of arguing their respective cases and then dispose of the appeal before him in accordance with law. There will be no order as to costs in this appeal.

K.S.

*Appeal allowed.***A. I. R. 1933 Calcutta 477****MUKERJI AND BARTLEY, JJ.***Hemanta Kumari Debi—Appellant.*

v.

Sefatulla Biswas—Respondent.

Appeal No. 122 of 1929, Decided on 22nd July 1932.

(a) Civil P. C. (1908), O. 1, R. 9—Lease settled by plaintiff with two persons for definite period—Sale of jote for arrears of rent and purchase by son of one of lessees—Suit for khas possession after expiry of period resisted by person alleging to be lessee from original lessee on ground that lease granted to original person had not determined—Purchaser and original lessees are not necessary parties but only proper parties—Effect of non-joinder of them is not fatal to suit.

Plaintiff settled land for cultivation for a period of ten years with A and K. The jote was sold for arrears of rent and the purchaser continued to cultivate for the remaining term of lease. After the expiry of the terms plaintiff settled the land with other persons who were dispossessed by S who claimed to be a lessee from A. In a suit for khas possession, the purchaser and the original lessees were not impleaded.

Held: that they were not necessary parties but only proper parties, that their non-joinder was not fatal to the maintainability of the suit, that even though they were not bound by the decree that may be passed, plaintiff was entitled to a decree if what he had alleged in plaint was proved. [P 479 C 2]

(b) Landlord and Tenant—Mere non-payment of rent does not prove abandonment of tenancy.

Mere non-payment of rent does not indicate an intention on part of lessee to abandon the tenancy. [P 479 C 2]

(c) Bengal Tenancy Act (1885), S. 89—Original lease for definite term containing renewal clause with no term fixed—Merely on expiry of such period, relationship as lessor and lessee does not cease where lessee is in possession unless there is waiver or refusal.

When the original lease for a fixed period contains a renewal clause with no term fixed, and the lessee continues in possession after the expiry of the original term the mere fact that the original term has expired in the absence of any circumstance suggesting a waiver of refusal, ought not to be regarded as determining the relationship between the parties and the lessor before he makes a fresh settlement is bound to give notice to the original lessee about issue of leases: *Case law referred*. [P 480 C 2]

Brojola Chakravarti, Debendra Nath Bagchi and Bansori Lal Sircar—for Appellant.

Atul Chandra Gupta, Dinesh Chandra Roy, Satish Chandra Sinha, Provas Chandra Chatterjee for Amulya Narain Biswas and Sudhir Kumar Khastgir—for Respondent.

Prafulla Chandra Chakravarti—for Deputy Registrar.

Judgment.—The plaintiff's case shortly put was as follows: By a lease dated 4th Agrahon 1320 (20th November 1913) the plaintiff settled a chur named Chur Udaipur, consisting of about 392 bighas of land, for a period of ten years with one Asiruddi Hazi and one Kazem Munshi, for purposes of cultivation. The jote was sold in execution of a decree for arrears of rent for the period 1324 to 1327 B. S., and purchased by one Syeduddin, son of Asiruddi Hazi on 24th October 1922. Syeduddin thus came into possession and continued to be so for the unexpired portion of the lease. The term of the lease expired in Kartic 1330, when Asiruddi gave up possession, so that the chur reverted to the khas possession of the plaintiff. The plaintiff then caused proclamation for settlement of the chur to be made by beat of drum and by affixing notices at various places, got the chur surveyed and chittas and khatians prepared and then settled it with the pro forma defendants, such settlements being made during the period Falgoon 1330 to Baisakh 1331. Defendant 1 Sefatulla Biswas (who had taken a lease of a half of the chur, i. e., of 196 bighas, from Asiruddi) at first tried to obtain a settlement, but having failed therein, created various disturbances and eventually dispossessed the proforma defendants. The plaintiff therefore instituted this suit on 9th March 1927 for recovery of khas possession or if it be found that the pro forma defendants had raiyati rights then for recovery of joint possession with them, and also for mesne profits.

Defendant 1 in the suit was the said Sefatulla Biswas as already stated. Defendants 2 to 37 are sub-lessees and other persons whom defendant 1 set up and who are alleged to have been acting in concert with him in the matter of the dispossession. Defendants 38 to 76 are the pro forma defendants. The written statement of defendant 1, under whom the contesting defendants, namely, defendants 2 to 37 claim, is important. He pleaded that the suit could not proceed as the jotedars Asiruddi Hazi and the heirs of Kazem Munshi were not parties to it and without determining whether they had given up the lands. He denied that Asiruddi or Kazem or the heirs of the latter or Syeduddin ever abandoned the holding, and asserted that conse-

quently the plaintiff had no right to make a fresh settlement of the lands. He also denied the allegations as to the issue or service of the proclamations for settlement. A written statement was originally filed on behalf of defendants 2 to 37 in which only a barga right and no permanent right was set up. The suit proceeded and eventually there was a decree on a compromise as amongst the plaintiff, defendant 1 and some of the pro forma defendants, defendant 1 getting a quantity of land for himself, and ex parte against defendants 2 to 37. Subsequently the ex parte decree was set aside, and defendants 2 to 37 were allowed to file a fresh written statement, it being held that the first written statement filed on their behalf was not really theirs but was the handiwork of defendant 1 who had practised a fraud on them. They filed a fresh written statement pleading that the tenancy of Asiruddi and Kazem had not been determined, that they themselves had taken settlements from defendant 1 whose tenancy was subsisting and that, in any case, they were tenants bona fide holding under the latter and so not liable to eviction. The Subordinate Judge has dismissed the suit. Hence this appeal by the plaintiff.

The main question, which the Subordinate Judge treated as a preliminary question in the case and on the decision of which he has dismissed the suit, is, as he put it in his judgment, a question as to non-joinder, namely, non-joinder of Asiruddi, of the heirs of Kazem and also of Syeduddin. In reality however it is not a mere question of non-joinder but a question of substance as well. He held that the plaintiff had failed to prove that these persons had no subsisting rights, that the question as to whether the lease in favour of Asiruddi and Kazem had determined or not or whether Syeduddin had a subsisting tenancy or not could not be decided in the absence of those persons, and he observed :

"If they were made parties, they would be able to produce evidence, which the contesting defendants are not in a position to produce, that their lease had not been legally determined; so in their absence the plaintiff's right to settle lands to the pro forma defendants cannot be established. This non-joinder of necessary parties is fatal to the plaintiff's case. The plaintiff has not impleaded the parties whose right to remain in possession cannot be ignored."

In our judgment, there is considerable difficulty in regarding these persons as "necessary" as distinguished from "proper" parties, so as to make their non-joinder fatal to the suit. They were certainly very proper parties, but having regard to the frame of the suit it cannot, in our opinion, be said that in their absence the suit was not maintainable. Any decision arrived at in their absence would not, of course, be binding on those persons, and it may even be that such a decision may be rendered infructuous by these persons because of the fact that they would not be bound thereby. But even then, if what the plaintiff alleged is proved, the plaintiff is entitled to have a decree, whatever its practical effect or consequence may be. The real question is a question of the merits, which as indicated above is closely intermingled with the question of non-joinder. To deal with the merits a few more facts require to be stated. The kabuliati executed by Asiruddi and Kazem was as already stated, for a term of 10 years to expire in Kartik 1330; but in it there was the following clause :

" If on the expiration of the term we apply for obtaining settlement of the aforesaid land at a reasonable or proper rate of rent, you will grant a fresh settlement to us or to our heirs or legal representatives."

In Sefatulla's kabuliati in favour of Asiruddin, which as already stated was executed in 1919, it was recited that the jote which the latter was holding was a kayemi jote, but it was also stated :

" Your term in respect of the land described in the schedule will expire in the month of Kartik 1330. I shall not be able to plead for abatement of rent for that reason. If you take a fresh settlement of the said property from the zamindar Hemanta Kumari you will not be entitled to eject me from the property described in the schedule."

The arguments addressed to us on behalf of the appellant are of a three fold description. In the first place it has been contended that Asiruddi and Kazem never appeared to take a settlement although it was publicly proclaimed that a fresh settlement was going to be made; indeed it was alleged in the evidence that there was positive refusal on their part to take a fresh lease. Secondly, it has been urged that there was, in fact, abandonment on the part of Asiruddin and Kazem and also on the part of Syeduddin, as was the case alleged in

the plaint. And thirdly, it has been maintained that the plaintiff was entitled under the law to regard the tenancy as having come to an end. So far as the first of these contentions is concerned we are in entire agreement with the Judge below in the findings of fact that he has arrived at. We hold that the case put forward on the appellant's behalf that two officers of Asiruddin and one Abdul Sobhan on behalf of Kazem's heirs told them that they would not take a renewal is not proved. At the same time we are not inclined to accept as true the evidence that has been adduced on behalf of the defendants that negotiations were going on with those persons when the fresh settlements were made. We think the evidence on the whole justifies the finding that the plaintiff's officers took the position to be that Asiruddi and Kazem's heirs had no existing right and on that supposition proceeded to deal with the lands. As regards the second contention we are of opinion that that also has not been made out. Nothing has been proved which can reasonably lead us to hold that there was abandonment either in fact or in law. It is true that rent was not being amicably paid, but that is hardly any indication that there was an intention to give up the property, when the amounts were being paid in one way or another and when the property was put up to sale, either the sale was set aside by payment of the decretal amount together with compensation or the property was purchased in the name of Syeduddin, son of Asiruddin. There is evidence that the tenancy was a profitable one. On the other hand the attempt made by the plaintiff to prove that possession had, in fact, been given up by those persons has not succeeded. The sub-tenant Sefat and his under-tenants were on the land, and there is nothing to indicate that Asiruddi or Syeduddin, and Kazem's heirs were not in possession of the lands through those persons as before.

The third contention is the only one that deserves a more careful consideration. The position taken up by the plaintiff is that, in any case, on the expiry of the lease and when there was no prayer for renewal she was justified in treating the tenancy at an end and in making fresh settlement of the lands with the pro forma defendants; ignoring such posses-

sion as Asiruddi or Syeduddin or Kazem's heirs or Sefat or the subordinate tenants or bargadars who may have been on the lands had. As observed by the Judicial Committee in the case of *Watson & Co. v. Ram Chand Dutt* (1):

"in Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience."

In England where the original lease provides that the lessee must apply for a renewal within a specified time, the condition is not regarded as implying that time is to be regarded as the essence of the contract unless there is clear stipulation to that effect either express or implied: see *Hearne v. Tenant* (2). In *Lewis v. Stephenson* (3) it was said that where a lease is silent as to the time when application should be made, it has been said that it must be made with a reasonable time before its expiration. But it has been pointed out that this dictum was obiter: (see *Fox on Landlord and Tenant*, Edn. 6, p. 360 where it is also said, quoting *Job v. Barrister* (4), affirmed, in 28 Ch. 125, that it is not, as it is thought to be inferred, that the lessee will necessarily lose his right of renewal by not having made the application if he continues in possession afterwards with the sanction of the lessor). If one party is guilty of delay the other may call upon him to fulfil the agreement within a reasonable time and any further delay after notice will defeat a claim to specific performance whether made by the lessor or by the lessee unless capable of satisfactory explanation. In *Fox on Landlord and Tenant*, Edn. 6, p. 429 it is said:

"Hence though an agreement to let for a specified term, with a stipulation to grant a lease at the tenant's request for a further specified term at the same rent, may be specifically enforced at the instance of the lessee unless he has waived his right (*Mc Ilroy v. Clements*) (5), affirmed G. A. p. 140 at any time after expiration of his first term (*Moss v. Burton*) (6), so long as he has continued in possession with the sanction of the lessor (*Buckland v. Papillon*) (7), or (as it has been otherwise expressed) as long as the relation of landlord and tenant continues (*Ryder v. Ford*) (8) *Mc Ilroy v. Clements* (5) the lessor

may call upon him to decide if he will take the lease, and any delay on the part of the lessee after receiving such notice will be fatal, [*Hersey v. Gibbett* (9); per Lord Romilly M. R.]."

Now the circumstances under which a holding over may be presumed may not have been present in this case; but there was no waiver of the clause, and the original tenants were in possession by themselves and through sub-tenants. If the lessee continues in possession, when there was a renewal clause in the original lease, by himself or his under-tenants, after the original term without exercising his option, he is liable for rent in an action for use and occupation: (*Christy v. Tancred* (10); *Waring v. King* (11). In the case of *Mc Ilroy v. Clements* (5) in the judgment of the Court of appeal no grounds are given, and it would seem that the original relationship was supposed to continue because the lessee continued in possession. When the original lease contains a renewal clause with no term fixed, and the lessee continues in possession after the expiry of the original term the mere fact that the original term has expired in the absence of any circumstance suggesting a waiver or refusal, ought not, in our opinion, to be regarded as determining the relationship between the parties. Moreover a contrary assumption would militate against the spirit if not the letter of S. 89. Ben. Ten. Act.

We are of opinion that the plaintiff, before she made the fresh settlements was bound to give notice to the original lessees. Proclamation may have been issued inviting people to take fresh settlements, but we are not satisfied that the original lessees had any notice or knowledge, from which a refusal or waiver on their part could be inferred. We think the Court below was right in the view it took of the merits of the case. We accordingly dismiss the appeal, with costs to the appearing respondents, other than respondent 1.

K.S.

Appeal dismissed.

9. (1864) 18 Beav 174=2 W R 206=28 L J Ch 818.

10. (1840) 7 M & W 127=10 L J Ex 238=4 Jur 1064.

11. (1841) 5 M & W 571=11 L J Ex 49.

1. (1891) 18 Cal 10=17 I A 110=5 Sar 535 (PC),

2. (1807) 13 Ves 237.

3. (1897) 87 L J Q B 296=78 L T 185.

4. (1856) 2 K & J 374.

5. (1928) W N 81.

6. (1866) 1 E Q 474.

7. (1864) 2 Ch 67=36 L J Ch 81=15 L T 378=12 Jur (n s) 992=15 W R 92.

8. (1928) 1 Ch 541=92 L J Ch 565=129 L T 347.

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PANCKRIDGE AND PATTERSON, JJ.

Montajaddin Choukidar—Accused —
Petitioner.

v.

Emperor—Opposite Party.Criminal Revn. No. 785 of 1932, De-
cided on 1st March 1933.(a) **Criminal P. C. (1898), S. 195 (1) (c)—Of-
fence by party to civil proceedings—Docu-
ment given in evidence in suit—Complaint of
civil Court is necessary—Penal Code, S. 468.**Where an offence is committed by a party to
a proceeding in a civil suit in respect of a docu-
ment given in evidence in such suit, no crimi-
nal Court can take cognizance except on the
written complaint of the said civil Court
under S. 195, Cl. 1 (c) and in absence of such
complaint conviction under S. 468, Penal Code,
should be set aside. [P 481, C 2](b) **Registration Act (1908), S. 82—Charge
not specifying abetment—No failure of jus-
tice—Accused not misled—Omission is im-
material.**Where a person assists another in personating
him as a third person, he abets such other's
offence under S. 82 (c) and thereby renders
himself liable to punishment under S. 82 (d).
The mere fact that the charge does not specify
the offence of abetment is immaterial if the short-
comings having not misled the petitioner in
any way or have not occasioned failure of jus-
tice. [P 481 C 2; P 482 C 1](c) **Criminal P. C. (1898), S. 439—Finding
of civil Court is not always binding.**High Court as a criminal Court of revision
is not bound to pay much attention to the
findings of the civil Court specially when the
finding is one against which the person affected
by it could not appeal because he was successful
in the suit on other grounds. [P 482 C 1]*Sures Chandra Talukdar* — for Peti-
tioner.*Khondkar*—for the Crown.

Order.—The ground on which this Rule was obtained is that the alleged offence having been committed by a party to a proceeding in a civil suit in respect of a document given in evidence in such suit, no criminal Court can take cognizance except on the written complaint of the said civil Court under S. 195, Cl. 1 (c), Criminal P. C. The petitioner Montajaddi Choukidar was convicted of an offence punishable under S. 468, I. P. C., and also with an offence punishable under S. 82, Registration Act. It appears that he was a party to a mortgage-deed which purported to create a security in favour of a certain lady who had lent money to the petitioner and his brother, a man named Ainuddi. Ainuddi was also on the face of the document, a party to it and the

property affected by the document was the property jointly owned by the petitioner and Ainuddi. The lady brought a civil suit on the document and Ainuddi took two defences. In the first place he denied execution and stated that his signature on the document was not a genuine signature and he also stated that he was a minor at the time of the alleged execution. The civil Court found that the document was executed by Ainuddi and disbelieved his case on that point but held that he was, as he stated, a minor at the date of the execution. As a result the suit was dismissed as against Ainuddi and the plaintiff obtained a decree which only entitles her to enforce her security as against the petitioners' share of the property. No application was made asking the civil Court to make a complaint against Ainuddi for giving false evidence. Subsequently however the plaintiff in the civil suit instituted proceedings in the ordinary way against the petitioner, Ainuddi, and a relation of theirs named Montajaddi Akond. Ainuddi was acquitted but the present petitioner was convicted under S. 468, I. P. C., and S. 82, Registration Act.

The Court had found that the petitioner and Muntajaddi Akond went to the Registration Office with a man named Safar Ali and that Safar Ali, with the assistance of his companions, personated Ainuddi and induced the Sub-Registrar to register the document in respect of which a suit was subsequently instituted. In my opinion the conviction of the petitioner under S. 468, I. P. C., which has been affirmed by the learned Sessions Judge, cannot stand. As far as I can see there was no evidence at all that the signature was the actual work of the petitioner and, in any event, it appears to me which is also Mr. Talukdar's contention, that the case is one covered by S. 195, Cl. 1 (c), Criminal P. C., and therefore the proceedings were vitiated by the absence of a complaint made by a Court. I therefore think that the conviction under S. 468, I. P. C., should be set aside. These considerations do not however apply to the petitioner's conviction under S. 82, Registration Act. If the finding of the trial Court and the lower appellate Court is correct then Safar Ali personated Ainuddi and in such

character presented the document for registration. He therefore committed an offence punishable under S. 82 (c), Registration Act. Further the findings of the lower Courts make it clear that the petitioner assisted Safar Ali in personating him as Ainuddi. He therefore abetted Safar Ali's offence under S. 82 (c), Registration Act, and thereby rendered himself liable to punishment under S. 82 (d). The only difficulty that I feel with regard to the charge under the Registration Act is that it is not very happily worded because it does not specify the offence of abetment. However although the charge is defective I do not think that its shortcomings have misled the petitioner in any way or have occasioned a failure of justice. Mr. Talukdar has urged upon us that a criminal Court is precluded from coming to a finding different from that of a civil Court and he argued that the question of the genuine nature of the document is concluded by the findings of the civil Court in the suit brought upon the document where it was found that Ainuddi was the executant. I agree that in cases falling within S. 195, Criminal P. C., where the complaint of a Court is necessary, difficulties of the nature indicated may arise. I do not think we are bound to pay much attention to the findings of the Munsif's Court specially when the finding is one against which the person affected by it could not appeal because he was successful in the suit on other grounds. The Rule has not been issued on the ground that the sentence is excessive and seeing that under S. 82 the sentence of seven years' rigorous imprisonment is permissible we do not consider a sentence of six months rigorous imprisonment is by any means excessive.

The result is that the conviction and sentence under S. 82, Registration Act is upheld. The petitioner, if on bail, will surrender to his bail bond and serve out the remainder of the sentence.

R.K.

Order accordingly.

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RANKIN, C. J. AND MITTER, J.

Sarat Chandra De—Plaintiff—Appellant.

v.

Pramatha Nath Banerji and others — Defendants—Respondents.

Appeal No. 130 of 1929, Decided on 15th June 1932, from original decree of First Class Sub-Judge, 24-Parganas, D/- 23rd January 1929.

(a) Succession Act (1925), S. 321—Revocation proceedings started owing to failure of executor who was specific legatee to issue citation to widowed daughter of testatrix—Costs of such proceedings ordered to come out of estate of testatrix—Mortgage effected before such order by heirs of executor—Execution of decree for costs by transferee of widowed daughter's interest — Mortgagee is entitled to preliminary decree conditional on his paying the costs of revocation proceedings.

A testatrix died leaving a grandson and a widowed daughter. The entire estate devolved on the grandson and he obtained probate of the will; but no citation was issued to the widowed daughter who transferred her interest to two persons. The latter applied to revoke the probate of the will and the will was ordered to be proved in solemn form. The will was accordingly proved but the costs in the proceedings were ordered to come out of the estate. In the meantime the grandson died and his widow as certified guardian of minor sons and with permission of District Judge effected a mortgage in respect of the property for repayment of loan. The mortgage was prior to the order as to costs. In execution of the decree for costs, the right, title and interest of judgment-debtor was sold and a suit by the mortgagee to enforce the mortgage was contested by such purchaser.

Held: that the mortgagee was entitled to a preliminary decree only on payment of costs as the revocation proceedings had to be started because the executor had not issued citation but that the purchaser did not get the property but only the equity of redemption and as such was liable for the mortgage-debt: *Godwin v. Prince*, (1898) 2 Ch 225, *Dist.* [P 494 C 2; P 485 C 2]

(b) Succession Act (1925), S. 333 (2) — Specific legacy—Specific legatee appointed executor — Death of legatee six years after order for probate and full administration of estate — Assent of executor to specific bequest may be presumed.

Where a specific legatee who is appointed executor dies six years after the order for probate and full administration of the estate, the assent of the executor to the specific bequest must be presumed. [P 485 C 1]

(c) Mortgage — Subrogation — Subsequent mortgagee paying off prior mortgage is subrogated to position of prior mortgagee — Transfer of Property Act (1882), S. 74.

Where a subsequent mortgagee pays off a prior mortgage, he must be assumed according to the rule of justice, equity and good conscience to have intended to keep the first mortgage alive and is entitled to stand in the place of the first

mortgagee: 10 Cal 1085 (PC) and AIR 1924 PC 36, Ref. [P 485 C 1]

(d) Will—Principle that residuary legatee is entitled only to share in ultimate residue after all liabilities of estate including all administration expenses has no application in case of specific legatee who has acquired title before the incurring of expenses.

The principle that a residuary legatee is entitled only to a share in the ultimate residue which may remain for final distributions after all the liabilities of the estate including the expenses of administration have been satisfied has no application to a case of a specific legatee who acquires a title to the property long before the expenses are incurred in connexion with revocation proceedings, the costs of which are ordered to come out of the estate: 32 Cal 198 (PC) and AIR 1928 PC 38, Dist. [P 485 C 2]

Rupendra Kumar Mitter, Pramatha Nath Mitter and Debendra Nath Mukerji — for Appellant.

Hirabai Chakravarti — for Respondents.

Mitter, J.—This is an appeal by the plaintiff and arises out of a suit brought by him to enforce a mortgage security executed by defendant 1 for self and as certificated guardian of defendants 2 and 3 and of their eldest brother Motilal Chatterji since deceased in favour of the plaintiff on 24th July 1922 for a sum of Rs. 7000. Defendant 4 who is the only contesting defendant in the suit has been impleaded as he claims to have purchased the mortgage property in the year 1927 in execution of a money decree. The Subordinate Judge of 24 Parganas before whom the suit came up for trial dismissed the suit with costs against defendant 4 and decreed the suit against defendants 1 to 3 with costs, the decree against them being a simple money decree.

It is against this decree that the present appeal has been brought. The questions of law which fall for determination in this appeal depend on facts which are not disputed and which may be shortly stated as follows: Premises No. 37, Chakraberia Road which forms the subject of the mortgage security belonged originally to one Becharam Banerjee who made a gift of the said property to his daughter Kamanimoni Devi by a registered deed of gift dated 20th November 1876 and Kamini was possessing the said property in absolute right till the time of her death which happened on 18th February 1908. In the meantime on 29th January 1908 the said Kamini executed a will to the effect

that on her death her two grandsons (Haripada Chatterji and Motilal Chatterjee) by a predeceased son Benimadhav would obtain the said property in equal shares, and that Motilal would be the executor to her estate and would look after the property after her death. The will further provided that should Haripada die sonless then Motilal would obtain Haripada's half share of the property. At the time of Kamini's death there were living her grandson Motilal and a widowed daughter named Matangini but Haripada had not been heard of for a long time before Kamini's death and he left no heirs, consequently the entire estate devolved on Kamini's grandson Motilal. Motilal obtained the probate of the will in common form on 5th May 1909 and probate was directed to be issued on 21st December of the same year. Motilal died in April 1915 and was survived by his widow Bibhabati, defendant 3 and three minor sons Bankim, Kanai, defendant 1 and Joy Krishna, defendant 2. On 21st December 1918 Bibhabati acting as a certificated guardian of her minor sons and with the sanction of the District Judge of 24 Parganas executed a mortgage in favour of Srinath De for repayment of a loan of Rs. 3,000 by which 37, Chakraberia Road South was hypothecated. It appears that when probate was applied for no citation was issued to Matangini the widowed daughter of Kamini who had in the meantime transferred her interest in Kamini's estate to two persons Charu Chandra and Bir Sinha. The latter two persons applied to revoke the probate of the will on 8th December 1920. The Additional District Judge of 24 Parganas passed the following order on the said application:

"I am inclined to call upon the applicant for the grant to prove the will in solemn form and to prove the other remaining issue as to whether the will is a forged document in that proceeding. I do not at this stage order revocation directly and follow the rule laid down in *Prem Chand Das v. Surendra Nath Sah* (1) and direct that the probate be re-called and the District Judge would please call upon the opposite party to prove the will in solemn form."

The will was proved in solemn form in the presence of Charu and the District Judge made an order for grant of letters of administration to the sons of Motilal with a copy of the will annexed,

This order is dated 28th July 1924. An appeal was taken to the High Court against this order by Charu and this Court varied the order to this extent namely, that letters of administration with a copy of the will annexed was granted to Bankim the eldest son of Motilal as he alone had attained majority. The High Court however directed that the costs of the proceedings both in the High Court and in the lower Court should come out of the estate of the testatrix. This order was made by the High Court on 16th August 1926.

It has already been stated that on 24th July 1922 Bankim and his two minor brothers through their certificated guardian Bibhabati borrowed Rs. 7,000 from the present plaintiff and executed a mortgage in respect of 37, Chakraberia Road. Out of this sum of Rs. 7,000 the first mortgage in favour of Srinath De, father of the present plaintiff, was satisfied and sum of Rs. 2,151 was paid in cash to the mortgagors. This mortgage was also effected with the permission of the District Judge of Alipur obtained on 13th May 1922. On 14th January 1927 Charu Chandra and Bir Sinha made an application for execution of the decree of the High Court for costs against Bankim and his two brothers and on the death of Bankim pending execution his mother Bibhabati was substituted in his place. In the column which relates to the mode in which the assistance of the Court is required it was stated that the prayer was for realization of the amount of the costs from the estate of the late Kamini Debi by attachment and sale of premises No. 37, Chakraberia Road. In execution of this decree the right, title and interest of the judgment-debtors in No. 37, Chakraberia Road was sold and was purchased by defendant 4 who is the only contesting respondent.

On the state of facts stated above the Subordinate Judge was of opinion that the mortgage of the plaintiff which was for consideration must be postponed to the purchase of defendant 4 or in other words defendant 4's purchase would have priority over plaintiff's mortgage. Several issues were framed in this suit and it is not necessary to refer to them in any detail for the purposes of this appeal. In support of this appeal four points have been raised by Mr. Rupendra

Kumar Mitter who appears for the appellant. He contends in the first place that no charge was created by the decree for costs passed by the High Court in favour of Charu Chandra Chatterjee and another. Secondly it is said that if any charge was created it was not a first charge; thirdly, he contends that even if it is a first charge the effect of the execution proceedings was not to affect the estate of Kamini as her estate was not represented in the said execution proceeding and it is contended in the last place that even if the decree for costs created a first charge on the premises in question the plaintiff has a right to redeem the charge as he was not admittedly made a party to the execution proceeding.

In support of the first two contentions reference is made to the provision of S. 321, Succession Act and it is said that the costs incurred by Charu in the revocation proceedings cannot be regarded as expenses of obtaining probate or letters of administration including the costs incurred for or in respect of any judicial proceeding that may be necessary for administering the estate within the meaning of S. 321, Succession Act, and reliance is placed on a decision in the case of *Godwin v. Prince* (2). That case however is distinguishable for there it was held that plaintiffs' costs of an unsuccessful action impeaching the validity of a will though ordered by the Judge of the probate division to be paid out of the testator's estate are not testamentary expenses. In the present case the revocation proceeding had to be started because the executor had not issued the citation on Matangini and the transferees of Matangini's interest merely wanted a decision upon the validity of the will by requiring the will to be proved in the solemn form. Besides it appears from the judgment of B.B. Ghose and Cammiade, JJ., that there were elements of doubt in the case arising from the fact that the petition for probate altogether ignored Matangini and that the will was not registered although executed at a place within a short distance of the registration office and also having regard to the fact that only one of the attesting witnesses was examined and the other was not. In these circumstances, (1-98) 2 Ch 225=67 L J Ch 691=47 W R 25=78 L T 790.

stances I am of opinion that there is no substance in the first two grounds taken.

The argument with regard to the third ground is put in this way ; that in 1918 when the mortgage was made in favour of Srinath the title of Motilal as a specific legatee was perfected. It is argued that the premises in question was a specific legacy to Motilal and he must be presumed to have assented to his own legacy as he died about six years after the order for probate and the estate was then fully administered and reliance is placed on S. 333, Cl. 2, Succession Act, which says that the assent of the executor to a specific bequest may be verbal and it may be either express or implied from the conduct of the executor and reference is made to Illus. 4 of that section which runs as follows :

"Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed."

I am of opinion that this contention is sound and must prevail. The title of the legatee to the bequest was complete on the date of the mortgage of 1918 and by the mortgage of 1922 plaintiff was subrogated to the position of the mortgagee of 1918. The plaintiff having paid the first mortgage must be assumed according to the rule of justice, equity and good conscience to have intended to keep the first mortgage alive and was entitled to stand in the place of first mortgage : see *Gokuldas Gopaldas v. Puranmal Prem Sukhdas* (3), also *Malireddi v. Gopalakrishna* (4). Besides there is no need for assumption in this case for the mortgage deed itself shows that the intention was to keep alive the first mortgage for the deed states as follows :

"I have paid to the first mortgagee Rs. 4,849 on account of the due under the first mortgage and having redeemed the first mortgage bond, I make it over to you as a document of title and you will be entitled to exercise whatever right, title or power the first mortgagee had under the law."

Now in the ultimate event the probate or rather the letter of administration with the will annexed stands. The plaintiff therefore acquired good title under the mortgage. It would seem also that the result of the execution proceeding was not to pass the mortgaged premises to defendant 4 for the sale certificate makes it expressly clear that what

passed was the right, title and interest of the judgment-debtors in 37, Chakraberia Road and as the said premises was subject to the mortgage of the plaintiff defendant 4 merely purchased the equity of redemption in the said premises which remained outstanding in defendants 1, 2 and 3. An order that estate of Kamini might be got at the execution should have been taken against the estate but an examination of the application of the decree-holders at pp. 17 to 19 shows that execution was taken out against all the three brothers, Bankim, Kanai and Joyram and not against Bankim alone as representing the estate. I am therefore of opinion that defendant 4 as purchaser of the equity of redemption is liable for the mortgage debt. It remains now to consider the two cases relied on by the Subordinate Judge. The first case is that of *Chuttraput Singh v. Maharaj Bahadur* (5), and the other is the case of *Puran Chand v. Monmoitho Nath* (6). In the former of these cases their Lordships of the Judicial Committee said this :

"When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact, the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied."

And this principle was extended to the case of administration of trust in *Puranchand's* case (6). An examination of the former case will show that the principle was made applicable to the case of a residuary legatee ; those cases can have no application to the facts of the present case for here the specific legatee had acquired a title to the property in question long before the proceeding which resulted in the decree for costs in execution of which defendant 4 purchased. The result is that the decree and judgment of the Subordinate Judge are set aside and in lieu thereof there will be a preliminary mortgage decree for the sum of Rs. 10,000 as was claimed in relief (Ka) of the plaintiff and interest will be allowed on the sum of Rs. 7,000 at the rate stipulated in the mortgage

3. (1884) 10-Cal 1035-11 I A 126 (PC).

4. AIR 1924 P C 86-79 I C 592-51 I A 140-47 Mad 190 (PC).

5. (1904) 32 Cal 198-82 I A 1 (PC).

6. AIR 1928 P C 88-108 I C 342-55 I A 81-55 Cal 532 (PC).

bond with compound interest with yearly rest from the date of the suit up to the date of the period of grace and six per cent per annum thereafter.

This order is conditional on the mortgagee discharging the amount of cost of Rs. 484 which had been incurred by defendant 4 in the revocation proceedings with interest at the rate of six per cent per annum from the date of the judgment of this Court in F. A. No. 275 of 1924. This sum, that is, the sum in respect of which the preliminary decree has been passed, must be paid into Court within six months from to-day. If the sum is not paid into Court within that date the mortgaged property will be sold. There will be an ordinary preliminary decree for sale on these lines. The plaintiff will be entitled to get costs of this Court and of the lower Court which must be added to the mortgage money.

Rankin, C. J.—I agree.

K.S. *Order accordingly.*

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GUHA AND M. C. GHOSE, JJ.

Gobardhan Behari Rose and another—Appellants.

v.

Sarat Chandra Bhattacharjee and others—Respondents.

Appeal No. 197 of 1931, Decided, on 6th July 1932.

(a) Civil P. C. (1908), O. 21, R. 90—Sale fixed for a particular date—Such date happening to be a holiday—Sale held next day—No allegation or proof as to paucity of bidders—Sale held could not be set aside.

Where a sale fixed for a particular date, could not be held on the date so fixed because it was a holiday and when in consequence it was held on the next day there was no allegation or proof that there was any paucity of bidders or that bidders were not present owing to the changed date:

Held: that the sale could not be set aside: *A I R 1925 Cal 201, Ref.* [P 487 C 1]

(b) Decree—Execution—Sale—Question of adequacy of price fetched—Most material evidence is collection papers relating to property sold—Civil P. C. (1908), O. 21, R. 90.

Where the question is one bearing on the adequacy or otherwise of the price fetched at the sale, the most material evidence would be that afforded by the collection papers and not mere statements of witnesses. [P 487 C 2]

Amarendra Nath Rose, Jatis Chandra Guha and Hementa Kumar Bose—for Appellants.

*Bijon Kumar Mukerji and Kali Kin-
kar Chuckerbuty—for Respondents.*

Guha, J.—This appeal has arisen out of an application made by the judgment-debtors under O. 21, R. 90, Civil P. C., for setting aside a sale held in execution of a decree, passed in Title Suit No. 60 of 1930, by the Subordinate Judge, 3rd Court, Hooghly. The sale in execution of the decree was held on 18th November 1930. The application out of which this appeal has arisen, by the judgment-debtors for having the sale set aside, was filed on 15th December 1930. It appears that on 17th December 1930, the receiver who was in possession of the properties sold in execution of the decree applied to have the sale set aside under the provisions of O. 21, R. 90 of the Code. This application by the receiver for setting aside the sale was dismissed, on 7th February 1931. Thereafter the only proceeding before the Court in the matter of setting aside the sale was the one arising on the application of the judgment-debtors filed in Court on 15th December 1930. The learned Subordinate Judge has disallowed the application made by the judgment-debtors for setting aside the sale. The judgment-debtors have appealed to this Court.

The first question urged by the learned Advocate appearing for the appellant was directed to the question whether the application made by the judgment-debtors was one maintainable under the law or not. This question was raised before the learned Subordinate Judge in view of the fact that there was the application by the receiver appointed by the Court for setting aside the sale. That application having been dismissed on 7th February 1931, it was contended before the Court below that the application for setting aside the sale as made by the judgment-debtors was not maintainable. Although there is some substance in the question raised as to the maintainability of the application of the judgment-debtors for setting aside the sale, we are not disposed to dismiss their application simply on the ground that it was not maintainable for the reason that the receiver's application for setting aside the sale had been previously dismissed. We gave liberty therefore to the appellants in this Court to go into the other questions raised in support of the appeal before us. So far as the judgment-debtors' application

for setting aside the sale was concerned the first point sought to be made before us was based upon the fact that the sale was adjourned for more than seven days, and that it was held on 18th November 1930, 17th November being a holiday. It was urged that there was material irregularity in the matter of the sale in view of the fact that it could not be held on 17th November, but was, in fact, held on the date following, which was beyond seven days of the date on which the sale was adjourned.

The question thus raised does not appear to have much of substance in it. Conceding in the appellants' favour that the sale was held on a date which was not fixed by the Court for the sale of the properties, the fact of the sale having taken place on 18th November amounted at the most to a material irregularity and such irregularity would not be of avail to the judgment-debtors, if it were not possible for them to make out that they had suffered substantial injury or loss on account of the same. A suggestion was made that the holding of a sale on a date which was not fixed by the Court for the sale would make a sale illegal or void which could be avoided as a nullity; and reference was made in this connexion to the decision of this Court in the case of *Motahar Hossain v. Mohammad Yakub* (1). In view of the observations made by the Judicial Committee of the Privy Council from time to time, and regard being also had to the fact that in the case to which reference has been made above, there was no date actually fixed for the sale of the properties, it would not lie in the mouth of the judgment-debtors, appellants in this Court, to say that the sale in the present case was one which could be avoided by them on the ground that it was a nullity, seeing that the sale in the present case was fixed for a particular date, but could not be held on the date so fixed, because it was a holiday. Furthermore, it has not been suggested, much less has it been made out, that there was any paucity of bidders or that bidders were not present on account of the sale having taken place on 18th November instead of on 17th November which was a holiday. In this view of the case, the first question raised before

us in support of the appeal, must be decided against the appellants.

It has next been urged that so far as the publication of the sale proclamation was concerned, the evidence adduced on the point on behalf of the decree-holder and the auction-purchaser was not sufficient for the purpose of making out a case that there was proper publication of the sale proclamation. The learned Subordinate Judge, in the Court below, has dealt with the evidence bearing on the point in detail; and reference has been made to the evidence on this point, both oral and documentary, during the hearing of the appeal in this Court. We are unable on the evidence as it stands to come to any finding on the question of the publication of the sale proclamation, other than the finding arrived at by the learned Subordinate Judge. In our judgment, the evidence given on the point of the publication of the sale proclamation in the locality is satisfactory and convincing. The most material question in the case viz., the one bearing upon the adequacy or otherwise of the price fetched at the sale, has been argued before us at length. As the Subordinate Judge in the Court below has noticed, the most material evidence on this part of the case would be that afforded by the collection papers relating to the properties sold. We have it upon the evidence given by the applicants for setting aside the sale themselves, that there were collection papers in possession of the receiver appointed by the Court. It was frankly admitted before us by the learned advocate for the appellants that no serious attempt was made on behalf of his clients when the case was pending before the learned Subordinate Judge to have these papers produced in Court in support of the evidence on the question of the inadequacy of the price, as alleged by them in their application for setting aside the sale. Some witnesses had been examined on behalf of the petitioners who stated that the price of the properties sold was much above the price fetched at the sale. But it is impossible for us, as it was impossible for the Court below, to proceed upon mere statements of these witnesses in the absence of any documentary evidence and in the absence of the collection papers which were not produced before the Court by the appli-

cants for setting aside the sale. The learned Subordinate Judge has pointed out in his judgment that on the statement made by one of the petitioners themselves, the price fetched at the sale was more than twenty times of the income of the properties sold. On the facts and circumstances of the case and regard being had to the price actually fetched at the sale, it is impossible for us to hold that it has been made out by the appellants in this Court that there was any inadequacy of price fetched at the sale or that there was any substantial loss or injury suffered by the appellants. In view of the conclusion we have arrived at, this appeal must fail, and we direct accordingly. The appeal is dismissed with costs. We assess the hearing fee in this appeal at one gold mohur to each of the respondents, the decree-holder and the auction-purchaser.

M. C. Ghose, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Calcutta 488

MUKERJI AND BARTLEY, JJ.

Sarba Mohan Banerjee — Plaintiff—Appellant.

v.

Manmohan Banerjee and others—Defendants—Respondents.

Appeal No. 73 of 1929, Decided on 7th June 1932, against original decree of Addl. Sub-Judge, Dacca, D/- 27th November 1928.

(a) Contract Act (1872), S. 12—Temporary forgetfulness.

Temporary forgetfulness is not sufficient to indicate want of mental capacity, [P 489 C 1]

(b) Transfer of Property Act (1882), S. 122—Delivery of gift deed to donee—Receipt by Donee of same after knowing its bearing—Such receipt is acceptance of gift.

Where after execution of a deed of gift the donor himself made over the deed to the donee and told her that he had made the gift to her and the donee received the document knowing that it was a deed of gift and never thought of doing anything contrary to its terms.

Held: that that was more than enough to constitute acceptance of the gift: *Xenos v. Wickham*, (1869) 2 H L 296 and *London and County Bank v. London and River Plate Bank*, (1888) 21 QBD 535, *Ref.* [P 489 C 1]

(c) Transfer of Property Act (1882), Ss. 122 and 127—Acceptance of gift is acceptance of onerous gift.

For an acceptance of an onerous gift, acceptance of the gift itself is sufficient, and an acceptance of the onerous condition also at the same time is not necessary: *Standing v. Bowring*, (1885) 81 Ch D 282, *Rel on.* [P 489 C 2]

Jogesh Chandra Rog, Prakash Chandra Pakrasi and Satindra Chandra Khasnavis—for Appellant.

Ramesh Chandra Sen and Kanailal Saha—for Respondents.

Judgment.—In this appeal which the plaintiff has preferred from a decree and decision by which the Additional Subordinate Judge of Dacca has almost entirely dismissed his suit, two questions have been raised. The plaintiff is the eldest son of one Haramohan Banerji by his predeceased wife. Defendants 1 to 3 are Haramohan's sons by his second wife Kulakmini who is defendant 4. The plaintiff prayed for partition of certain immovable properties, to wit, two houses and some moveables of the value of Rs. 696. The Subordinate Judge held that the two houses had been made a gift of by Haramohan in favour of his wife defendant 4, and that as regards the moveables the plaintiff had failed to make out his case. He accordingly dismissed the suit for partition and gave a decree to the plaintiff for Rs. 10-8-0 on the defendants' admission that there was an old iron sale of the value of Rs. 42 in existence as the only item of joint family moveable property. The two questions raised relate to: 1st the validity of the gift; and 2nd the existence of the moveables.

The gift is evidenced by a deed written in its entirety by Haramohan himself, and he personally took it to the Registration Office and had it registered there. The validity of the deed has been questioned upon several grounds, with which we now propose to deal. The first ground urged is that Haramohan was not of sufficient mental capacity or at any rate was the subject of undue influence. Haramohan was a teacher by occupation. The plaintiff put down his age at 85 or 86 years; he himself being, as he says, 50 years of age. Though this may not be absolutely correct Haramohan undoubtedly was an old man. The evidence nevertheless is that he was working as a private tutor in certain families. The deed was executed on 14th January 1924 and was registered on the next day. The postcards Ex. A series were admittedly written by Haramohan in December 1923—February 1924 and that clearly show that he was in a normal state of mind even after more than a month of the trans-

action. He died on 25th March 1924. The oral evidence about the state of his mental capacity at and about the time of the transaction is clear and positive. A faint attempt has been made by the plaintiff through his witness P. W. 2 Prafulla to make out that Haromohan had lost his memory, but temporary forgetfulness of the kind spoken to by that witness is not sufficiently indicative of want of mental capacity. So far as undue influence is concerned there is no suggestion in the evidence, far less any proof, excepting a story which P. W. 2, Prafulla has given, but which we cannot accept as true. (The judgment here considered the evidence regarding attestation of the deed and held that there was requisite attestation.) The next contention is that there was no acceptance of the gift by Kulakamini such as is necessary under the law. The argument is based upon the fact that Kulakamini's name was not registered in Municipal records or landlord's Shirista till after Haromohan's death, and also upon a statement to be found in the deposition of Kulakamini herself to which reference will presently be made. Haromohan lived only two months and a half after the deed and the omission to mutate the names within that short period does not signify much. The statement in her deposition is that she knew nothing about the condition which is to be found in the deed that she would have to pay Rs. 5 as maintenance allowance to Haromohan so long as he lived. It has been argued that when she did not know about this condition there was no valid acceptance by her. This argument has, in our opinion, no force.

After execution Haromohan himself made over the deed to her and told her that he had made the gift to her and if she received the document knowing that it was a deed of gift and never thought of doing anything contrary to its terms that was more than enough to constitute acceptance. In English Law assent by a donee is presumed until and unless he disclaims *Xenos v. Wickham* (1); *London and County Bank v. London and River Plate Bank* (2) and the same principle is extended even to onerous

gifts *Siggers v. Evans* (3). And in the case of *Standing v. Bowring* (4) at p. 288, Cotton, L. J. observed.

"Now I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligation which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it. When informed of it he may repudiate it, it vests in him until he repudiates it.'"

Whatever difference the wording of S. 122, T. P. Act may make in the matter, there is no authority for the view, which to us seems most unreasonable, that for an acceptance of an onerous gift, acceptance of the gift itself is not sufficient, but an acceptance of the onerous condition also at the same time is necessary. Moreover the onerous condition in the present case is one of a trifling character which evidently was not intended to be thought of or enforced. We must accordingly overrule this contention. Lastly, it has been said that the deed created not a gift but a sale or a lease and that as no consideration passed the transaction was invalid. This contention must be rejected. So far as the gift is concerned, we are in entire agreement with the Judge of the Court below that it is unassailable. The other question namely as regards the moveables is one about which we have some doubts. We are not satisfied that the defendants' case is literally true. But here again it was for the plaintiff to prove his case. And the plaintiff has only to thank himself if on his evidence the Court does not feel safe to proceed, for he has professed ignorance even about his father's handwriting and signature. That there is an almirah in the house is not denied by the defendants but their case is that it belonged to Kulakamini's mother and she had given it to her. Bankim says,

"The almirah has been in existence from before my birth These (the moveables) in the house were all acquired by us except the iron safe and the almirah."

Kulakamini and Monmohan say that the almirah belonged to Kulakamini's mother who had given it to her, but no independent witnesses have been called to prove this gift. The plaintiff's case is and that case has been supported by

1. (1868) 2 H L 296=36 L J O P 813=16 W R 38=16 L T 800.

2. (1888) 21 Q B D 535=57 L J Q B 601=37 W R 89=61 L T 87.

3. (1855) 5 E & B 867=3 C L R 1209=24 L J Q B 805=1 Jur (n s) 851.

4. (1886) 31 Ch D 292=55 L J Ch 218=34 W R 204=54 L T 191.

his sister Sashimukhi that the almirah belonged to her mother (Haramohan's predeceased wife). But in his plaint the plaintiff has claimed only a fourth share in the almirah which is contrary to his present case. In these circumstances we think we must hold that he has failed to make out his case. The result is that in our judgment this appeal fails and must be dismissed with costs, hearing-fee three gold mohurs.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 490**

RANKIN, C. J. AND C. C. GHOSE, J.

Janaki Nath Nandi—Plaintiff—Appellant.

v.

Amarendra Nath Biswas and another—Defendants—Respondents.

Letters Patent Appeal No. 12 of 1932, Decided on 16th August 1932, against decision of M. C. Ghose, J., D/- 20th April 1932, in Appeal No. 254 of 1930.

Bengal Tenancy Act (8 of 1885), S. 195 (e)
—Occupancy raiyats cannot be evicted by auction-purchaser on sale under Patni Regulation (8 of 1819), S. 11.

An auction-purchaser of a patni under Regn. 8 of 1819 is not entitled to evict occupancy raiyats though they are unable to show that they were khudkast raiyats with rights of occupancy and that the tenancy in question was in existence in 1819: 13 W R 410, *Appl*; AIR 1928 Cal 52, *Rel. on.*; 8 C W N 19, *not foll.*

[P 490 C 1; P 492 C 1]

N. K. Bose—for Appellant.*Bijan Kumar Mukherji and Uma Sankar Sarkar*—for Respondents.

C. C. Ghose, J.—The plaintiff is the purchaser of the property in dispute at a sale under Regn. 8 of 1819. He alleges that after the said sale, there was an extinguishment of all encumbrances and that the defendants who are in possession of the lands described in the plaint herein have no right to possess the same and are trespassers. It is further alleged that the defendants fraudulently had an entry made in the Record of Rights to the effect that they were holding the lands as occupancy raiyats at a jama of Rs. 4 a year. In the circumstances the plaintiff is asking for khas possession of the said lands together with mesne profits. The defendants' contention is that they have occupancy rights in the holding, that the holding has been in existence from before the date of the permanent settlement, that they are khudkast resident

and hereditary raiyats of the holding, that the holding was not an encumbrance and that it was not and could not be annulled by reason of the sale under Regn. 8 of 1819, and that therefore the plaintiff was not entitled to khas possession as prayed for by him. The first Court found that the patni tenure was created before the date of the origin of the tenancy in this case, and that the defendants were not resident or hereditary khudkast raiyats but they were paikast raiyats and that though they had acquired occupancy rights, they were not khudkast raiyats within the meaning of S. 11, Regn. 8 of 1819 and that therefore the plaintiff was entitled to get khas possession of the lands in dispute.

The lower appellate Court was however of opinion that a raiyat with an occupancy right occupied the same position as a khudkast raiyat and that he had the same protection as khudkast raiyat had when the Putni Regulation of 1819 was enacted, and that the plaintiff being a purchaser at a sale under the said Patni Regulation was not entitled to evict the defendants. The lower appellate Court accordingly held that the plaintiff's suit should be dismissed. On appeal to this Court the learned Judge before whom the appeal came on for hearing was of opinion that the defendants having acquired the status of occupancy raiyats were not liable to eviction. It is against this judgment that the present appeal has been preferred.

The question depends upon the ascertainment of the rights which the defendants have in respect of the lands in suit and upon the proper construction of S. 11, Regn. 8 of 1819. The lower appellate Court has adopted the finding of the first Court that the defendants are not khudkast raiyats but that they are occupancy raiyats, and we must therefore proceed on this footing. It is therefore not necessary, strictly speaking, to go at length into the question of the rights of khudkast raiyats; but reference may be made to para. 406 of Sir John Shore's Minute of 18th June 1789 relating to the question of the permanent settlement of lands in Bengal where the rights of khudkast raiyats are discussed and also to the judgment of Trevor, J., in the great rent case of *Thakurani*

Dassi v. Visweswar Mukherjee (1), where an elaborate account is given. It may be noticed however that it is by no means correct to say that khudkast raiyats had no rights of occupancy; but be that as it may, the defendants have certainly rights of occupancy in the lands comprised in their holding and the question now is whether they can be evicted at the instance of the plaintiff. The plaintiff relies on Cl. 3, S. 11, Regn. 8 of 1819 and argues that none but khudkast raiyats are protected from eviction in the event of a sale of the patni tenure under Regn. 8 of 1819. This contention was negatived by B. B. Ghose and Roy, JJ., in a case which was decided by this Court in 1927: *Rash Behary Mandal v. Hemanta Kumar Ghose* (2) (at p. 794 of 54 Cal.) The learned Judges observed as follows:

"There is ample authority for the proposition that the proviso in Cl. 3 does not mean that persons in occupation not coming within the definition of khudkast raiyats are liable to be ejected even if they have acquired occupancy rights under the Tenancy Law. I have not been able to find any authority with regard to the *patni* sales, but the cases with reference to S. 16, Act 8, of 1865, where the proviso is in the same terms as the proviso in Cl. 3, S. 11, Regn. 8 of 1819 support the proposition. Those cases are *Puretag Singh v. Pratap Narain Singh* (3); *Nil Madhab v. Shiboo Pal* (4); *Eman Ali v. Atur Ali* (5) and *Bama Charan v. Ram Kanti* (6)."

Of the illustrative cases referred to above, reference may be made to the judgment of Sir Charles Hobhouse in the case in *Nil Madhab v. Shiboo Pal* (4). There the plaintiff became the purchaser at an auction-sale under Act 8 of 1865 (Bengal Council) of a certain under-tenure. The person who held that under-tenure previous to the plaintiff's purchase created an incumbrance on that tenure in the shape of a mokarari lease in favour of the defendant. The plaintiff sued to recover from the defendant khas possession of the lands covered by the mokarari. The lower appellate Court found that the defendant had been at any rate in possession for more than 12 years of the lands in question and it was therefore held that the plaintiff could not succeed in obtaining khas possession by ejecting the defendant. Hobhouse, J., observed as follows:

"The argument of the special appellant is this: he says and says truly enough, that the mokarari lease in question is an incumbrance and he then says that inasmuch as the defendant is the holder of that incumbrance, so if he has the right to get rid of that incumbrance, he has also the right to eject the defendant, the person who is the holder of it. And he contends that the only way in which the defendant can escape from ejectment is by pleading to the proviso 1 in S. 16, Act 8 of 1865 (Bengal Council) and by showing that he is khudkast raiyat or else a resident and hereditary cultivator within the meaning of that proviso 1."

"But it seems to us that the proviso in question has nothing whatever to do with, and does not at all concern the party before us. It is quite true that the Judge has found or seems to find that the defendant is not a khudkast raiyat and the Judge has certainly not found that the defendant is a resident and hereditary cultivator, but the Judge has found that the defendant is a raiyat having a right of occupancy within the meaning of S. 6, Act 10 of 1859; and this we think is sufficient to protect the raiyat in this instance. The law, S. 16, is couched in these terms: 'The purchaser of an under-tenure sold under this Act shall acquire it free from all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure his representatives or assigns, unless, as the law goes on to say, the right of making such assignment is specially provided for or unless the particular tenant against whom any suit may be brought is a tenant coming within the terms of the proviso to which I have above referred. Now, if the suit had been one on the part of the plaintiff to declare that he was free from the incumbrance made by the late holder of the tenure, it is most likely that we should have held that the suit was a good one and that we should have given the relief asked for, because the incumbrance in question was undoubtedly an incumbrance which had accrued by the act of the former holder and which was not protected by any especial right given under especial right given under especial agreement to make such incumbrance, but the defendant in this instance does not rely solely upon the incumbrance, if he indeed relies upon it at all. He says that he cannot be ejected because he has a right of occupancy, a right expressly given to him by the provisions of Act 10 of 1859. The incumbrance to which S. 16, Act 8 of 1865 (Bengal Council) refers, is not the person but the thing. The lease in this instance might possibly be avoided; but it does not follow that the man who holds that lease must necessarily thereby and therefore be ejected. The law does not say so, and on the contrary the provisions of Act 10 of 1859, on which the defendant relies protect a person, who, like defendants has a right of occupancy."

In my opinion, the present case is covered by the reasoning of Hobhouse, J., and by the judgment of this Court in the case of *Rash Behari Mandal v. Hemanta Kumar Ghose* (2). It is said however that the plaintiff's case is concluded by the authority of *Jogeswar*

1. 8 W R Act, 10 p 29.
2. AIR 1928 Cal 52=106 I C 71=54 Cal 788.
3. (1869) 11 W R 253=5 B L R App 20 Note.
4. (1870) 13 W R 410=5 B L R App 18.
5. (1874) 22 W R 138.
6. (1915) 28 I C 374.

Majumdar v. Abad Mohamed Sarcar (7). But this case as has been pointed out in the case in *Rash Behari Mandal v. Hemanta Kumar Ghose* (2) (at p. 794 of 54 Cal.) has been doubted in various other cases. As regards the construction of S. 11, Regn. 8 of 1819, I cannot add usefully to what has been said in the case in *Rash Behari Mandal v. Hemanta Kumar Ghose* (2) (at pp. 793 and 794 of 54 Cal.) and I respectfully adopt the same. In my opinion, the plaintiff cannot derive any comfort from the argument that it has not been shown (1) that the defendants were khudkast raiyats with rights of occupancy and (2) that the tenancy in question was in existence in 1819. This question, in my opinion, does not really arise. Whether the tenancy was in existence in 1819 or not, it is quite clear that rights of occupancy in the sense in which we know them now came into existence with Act 10 of 1859 and that the defendants are certainly at the present moment occupancy raiyats. If the defendants are occupancy raiyats, they are, in my opinion, protected from eviction having regard to the provisions of the Bengal Tenancy Act. I am therefore of opinion that this appeal has no substance and must be dismissed with costs.

Rankin, C. J.—I agree.

M.N. *Appeal dismissed.*

7. (1899) 3 C W N 13.

* A. I. R. 1933 Calcutta 492

GUHA AND BARTLEY, JJ.

Mahomed Maijaddin Khan—Defendant 2—Appellant.

v.

Janakiballav Dutta and others—Plaintiff—Respondents.

Appeal No. 1058 of 1930, Decided on 16th August 1932, against decree of Dist. Judge, Dacca, D/- 11th January 1930.

* (a) Bengal Municipal Act (3 of 1884), S. 15—Election R. 40—District Magistrate declaring election void—Declaratory suit in civil Court—Civil Court's jurisdiction is not ousted by R. 40—Civil P. C. (1908), S. 9—Specific Relief Act (1877), S. 42.

The more fact that a District Magistrate declares an election void under R. 40 on the ground of bribery does not oust the jurisdiction of the civil Court from entertaining a suit for declaring one's election valid. Such a suit is one of a civil nature and as it involves the maintaining or establishing a civil right of vital importance, the civil Court has jurisdiction to entertain it.

[P 493 C 1]

* (b) Bengal Municipal Act (3 of 1884), S. 15—Election Rule (1930), R. 40—"Material irregularity" does not cover bribery or corrupt practice.

Bribery and corrupt practice generally are not covered by the expression "material irregularity" as used in R. 40, and are outside the scope of the rules framed under S. 15. Therefore the District Magistrate has no jurisdiction under the Bengal Municipal Rules to declare an election void, on the ground of corrupt practice and if such an order is passed it is ultra vires.

[P 494 C 1, 2]

Jatindra Nath Sanyal, Manindra Narayan Majumdar and Manmatha-nath Das Gupta—for Appellant.

Jitendra Mohan Bannerjee—for Respondents.

Judgment.—This is an appeal by defendant 2 in a suit for a declaration that the plaintiff's election as a Commissioner of the Dacca Municipality was valid. At the Municipal election held on 19th July 1928, for Ward No. 2 of the Dacca Municipality, the plaintiff obtained 1484 votes, Sita Nath De secured 1311 votes, Mahomed Maijaddin Khan obtained 826 votes. Of the total number of five candidates for election, the other two were able to secure seven and two votes respectively. The first two candidates named above were the successful candidates, so far as the election held on 19th July 1928, was concerned, as there were only two seats of Municipal Commissioners to be filled up, and for which purpose the election was held. After the election was over, Mahomed Maijaddin Khan, defendant 2 in the suit, appellant in this Court, filed a petition before the District Magistrate of Dacca, purporting to be one under R. 40 of the Bengal Election Rules (1930), for declaring the election of the plaintiff void, on the ground that he had bribed the voters of the Ward concerned. An inquiry was held by the District Magistrate, and by his order passed on 29th September 1928, the District Magistrate declared the election of the plaintiff void. The suit out of which this appeal has arisen, was then instituted by the plaintiff for the purpose already mentioned; and as has been pointed out by the trial Court, the plaintiff wanted to have a declaration that he had the right and the legal character he got by being elected a Commissioner of the Dacca Municipality, which have been interfered with by the District Magistrate at the instance of the defendants. The de-

cision of the trial Court was in favour of the plaintiff; the learned Munsif held that the whole story regarding corrupt practice alleged to have been committed by the plaintiff was false and concocted, and that from all points of view the plaintiff's election was good, valid and regular, and that it was not liable to be declared void, as was done by the District Magistrate, on the application by defendant 2. The trial Court declared

"the plaintiff's election as a Commissioner for Ward No. 2 of the Dacca Municipality was good and valid,"

and that the plaintiff had

"acquired good right to sit as a Commissioner on the Board of Dacca Municipality and do the function of that office."

On appeal by defendant 2, the real contesting defendant in the suit, the learned District Judge of Dacca affirmed the decree passed by the trial Court, after setting aside the finding of the Munsif on the question of corrupt practice, as irrelevant. According to the District Judge, it was unnecessary to deal with the question whether there was corrupt practice or not, as the District Magistrate had no jurisdiction under the Bengal Municipal Rules, to declare an election void, on the ground of corrupt practice. The question whether a civil Court had jurisdiction to try a suit of the present description, and the further question whether the suit was barred under S. 42, Specific Relief Act, appear to have been argued before the trial Court, but they do not appear to have been agitated before the learned District Judge on appeal. We have no hesitation in holding that in view of the provisions contained in S. 9, Civil P. C., and S. 15, Bengal Municipal Act, civil Courts have jurisdiction to try suits of the present nature. In our judgment, there can be no doubt that the suit is one of a civil nature; and there can be no reason why a civil Court should not have the jurisdiction to determine a question arising for consideration in the matter of maintaining or establishing a civil right of vital importance. As to the applicability or otherwise of S. 42, Specific Relief Act, it need only be mentioned that the section allows a suit by a plaintiff entitled to any legal character, against any person denying or interested to deny the right of the plaintiff, to any such legal character. The plaintiff claimed in the suit, to be entitled to be elected a Com-

missioner of the Dacca Municipality. Defendant 2 denied that right, and filed a petition to the District Magistrate, and the other defendants supported that defendant, so far as the denial of the plaintiff's right and his legal character were concerned. We are in agreement with the view expressed by the trial Court on this point, that it could not be the case that the plaintiff had no right of any sort or had no legal character by virtue of his having obtained the largest number of votes at the election of Municipal Commissioners. The plaintiff having secured the largest number of votes, instead of being a bar, S. 42, Specific Relief Act, entitled the plaintiff to pray for the declaration that his election was valid, and that he has acquired the right to sit as a Commissioner of the Dacca Municipality, and discharge the functions of that office. The main question raised in the case, a question of real importance—though a simple one—is the interpretation of R. 40, Bengal Municipal Election Rules (1930), which is quoted below:

"40. All disputes arising under these Rules shall be decided by the Magistrate, and his decision shall be final. If he finds any material irregularity prejudicing the election he may declare the election void and order fresh election."

"*Note.*—The offence of personation, of undue influence and of bribery at an election is punishable under Ss. 171-E and 171-F, I. P. C., 1860, as amended by the Elections Offences and Inquiries Act 1920 (39 of 1920)."

Had the District Magistrate, jurisdiction under this rule, to declare the plaintiff's election void on the ground of bribery, as he did by his order passed on 29th September 1928, on the application of defendant 2? There can be no doubt that elections can be declared to be void on the ground of corrupt practice by means of election petitions filed before tribunals appointed for the purpose; and there is the jurisdiction of Courts of Civil Judicature to give relief, where no such special tribunals are appointed. It is worthy of notice in this connexion, that municipal authorities in England, used for merely to deal with their own questions of disputed elections, but the jurisdiction is transferred now, to Commissioners appointed under Acts of the Legislature, and as it has been observed, whatever abuses or defects may have existed in the past, elections are now dealt with on sound and equitable prin-

ciples, and that, even-handed justice administered by the Courts of law, is a guaranteed protection against all disturbing influences. Following the rule now prevailing in England, so far as municipal election petitions go, it may safely be laid down that neither any action on the part of the municipal authorities themselves, nor any action by the District Magistrate in whom is vested, as a controlling authority, certain powers under the Bengal Municipal Act, and the power to decide disputes arising under the Bengal Municipal Election Rules and declare an election void, in case of any material irregularity prejudicing the election, can affect the rights of parties by having an election declared void in the case of corrupt practice in elections. As it stands, it is the function of the civil Court, on an election petition properly filed, to investigate the charge of corrupt practice alleged in the petition, and to declare an election void, and the general jurisdiction of the Court to give relief, has not been taken away by anything contained in R. 40, Bengal Municipal Election Rules.

The rule is expressed in clear and simple language ; and it cannot, in our judgment, be argued upon the rule as it stands, that the District Magistrate was the supreme authority to inquire into a charge of bribery, and decide whether one's election was valid, or that after the District Magistrate's decision under the rule that an election was void owing to corrupt practice, the civil Court had no jurisdiction to try the question of the validity or otherwise of the election. The dispute to be decided by the District Magistrate under R. 40, must be one arising under the rules, and the District Magistrate was not authorized to decide the question of any irregularity not coming within the purview of those rules. Bribery as alleged in the case before us, and corrupt practice generally, are not covered by the expression "material irregularity" as used in R. 40; and corrupt practice was a subject which was according to the tenor of the rules, left wholly outside the scope of these rules framed under S. 15, Bengal Municipal Act, regarding five specified subjects: the division of the Municipality into Wards, the number of Commis-

sioners to be elected for each Ward, the qualifications required to entitle persons to vote for Commissioners, the mode of election, and the authority who shall dispute at elections. It may also be pointed out that S. 15 itself provides that nothing contained in the section nor in any rules made under the authority of the Act, shall be deemed to affect the jurisdiction of the civil Courts. The argument advanced on behalf of the appellant based upon the note added to R. 40, has no substance in it. The offence of bribery at an election is according to the note punishable under the Indian Penal Code, as amended by the Elections Offences and Inquiries Act 1920 ; and the reason for adding the note was simply this, that at the time of the publication of the Elections Rules in force before the Elections Offences and Inquiries Act 1920, came into force, there was no definite or specific provision in law, under which bribery at an election was punishable as an offence under the Indian Penal Code.

The intention of the Government in adding the note to R. 40 could not have been the one suggested on behalf of the appellant before us, that the decision of the District Magistrate on the question of bribery or corrupt practice was made final, so as to oust the jurisdiction of the civil Court; in any view of the matter that intention has not been clearly expressed by the language of R. 40 or of the note added to the rule. As indicated above, we are clearly of opinion that the District Magistrate had no jurisdiction under the Bengal Municipal Rules to declare the election of the plaintiff in the suit, void, on the ground of corrupt practice, and the decision of the District Magistrate was, in the case before us, *ultra vires* and without jurisdiction.

It remains to mention that we agree with the learned District Judge in holding that it was unnecessary to deal with the question whether there was corrupt practice or not, in the case before us. In the result, the decision of the Court of appeal below, affirming the decree passed by the trial Court, in favour of the plaintiff in the suit, respondent in this appeal, is affirmed, and this appeal is dismissed with costs to the plaintiff-respondent. The cross objection is not

pressed and it is dismissed without costs.

K.S.

Appeal dismissed.

*** A. I. R. 1933 Calcutta 495 (1)**

PANCKRIDGE AND PATTERSON, JJ.

Santo Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 485 of 1932, Decided on 1st December 1932.

* Arms Act (1878), Ss. 4 and 19 (f)—Loose parts of same revolver in rusty condition capable of being used as fire-arm are "arms" within the section.

Loose parts of the same revolver in a rusty condition capable of being used when cleaned and oiled are "arms" within the meaning of S. 4, unless there is something to suggest that they cannot be assembled together either with or without other parts in such a way as to be capable of being used as a fire arm: 21 *Mad* 360 (F B), *Itel on.*; 6 *Mad* 60 (F B), *held Over-ruled.* [P 495 C 1, 2]

Janna Nath Borah—for Petitioner.

Judgment.—This Rule was granted by Jack and Dwarka Nath Mitter, JJ., on 6th June 1932, and calls on the Deputy Commissioner of Kamrup to show cause why the conviction of the accused and the sentence passed on him under S. 19 (f), Arms Act, should not be set aside on the ground that on the findings of fact arrived at by the Sessions Judge the petitioner was entitled to an acquittal. Owing to the course which the proceedings have taken the result of the Rule has very little importance as the petitioner has now served out the sentence imposed upon him. He was convicted by an Honorary Magistrate of Gauhati of being in illegal possession of a revolver "in loose parts" without a license and sentenced to a year's rigorous imprisonment. On appeal the learned Sessions Judge upheld the conviction but reduced the sentence to a period of six months. It appears that a box belonging to the accused was searched at Amingaon Railway Station and there was found in it a rag in which were tied 21 parts of a revolver. These parts were rusty and the witnesses before the Magistrate who were questioned on the point stated that they, at any rate, could not put the parts together. The learned Magistrate who is a retired Police Officer and thus has an expert knowledge of fire arms says that if the parts were cleaned and oiled they could be used for the purpose for which they were originally in-

tended. Both the Courts below rejected the defence of the petitioner as to how he had come to be in possession of the articles in question. The only point is whether the articles in question are arms within the meaning of S. 19, sub-S. (f), Arms Act of 1878. "Arms" are not defined in S. 4 of the Act, but it is provided that they include fire-arms, bayonets, swords, daggers, spears, spear-heads, bows, arrows, cannon, parts of arms and machinery for manufacturing arms.

The petitioner has relied on the case of *Queen v. Siddappa* (1), where a Full Bench of the Madras High Court held that a gun rendered unserviceable by the loss of the trigger does not fall within the definition of "arms" in S. 4, Arms Act 1878, and that possession of such a weapon without a license is not an offence under S. 19 (f). It is unnecessary for us to criticise the reasoning in that case because another Full Bench of the Madras High Court has definitely held that the decision in *Queen v. Siddappa* (1), is not correct observing that the question is not so much whether the particular weapon is serviceable as a fire-arm but whether it has lost its specific character and has so ceased to be a fire-arm: see *Empress v. Jayarami Reddi* (2). It appears to us that it cannot be said that the articles found had so changed their original character as to have ceased to be parts of a fire arm. They were all parts of the same revolver and there is nothing to suggest that they could not be assembled together either with or without other parts in such a way as to be capable of being used as a fire arm. In the circumstances, we think that the accused has been rightly convicted and we discharge the Rule.

K.S.

Rule discharged.

1. (1889) 6 *Mad* 60=1 *Weir* 657 (FB).
2. (1898) 21 *Mad* 360=1 *Weir* 669 (FB).

*** A. I. R. 1933 Calcutta 495 (2)**

GUHA AND BARTLEY, JJ.

Brojendra Nath Ghose—Appellant.

v.

Satish Chandra Das and others—Respondents.

Appeal No. 74 of 1931, Decided on 22nd July 1932, against order of Dist. Judge, Dacca, D/- 5th September 1930.

*** Provincial Insolvency Act (1920), S. 38—
Proposal for composition scheme.**

A proposal for a composition scheme can only be submitted after an order of adjudication has been made. Hence a composition scheme filed before the order of adjudication cannot be put into operation after the order of adjudication is passed. [P 496 C 1, 2]

H. D. Bose and Hemendra Narain Bhattacharji—for Appellant.

Amarendra Nath Bose and Phanindra Kumar Sanyal—for Respondents.

Prakash Chandra Pakrasi—for Receiver.

Guha, J.—This appeal is directed against an order passed by the learned District Judge of Dacca, in a proceeding under the Provincial Insolvency Act. It appears that two persons Satis Chandra Das and Subodh Chandra Das were adjudicated insolvents. Long before the order of adjudication was made, the debtors filed in Court, on 30th August 1928, a composition scheme, stating the terms of agreement with the creditors arrived at by them, and praying that the composition scheme might be given effect to after the order of adjudication is passed. The scheme was ordered to be kept with the record and put up on the date fixed for hearing. The order of adjudication was passed on 20th September 1928, but no attention was given to the composition scheme by any of the parties concerned, and no step was taken in regard to the same. The proceeding before the Court followed in the manner provided by law, on appointment of receivers in insolvency, without any reference to the composition scheme by any party. The insolvent prayed for final discharge on 19th September 1929. Upon that, attempt was made by the creditors to agitate the matter of the composition scheme, filed on 30th August 1928, by way of revival of the same. The insolvents filed their petition of objection on 28th July 1930, and applied for rejection of the so-called composition scheme on various grounds. One of the grounds was that the scheme filed in Court and which the creditors wanted to be put into operation at such a late stage, was not entertainable under the law, inasmuch as it was filed before the order of adjudication was made. The learned District Judge has given effect to the objection of the insolvents; and one of the creditors has appealed to this Court.

On the facts and in the circumstances of the case before us, also in view of the

clear provisions of the law contained in S. 38, Provincial Insolvency Act, 1920, there can be no doubt the order made by the learned District Judge rejecting application of the creditors to put into operation the composition scheme filed in Court on 30th August 1928, is right. It may be pointed out that under the Provincial Insolvency Act 1907, S. 27, a proposal for a composition scheme could be submitted by the debtors either before or after an order of adjudication. Under the present Act of 1920, a proposal can only be submitted after an order of adjudication has been made. The only point urged in support of the appeal by the learned counsel for the appellant that the learned District Judge in the Court below was wrong in holding that composition scheme could only be entertained after an order of adjudication, being decided against the appellant, this appeal must be dismissed and we direct accordingly. The insolvent respondents in the appeal are entitled to their costs. The hearing fee in this appeal is assessed at three gold mohurs.

Bartley, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 496

GUHA AND BARTLEY, JJ.

Khorshed Ali Bepari and another —
Plaintiffs—Appellants.

v.

Probhat Chandra Das—Defendant —
Respondent.

Civil Appeal No. 87 of 1932, Decided on 15th July 1932, against order of District Judge, Dacca, D/- 17th December 1931.

(a) Civil P. C. (1908), O. 41, R. 25 and S. 115—Order of remand under O. 41, R. 25—Appeal—Revision.

An order of remand under O. 41, R. 25 is not appealable, but the High Court can treat a memorandum of appeal as an application for revision and decide the case on merits: *AIR 1927 Cal 642, Relon*. [P 497 C 2]

(b) Civil P. C. (1908), O. 21, R. 7. Decree—Execution—Executing Court.

A Court executing a decree in a proceeding for execution of the decree cannot consider whether the decree as it stands is defective or faulty. [P 497 C 2; P 498 C 1]

(c) Decree—Execution—Decree for specific performance of contract—Defendant to execute kobala by accepting balance of price from plaintiff within a certain period, in default Court to execute and register kobala of sale on behalf of defendant on plaintiff's depositing balance amount—Default in first

part of decree—Default by whom committed is immaterial and plaintiff can execute second part of decree.

In a decree for the specific performance of a contract of sale, the defendant was directed to execute a kobala in favour of the plaintiff for the sale of the properties by accepting the balance of the price from the plaintiffs within a month. In default the Court was to execute and register a kobala of sale of the plaintiff schedule properties on behalf of the defendant in execution of the decree on the plaintiff's depositing into Court the balance of the purchase money and requisite stamp and registration fee. There was no payment of the balance amount nor was there any execution of the kobala within the time specified in the decree.

Held: that the question as to who committed the default was immaterial and that the plaintiff was entitled to execute the decree as mentioned in the second part of the decree by depositing the amount in Court and getting a sale executed and registered through the agency of the Court. [P 497 C 1, 2 P 498 C 1]

Upendra Kumar Roy and Nani Gopal Das—for Appellants.

Apurba Charan Mukherji and Manmatha Nath Das Gupta—for Respondent.

Judgment.—This appeal has arisen out of an application under S. 47, Civil P. C., raising objections to the execution of a decree for specific performance of a contract for sale, passed by the Munsif, Second Court Munshiganj, in the District of Dacca, on 11th September 1930. The operative part of the decree was in these terms:

"The suit be decreed *ex parte* with costs. The plaintiffs' right to have the contract for sale of the plaintiff schedule properties for Rs. 801 specifically enforced is hereby declared. The defendant is hereby directed to execute a kobala in favour of plaintiff 2, for the sale of the properties by accepting the balance of the price i. e., Rs. 651 from the plaintiffs within a month. In default the Court will execute and register a kobala of sale of the plaintiff schedule properties on behalf of the defendant in execution of the decree on the plaintiff's depositing into Court the balance of the purchase money and requisite stamp and registration fee."

There was no payment of the amount of Rs. 651, nor was there any execution of the kobala within the time specified in the decree. The plaintiffs however applied on 24th June 1931, for execution of the decree, praying for execution and registration of a kobala in the manner provided by the decree on default by parties in the matter of payment and execution and registration within the time mentioned in the decree. The main ground of objection to the execution applied for by the plaintiffs, was that there was default in the

matter of the plaintiffs carrying out the direction contained in the decree, and the decree could not therefore be allowed to be executed in the manner in which the plaintiffs prayed for execution of the same. The objection so raised was overruled by the Munsif. On appeal, the learned District Judge of Dacca came to the decision that the real question for determination in the case—whether the plaintiffs offered the balance of the purchase money within the time allowed by the decree—had not been dealt with by the Munsif, and the learned Judge therefore remanded the case to the Munsif, after setting aside the order dismissing the application under S. 47, Civil P. C. The plaintiffs appealed to this Court, against the order of remand passed by the learned District Judge. At the hearing of the appeal, before us, a preliminary objection as to the competency of the appeal was raised on behalf of the respondent. It was urged that no appeal lay to this Court under R. 1, O. 43, Civil P. C., which was the only provision of law for an appeal from an order of remand, inasmuch as in making the order, the lower appellate Court was purporting to act under O. 41, R. 25, and not under O. 41, R. 23 of the Code. The contention may be accepted as sound: see decision of this Court in the case of *Jagathari Saha v. Medini Mohan Burdhan* (1); but it is open to us to treat the memorandum of appeal to this Court, as an application for revision and give the plaintiffs decree-holders the relief they are entitled to. We proceed therefore to consider the merits of the case before us.

Regard being had to the second part of the decree sought to be executed, the plaintiffs were entitled to have specific performance of contract for sale in the manner indicated. On the plaintiffs depositing the amount of Rs. 651, the balance of the purchase money and requisite stamp and registration fee, the Court is to execute and register a kobala of sale, and no question of default, so far as the direction contained in the first part of the decree was concerned, could arise for consideration. The decree as it stands may be considered to be defective and faulty, so far as the second part of it is concerned but that

is not a matter which could be taken into account by the Court executing the decree in a proceeding for execution of the decree. The plaintiffs decree holders, upon the terms of the decree as it stands, had the right to deposit the balance of the purchase money and requisite stamp and registration fee, and get a conveyance executed and registered through the agency of the Court. The only limitation imposed upon the decree-holders in this behalf was the one under the law, prescribing the time within which the decree must be put into execution. The steps necessary for the purpose of executing the decree and getting the conveyance executed, having been taken within the period of limitation provided for execution of a decree, there is no bar under the law, or under the terms of the decree sought to be executed, to the direction contained in the second part of the decree being given effect to.

In the above view of the case, the order of remand made by the learned District Judge cannot possibly be supported, and it must be set aside. In the result therefore the appeal is held to be incompetent, and it is dismissed. We set aside the order of remand passed by the Court of appeal below, and restore the order passed by the Munsif, dismissing the application of the defendant judgment-debtor, under S. 47, Civil P. C., in the exercise of our revisional jurisdiction. The parties are to bear their own costs in this Court and in the Court of appeal below. The order as to costs made by the Munsif stands.

K.S.

*Order accordingly.***A. I. R. 1933 Calcutta 498**

MUKERJI, J.

Maiyarjan Bibi and another—Plaintiffs—Appellants.

v.

Abdul Shek—Defendant—Respondent.

Appeal No. 983 of 1930. Decided on 11th July 1932, against appellate decree of Sub-Judge, First Court, Faridpur, D/- 30th November 1929.

(a) Civil P. C. (1908), O. 22, R. 3—Death of plaintiff pending suit—Order substituting two persons as heirs—Subsequent discovery of other heirs by Court—Suit does not abate.

Where on the death of the plaintiff, the Court orders the substitution of two persons as heirs of the deceased but finds subsequently that there are two other heirs of the deceased and the omis-

sion is bona fide, the suit does not abate as a whole but they also can be substituted: *A I R 1929 Cal 26, Expl and Dist.*; 28 *Mad 125, Rel on.* [P 500 C 1].

(b) Civil P. C. (1908), O. 22, R. 3—Order allowing substitution or setting aside abatement passed cannot be questioned in appeal from decree—Civil P. C. (1908), S. 105.

It is well settled so far as the Calcutta High Court is concerned that an order allowing a substitution or setting aside an abatement passed by a trial Court cannot be questioned in an appeal from a decree in view of the provisions of S. 105. [P 500 C 2].

(c) Possessory suit—Suit for khas possession—Death of plaintiff and substitution of two persons as heirs—Court subsequently finding that other heirs are not on record—Duty of Court.

Where in a suit for khas possession, the plaintiff dies and two persons are substituted in his place as heirs but the Court subsequently finds that the prayer for khas possession is not maintainable by reason of the fact that all the persons who should have joined as plaintiffs in the suit are not on record, the Court is at liberty to make proper orders enabling some of those parties who may in the circumstances be entitled to claim joint possession with the defendant to amend their plaint and proceed with the suit thereafter. Whether there are several plaintiffs or only one plaintiff is immaterial: *AIR 1929 Cal 519, Foll.* [P 501 C 1]

Bansorilal Sarkar—for Appellants.

Surajit Chandra Lahari—for Respondent.

Judgment.—This is an appeal by the plaintiffs from a suit which they had instituted for recovery of khas possession or in the alternative recovery of possession jointly with defendant 1. There was originally a prayer for Wasi-lat but the same was withdrawn with liberty to institute a fresh suit for the purpose. The suit was originally instituted by one Kedari Mondal. He died during the pendency of the suit and upon that his widow and his daughter applied to be substituted in his place. An order was made for such substitution and the suit proceeded with these two persons as the plaintiffs. Afterwards as appears from the judgment of the learned Munsif, the defendant preferred an objection on the ground that Kedari had left two other heirs, one of the name of Samir and the other of the name of Felu, they being cousins of Kedari and were residuaries under the Mahomedan law. The Munsif dealt with this objection in these words:

"Admittedly Kedari left no son. Then according to Mahomedan law the widow gets two annas, the daughter gets eight annas and the residue goes to Samir and Felu, if they be cousins of Kedari. But this omission to make Sami

and Felu parties does not vitiate the suit. The plaintiffs, the widow and daughter claimed the entire four annas of Kedari. If by law they cannot get it then they can claim their ten annas."

On the merits, the Munsif found that Samir and Felu were really cousins of Kedari and that the plaintiffs could at best get a 10 annas share and no more. As regards the other question that arose on the merits the learned Munsif held that the purchase alleged to have been made by Kedari on which the plaintiffs' claim in the suit rested was not approved and that Kedari had no possession. The Munsif accordingly dismissed the suit. The plaintiffs, that is to say the widow and the daughter of Kedari, thereupon preferred an appeal. Before the Subordinate Judge, at the hearing of the appeal the respondents, that is to say, the defendants in the suit, took a preliminary objection to the effect that the appeal was incompetent as the suit had abated because of all the heirs of Kedari not having been made parties to the suit. The Subordinate Judge dealt with this matter as a preliminary point and on considering the evidence came to the same conclusion as the Munsif, namely, that Samir and Felu were also heirs of Kedari. Having come to this finding, the Subordinate Judge proceeded to hold that as all the heirs of Kedari were not substituted on the record the whole suit had abated. He relied upon a decision of this Court in the case of *Fajor Banu v. Rohim Bux Bhuiya* (1). It appears also that at the hearing of the appeal the pleader for the plaintiffs filed a petition asking that the plaintiffs might be allowed to bring Felu and Samir on the record if they were found to be the heirs of Kedari. The learned Subordinate Judge, however, held that the whole suit had already abated even when the suit was pending in the trial Court and that these persons could not be legally made parties at the stage at which that application was made. In this view of the case, the learned Subordinate Judge, without going into merits, dismissed the appeal holding that the suit had abated.

Plaintiffs have then preferred this second appeal. In the appeal it has been urged on behalf of the plaintiffs that when the substitution had already been made by the trial Court the question

before the Subordinate Judge was not really a question as to whether the suit had abated or not by reason of all the heirs of Kedari not having come forward to apply to be substituted in his place, but that the real question was whether the two heirs of Kedari, namely, the widow and the daughter who had been substituted in the place of Kedari were entitled to proceed with the appeal, that is to say, with the prayer which they had made in the plaint. It has been argued further that although in such a state of things the prayer for khas possession was not maintainable yet in view of the fact that the sharers of these two persons were not disputed it should have been held that they were entitled to go on with the suit and the appeal in so far as their claim for khas possession jointly with defendant 1 was concerned, which, as already stated, was one of the prayers in the plaint. On behalf of the respondent, however, reliance has been placed upon the decision in the case of *Fajor Banu v. Rohim Bux Bhuiya* (1), upon which the learned Subordinate Judge has relied and to which reference has already been made. The argument on behalf of the respondent is that an application by some of the heirs of a deceased appellant is not an application within the meaning of O. 22, R. 3 of the Code, and that when such an application is made the Court should regard it as not a proper application under that rule, but should, on finding that there are other heirs of the deceased appellants, reject the said application as one not made in accordance with law.

The argument is that inasmuch as in the present case it was only two of the heirs of Kedari who had made the application no order for substitution should have been made on it, but that the Court should have proceeded to deal with the matter as if no application had been made for substitution within time and in that view of the matter should have dismissed the suit. Reliance for this position has been placed upon a number of cases to which I shall presently refer. The respondent as already stated strongly relies upon the following passage in the decision of this Court in the case of *Fajor Banu v. Rohim Bux Bhuiya* (1),

"On behalf of the appellants it is urged that O. 22, R. 3 does not apply because an application for substitution was duly made by the 'legal

1. A I R 1929 Cal 26=115 I C 184.

representative" of Abdul Majid within O. 22, R. 3. In our opinion, "legal representative" in O. 22, R. 3 means the legal representative or representatives of the deceased plaintiff, or all the representatives of whom the representative applying knew or ought to have known: (see *Ghamandi Lal v. Amr Begum* (2), and *Haidar Hussain v. Abdul Ahad* (3).) It well may be that if one or more of the legal representatives are unknown or all unwilling to join in the application under O. 22, R. 3, different considerations will arise, and that a bona fide application by all the representatives who are willing to join in making the application will be a sufficient compliance with O. 22, R. 3: see *Bhikaji Ram Chandra v. Purshottam* (4), *Musala Reddi v. Ramayya* (5) and *Abdul Rahman v. Shahad-ud-din* (6)."

Now, it cannot be gainsaid that an application in order to be a proper application in consequence of which no abatement would be possible must be one made by all the heirs of a deceased person. But if an application is made by some of the heirs and nothing is stated as to whether there are other heirs in existence or not or whether the other heirs if in existence had refused to join in the application or not, when an order for substitution has already been made on the application such an order cannot possibly merely for that reason be regarded as an order made illegally or without jurisdiction upon the view that the application itself was one which did not come within the purview of O. 22, R. 3. It is quite open to a Court when an application for substitution is made and the Court finds that all the heirs of a deceased person have not come forward to apply to be substituted in his place to refuse to make an order for substitution upon the ground that there are other heirs who ought to have joined in the application. Similarly, the Court would be perfectly justified in refusing to make an order for substitution upon an application of this character if it finds that it was not bona fide made or that other persons who ought to have been informed about or asked to join in the application were not so informed or asked.

But I am not prepared to hold that if some of the heirs make such an application disputing the right of other persons to claim as heirs and proceed to maintain

that application by taking up the position that the other persons are not heirs, the Court as soon as it finds that the applicants are not the entire body of heirs is precluded from making an order for substitution in their favour and cannot substitute them reserving of course for its consideration the question as to whether such persons should be permitted to maintain the proceedings in the place of the dead person.

It has been argued on behalf of the respondent that it is necessary in order to maintain that application as a proper one that it should be distinctly stated that the other heirs had been informed and they had refused to join. I do not think that there is any sound reason at the back of any such proposition; if it is to be regarded as a proposition of universal application. It cannot be laid down that in all cases it is the duty of the applicants who find it to their convenience to come forward and apply to be substituted to go and beg of other persons who may not be willing to come forward and join with them. The whole question therefore is whether the persons who have been substituted are persons who are competent to maintain the appeal and the suit. It may well be pointed out that so far as this Court is concerned it is well settled that an order allowing a substitution or setting aside an abatement passed by a trial Court cannot be questioned in an appeal from a decree in view of the provisions of S. 105, Civil P. C., and the trial Court having already made an order for substitution in favour of the appellants it was not open to the appellate Court to hold that such substitution was wrongly made. My attention has also been drawn to certain other cases amongst which I consider it necessary to refer to one and that is the case of *Musala Reddi v. Ramayya* (5). In the decision of the learned Judge in that case will be found reference to several other cases and the whole principle has been discussed.

But it will be seen also that the learned Judges in that case expressed the view that where an application had been made by some of the heirs not joining with them the other heirs owing to their unwillingness to join with them or for some other reason but in consequence of a bona fide belief that it was unnecessary for them to make a joint applica-

2. (1894) 16 All 211=(1894) A W N 22.

3. (1908) 30 All 117=5 A L J 62=(1908) A W N 41.

4. (1886) 10 Bom 220.

5. (1900) 23 Mad 125=3 M L J 818.

6. A I R 1920 Lah. 228=55 I O 888=1 Lah 481.

tion on behalf of all, the mere fact that all the heirs had not joined would not make the application one not entertainable under the Code for the purpose of substitution. It is quite true that in the present case it has been found as a fact that the persons who have been left out were really two of the heirs of the deceased plaintiff. But their right as such heirs was disputed and nothing can be found which it could be said that they did not entertain the bona fide belief in their mind that the other persons had no right to come in and join with them as plaintiffs in place of the deceased plaintiff. I am of opinion therefore that the learned Subordinate Judge, in holding that the suit had abated notwithstanding that the order for substitution had been made by the trial Court in favour of the present appellant, had not taken the correct view of the law or of the circumstances of the case. In my opinion, the real question for consideration of the learned Subordinate Judge was whether it was open to the plaintiffs who were the appellants before him and who had substituted themselves in the place of the deceased plaintiff to proceed with the appeal, that is to say, with the prayers contained in their plaint in the suit and if so, to what extent.

Now, from a decision of this Court in the case of *Harī Charan Moulik v. Kali Pada Chakrabarti* (7), it would appear that in the circumstances such as these where the prayers for khas possession is not maintainable by reason of the fact that all the persons who should have joined as plaintiffs in the suit were not on the record, the Court is at liberty to make proper orders enabling some of those parties who may in the circumstances be entitled to claim joint possession with the defendant to amend their plaint and proceed with the suit thereafter. It has been argued on behalf of the respondent that that case is distinguishable because of the fact that in the present case there was only one plaintiff and an application for substitution was made on his death by some only of his heirs whereas in the case aforesaid there were several plaintiffs some of whom had died and in their place no substitution had been made. I do not think there can be any such distinction on principle. The case just cited in my opinion should

7. AIR 1939 Cal 519=119 IC 814=66 Cal 622.

be regarded as affording a true guide for the Court in so far as the present case is concerned. Following the decision in that case the order that I propose to make is to set aside the decree from which the present appeal has been preferred and send the case back to the Court of the learned Subordinate Judge in order that he may allow the appellants before him to amend their plaint, by striking out therefrom such of the prayers as are not maintainable at their instance and in the absence of the other heirs of Kedari, and then to allow them to proceed with the appeal in so far as the remaining prayers are concerned. The learned Subordinate Judge will deal with the merits of the case and consider and deal, with all other questions that will arise in connexion with the suit and the appeal before him. So far as the costs of this appeal are concerned, I make no order.

Leave to appeal under S. 15, Letters Patent, has been asked for. But I do not think that it is a fit case in which such leave should be granted.

K S.

Order accordingly.

* A. I. R. 1933 Calcutta 501

M. C. GHOSE, J.

Gouri Sankar Ram Kumar—Plaintiffs—Petitioners.

v.

Sashi Bhushan Das Bairagya—Defendant—Opposite Party.

Civil Rule No. 885 of 1932, Decided on 9th December 1932, from order of First Munsif, Kutwa (Burdwan), D/-16th May 1932.

* Provincial Small Cause Courts Act (1887), S. 25—Omission to consider material evidence or evident mistake in appreciation of evidence causing substantial injustice justify revision.

The wording of S. 25 allows High Court to interfere where by reason of omission to consider material evidence or where by evident mistake in the appreciation of evidence substantial injustice has been done to the party. [F 502 C 2]

Harī Charan Ganguly and Indu Prokash Chatterji—for Petitioners.

Jatindra Nath Sanyal—for Opposite Party.

Judgment.—This is an application under S. 25, Provincial Small Cause Court Act, by the plaintiff whose claim for a sum of Rs. 20 odd for goods supplied together with interest of Rs. 11 odd has been dismissed by the Court below. The plaintiff's case was that the defen-

dant Sashi Bhusan Das Bairagya introduced his son Rebati to the plaintiff's firm and asked them to supply goods on credit to the said son Rebati, that thereupon the plaintiff supplied biris to the son Rebati for a large sum. At the end a sum of Rs. 20 odd was the balance outstanding. As no payment was made the suit was instituted against the defendant. The defence was that he did not stand surety for his son Rebati, that Rebati took the biris for himself and the defendant was not responsible for the debts of Rebati. The Court accepted the defence view and dismissed the suit.

In this Court is urged that the learned Court below committed a material error in the appreciation of the evidence that the P. W. 2, Bejan Behari Dutta, gave evidence that the defendant himself paid Rs. 10 to him on account of the balance outstanding against Rebati. The amount was entered in the account book which was signed by the defendant. It is urged that this important piece of documentary evidence was not at all considered by the Court below and by that omission of the Court the plaintiff has suffered grievous injustice not so much for the small sum in dispute, but because a slur that has been cast upon his reputation as an honest merchant. S. 25 lays down that the High Court for the purpose of satisfying itself that a decree or an order made in any case decided by a Court of Small Causes was in accordance with the law may call for the case and may pass such order as it thinks fit. In this case the question is whether the Court below made any error of law. The learned advocate for the petitioner has referred to many cases, notably the case of *Nathuram Shivnarayan v. Dhularam Hariram* (1), in which case it was decided that the Court had powers of interfering with the decision on questions of fact. The passage runs thus :

"Interference in regard to appreciation of evidence should in general only be exercised when there appears to the Court to be a very clear case of misappreciation which has resulted in injustice to a party and makes the decree one that cannot be regarded by a revisional Court as 'according to law.'"

The learned advocate for the opposite party has quoted various decisions where the Court refused to interfere. On questions of law it appears to me that the

wording of S. 25 allows this Court to interfere where by reason of omission to consider material evidence or where by evident mistake in the appreciation of evidence substantial injustice has been done to the party. Bearing the above principle in mind it is to be considered whether in this case there has been substantial injustice. It is true that the entry Ex. 3 was proved of the plaintiff's side as being written by the defendant. The defendant however totally denied the allegation that he had paid Rs. 10. Unfortunately no question was asked as to his signature in Ex. 3. But the manner of his evidence does not leave any doubt that he probably would have denied the signature. The plaintiff supplied goods to Rebati and not to his father, the defendant; but the suit was instituted only against the defendant and not also against his son. On account of this the plaintiffs' firm stand to lose the amount claimed in the suit. In my opinion the failure in this rule does not cast any slur upon the plaintiff's firm as merchants. In the result I am of opinion that there is no sufficient ground for interference in this matter. The rule is discharged. The parties will bear their own costs in this Court.

v.v.

Revision rejected.

*A. I. R. 1933 Calcutta 502

LORT-WILLIAMS, J.

Amulyacharan Mitra—Plaintiff.

v.

Prakashchandra Mitra and another—Defendants.

Application No. 756 of 1918, Decided on 23rd November 1932.

* Partition — Improvements to joint property, by one co-owner creates equity in favour of co-owner making improvements which is met by allotment of improved share — Where partition by metes and bounds is impossible compensation in money is due for enhancement in value by reason of the improvements — Inquiry must be by Court — Co-sharers.

Where money is spent on improvements of the joint property by a co-owner, an equity is created in his favour which is recognized in case the property is partitioned, by allotting to him, wherever this can be done fairly, the portion on which the improvements were made. In a case where it is possible to divide a house by metes and bounds, and it is contended by one of the parties that he has spent money upon improvements or addition, it is not lawful to direct that the other parties should make compensation in money to the party making the improvements, in order to equalise the burden. Where a partition of the

property by metes and bounds is impossible and it is directed to be sold, the Court and not any officer should first inquire if the improvements were made, their present value and if there was any agreement between the parties regarding the expenditure for the improvements. Where it is found that the total price of the joint property has been enhanced by any sum on account of the improvement, then that sum ought to be deducted from the sale proceeds and reserved for the co-owner making the improvements before dividing the sale proceeds between the parties.

[P 503 C 2; P 504 C 1]

S. C. Ghosh—for Plaintiff.

S. N. Banerjee (Sr.), M. N. Dutt and S. N. Banerjee (Jr.)—for Defendants.

Judgment.—In this case there was a preliminary decree for partition made on 29th July 1921, in which the shares of the parties were declared in certain premises No. 18, Shampukur Street, Calcutta, and it was ordered that a partition be made of the said premises into eight equal parts or shares, and the commissioner was ordered, if he found that the premises could be conveniently and reasonably partitioned by metes and bounds, to make such division, with power to him to award compensation in money by way of equalizing the partition. It was further ordered that, in the event of the commissioner finding that the premises could not be conveniently and reasonably partitioned by metes and bounds, he was to report to the Court. It was further ordered that the expenses of the commission of partition were to be borne by the parties in proportion to the value of their respective shares. In the plaint, it was alleged that the plaintiff had made certain improvements and additions to these premises, and that it had been agreed between the parties that the costs of such improvements should be borne partly by the defendants.

The commissioner heard evidence, and the defendants tried hard to prove that it would be convenient and reasonable to partition this house by metes and bounds: but the commissioner eventually came to the conclusion that it would be impossible to divide the premises in any manner which would be convenient to the parties and this finding he has reported to the Court. The plaintiff now asks that the premises may be sold, and that the sale proceeds may be divided between the parties, but he contends that from the total price to be received for the premises there ought

first to be deducted the present value of the said improvements. He contends that a sum of Rs. 5,000 was expended by the plaintiff's predecessors for improvements and additions to the premises and that their present value is Rs. 2,805. His contention is based upon the argument that the price, which may be obtained for the premises, will be enhanced to the extent of the present value of the improvements, and therefore that this amount ought to be deducted from the price obtained, before a division is made between the parties. He further contends that, as the whole of the expenses before the commissioner were caused by the contentions of the defendants which have failed, these costs ought not to be taken out of the corpus of the estate. It is contended by the defendant that this question of the improvements cannot now be considered, that such matters must be considered at the time when the preliminary decree is made, and must be provided for in the decree, and directions given to the commissioner to take such improvements into consideration.

I have no doubt that that argument is correct in a case where partition by metes and bounds has been directed, and the shares declared, and that partition has been made. Further, I am of opinion that in a case where it is possible to divide a house by metes and bounds, and it is contended by one of the parties that he has spent money upon improvements or additions, it is not lawful to direct that the other parties should make compensation in money to the party making the improvements, in order to equalise the burden. It is true that an equity has been created in favour of the party who has made the improvements, but in such a case, the only way to recognize his equity is for the commissioner, if this be possible to allot to him that portion of the premises upon which the improvements and additions have been made. If that cannot fairly be done, then the party making the improvements must lose the value of his equity.

No such difficulty arises in a case such as this, where it has been found impossible to divide the premises by metes and bounds. Nor do I think that this question of the improvements has yet been considered by the Court in the

light of the position which has now arisen. It may have been, and probably was considered, in anticipation of the commissioner being able to divide the property by metes and bounds. As I understand the decree, if the commissioner found that it was impossible to make such a division, then he was directed to report that matter to the Court, and the Court could then deal with the matter again and from a new standpoint, except that the shares have already been declared, and that declaration cannot be interfered with. If it can be shown that the price which may be obtained for these premises has not been increased by the amount of the present value of the improvements, or by any amount in respect of the improvements, then the total received will have to be divided according to the shares already declared. If, on the other hand, it can be shown that the total price to be received has been enhanced by the money expended upon the improvements, then that sum must first be deducted, before the value of the premises so far as the other parties are concerned, can be ascertained. I agree with the contention of the defendant, that the questions whether such improvements were made at all, as to their present value, and as to whether any agreement was come to between the parties, or whether the defendants acquiesced in the making of such improvements in such a way that they are bound by acquiescence, are all points which ought to be decided in the first place by the Court, and ought not to be referred to the commissioner, or to any officer of the Court to ascertain.

Before therefore I can finally deal with this matter, I must hear, if it be necessary, evidence on these points. This motion therefore will be adjourned to Wednesday fortnight to hear this evidence, unless the parties can agree about these facts, in which case no further inquiry may be necessary, and the case may be mentioned to me again. The costs referred to in the plaint are clearly costs of the commission and are provided for in the preliminary decree.

v.v.

*Order accordingly.***A. I. R. 1933 Calcutta 504**

C. C. GHOSE AND MITTER, JJ.

Mahammad Fazlul Karim — Appellant.

v.

Ahmad Mahammad Paruk — Respondent

Appeal No. 78 of 1932, Decided on 22nd August 1932, against original order of Panckridge, J., in E. S. No. 3 of 1927.

(a) *Calcutta High Court Rules (Original Side)*, Ch. 27, R. 21 — Reserved price can be dispensed with.

The necessity for adhering to the reserved price might be dispensed with. The primary object of these rules is to see that the decree-holder is enabled to enjoy the fruits of his decree and that he should do so as early as possible. The Judge need not look into the surveyor's report or the reserved price or hear the Registrar before coming to a decision of his own. What is done by the Registrar subsequent to the final decree is done by him as a ministerial officer of the Court charged with the duty of carrying out the orders of the Court. The Registrar is not exercising judicial powers. He is not even sitting in a quasi judicial capacity [P 505 C 2; P 506 C 1]

(b) *Letters Patent (Calcutta)*, Cl. 15—Appeal—Final decree for mortgage—Order to sell without reserve, is not appealable.

An appeal against an order, directing that the Registrar might be at liberty to sell the mortgaged properties without reserve, is not competent. Taking a step in carrying out the directions contained in the final decree and in trying to bring the properties to a speedy sale is not determining rights of parties : 8 B. L. R. 483; 43 Cal. 157, *Expl.* [P 504 C 2; P 506 C 1,2]

H. D. Bose, S. C. Mitter and D. C. Ghose—for Appellant.*S. N. Banerjee and K. Basu*—for Respondent.

C. C. Ghose, J. — This is an appeal against an order made by my learned brother Panckridge, J., on 21st July 1932, by which he directed that the Registrar might be at liberty to sell the mortgaged properties without reserve in the circumstances which had happened. The facts involved in this appeal, shortly stated, are as follows : The plaintiff obtained a mortgage decree on 14th July 1927, and the decree directed that the Registrar should take the usual accounts on the footing of the mortgage. The Registrar did take the accounts and reported that a sum of one lakh seventy-seven thousand odd hundred rupees would be due and owing to the plaintiff mortgagee on 7th August 1928. Thereafter the final decree was passed and that would be found on pp. 45 and 46 of the paper book. In the final decree there was inserted a provision, as is

usually done in the Original Side, that the Registrar should fix a reserved price on the mortgaged properties before the sale was held by him. The Registrar, pursuant to the directions contained in the final decree, called a meeting of the parties and settled the sale proclamation in the presence of the parties. Thereafter, on 23rd March 1932, the mortgaged properties were put up to sale and the reserved price not having been reached the sale was adjourned to some date in May 1932. The date of the next sale was 20th May 1932, and on that occasion even the reserved price was not reached. The two sales hereinbefore referred to having been abortive, the plaintiff took out a Master's summons on 8th day of July 1932, for an order that "the necessity of fixing a reserved price at the sale to be held on 22nd day of July 1932", (that was the date fixed by the Registrar for the third sale), "be dispensed with and for an order that the Registrar do pay to Messrs. Khaitan & Co." a certain sum pursuant to a certain order. That application stood over from time to time at the request of the present appellant and was not finally disposed of by Panckridge, J., till 21st July 1932. There is no judgment in the case, but the minutes are printed on p. 36 of the paper book and it appears that the Court was of opinion that, on the plaintiff undertaking to commence the bid at the highest figure arrived at, at the last sale, namely, Rs. 1,90,000, the necessity for fixing a reserved price at the sale to be held on 22nd July, 1932 should be dispensed with. There were certain other directions about payment of a certain sum of money to Messrs. Khaitan & Co., but we are not concerned with the same.

It is against this order that the present appeal has been filed and, although we have not had the advantage of hearing Mr. S. N. Banerjee for the respondent, because we were of opinion that the case did not call for an answer from Mr. Banerjee, Mr. Banerjee has indicated to us that one of his points is that there is no appeal under the law against the order of Panckridge, J., dated 21st July 1932. It is reasonably clear from the materials on the record, to which our attention has been called, that the learned Judge has done nothing which has not been done by a succe-

sion of Judges who have sat on the original side and who have been and are thoroughly familiar with the practice which obtains there. It has often happened that sales have become abortive and thereupon the Judge taking interlocutory matters on the Original Side has given directions that, inasmuch as the sales have become abortive, the necessity for adhering to the reserved price might be dispensed with. As a matter of fact, this is provided for by the rules on the Original Side: see pp. 329 to 332 of the Original Side Rules. Therefore, there is not any particle of substance in Mr. Boss's contention that the learned Judge has done something which is in violation of the terms of the final decree. Anyone turning to the forms of final decrees as contained in the Appendix to the Civil Procedure Code will see at once that there is no mention of "reserved price" in the forms in the Civil Procedure Code. It is only according to the rules which obtain on the original side that the necessity of a reserved price arises; and, as the sales take place on the footing of what obtains in the Chancery Division in England, the forms prevailing there have been adopted and copied. But the primary object of these rules is to see that the decree-holder is enabled to enjoy the fruits of his decree and that he should do so as early as possible.

Now, when sales become abortive by reason of the paucity of bidders or for reasons allied to the same, the rules contemplate that the Judge's attention should be drawn and that the Judge, on a full consideration of the matters involved in any application made to him, should give directions either that the reserved price should be adhered to or that the reserved price should be dispensed with: see in particular R. 21, Ch. 27, Original Side Rules. This is exactly what Panckridge, J., has done and I am unable to discover even the vestige of a complaint as regards what has been done in this matter. Panckridge, J., has made the order not only on looking into the matters referred to in the plaintiff's application, but, after hearing the parties fully, i. e., after hearing the plaintiff and the defendant fully, and, after giving due weight to the circumstances which were responsible for the two sales being abortive. In this stage

of the record on the merits the appellant has no reasonable case to put forward.

It is said however that Panckridge, J., ought to have looked into the surveyor's report and to have looked into the reserved price and to have heard the Registrar before coming to a decision of his own. I desire to point out that what has been done or what was done by the Registrar subsequent to the final decree was done by him as a ministerial officer of the Court charged with the duty of carrying out the orders of the Court. The Registrar was not exercising judicial powers. He was not even sitting in a quasi-judicial capacity. Therefore, his proceedings, on all dates subsequent to the final decree, were of a ministerial character and the learned Judge could not be expected to register the decrees of the Registrar or to abide by what the Registrar chose to say. It was entirely within his competence to send for the Registrar or not to send for the Registrar. It was within his competence to look into the proceedings had before the Registrar or not to look into those proceedings. It was open to him to look into the reserved price or not to look into the reserved price. It was open to him to say :

"I will not look into the reserved price without looking into the circumstances which happened and, when I find that the two sales have become abortive, and when I find that there is this large sum of money due to the plaintiff and that the decree is as old as 1927, I must take steps and steps of a speedy character to bring the mortgaged properties to sale and to wind up the litigations that have been going on."

There is no force whatsoever in what Mr. Bose has urged that the Judge's order was without jurisdiction. Now, I come to the last point, namely, whether the appeal is a competent one or not. Mr. Bose has invoked the authority of Sir Richard Couch in the well-known case of *Justices of the Peace for Calcutta v. Oriental Gas Co.* (1). That case has often been the subject of debate and reference in later cases and, although the definition given by Sir Richard Couch of the word "judgment" in the case is not exhaustive, I am quite certain that Mr. Bose cannot derive any comfort whatsoever from Sir Richard Couch's judgment or the judgment of Sir Lancelot Sanderson in the case of *Mathura Sundari*

1. (1872) 8 B L R 488=17 W R 864.

Dasi v. Haran Chandra Saha (2). We have got to look into the substance of the thing. Has the learned Judge in this case said or done anything in determining the rights of the parties? The rights of the parties had been already adjudicated upon by means of the preliminary decree or by means of the final decree. What he has done is taking a step in carrying out the directions contained in the final decree and in trying to bring the properties to a speedy sale. Nothing in the nature of the rights of the parties has been determined and, if that is so, whether we look into Sir Richard Couch's judgment in the case of *Justices of the Peace for Calcutta* (1) or into Sir Lancelot Sanderson's judgment in *Mathura Sundari Dasi's* case (2), there is not the smallest chance of it over being held, so far as we are concerned, that the order made by Panckridge, J., in this case is an appealable order. One last observation may be made and it is this : not only does it not come within the definition of "judgment" as used in Cl. 15, Letters Patent, but it does not come within any of the numerous sub-rules of R. 1, O. 43, Civil P. C. That is sufficient to dispose of the matter and I would accordingly hold that the appeal is incompetent and is not entertainable. In this view of the matter the appeal stands dismissed with costs. The application which stood adjourned till the hearing of the appeal must also be discharged with costs.

Mitter, J.—I agree.

V. V.

Appeal dismissed.

2. (1916) 48 Cal 157=84 I C 634.

A. I. R. 1933 Calcutta 506

MUKERJI, J.

Nabjan Sardar—Defendant — Appellant.

v.

Neburali Molla—Plaintiff — Respondent.

Appeal No. 1970 of 1930, Decided on 2nd December 1932, against appellate decree of 2nd Sub-Judge, 24-Perganas, D/- 17th April 1930.

Transfer of Property Act (1882), S. 10—Lease—Stipulation to pay chouth to lessor in case of transfer is valid—Right of treating transferee as trespasser enures not only to lessor but also to purchaser in rent execution sale—Civil P. C., S. 65.

A stipulation in a lease that the transferee from the lessee whoever he may be will have to

pay a chouth to the lessor and if he does not pay it the transfer would be invalid, is a valid covenant for the benefit of the lessor and is operative. Such a restrictive covenant runs with the land and remains operative during the entire period of the lease and this right of treating the transferee as a trespasser enures not only to the lessor but also to purchaser of the holding at a rent execution sale: 19 Cal 774; AIR 1923 Cal 679 and 29 Cal 818, *Rel. on.*; 86 Cal 745; AIR 1922 Cal 474 and AIR 1926 Cal 533, *Dist.*

[P 107 C 2; P 508 C 1]

Satindra Nath Mukherjee and Hara Krishna Paramanik—for Appellant.

Narayan Krishna Kar—for Respondent.

Judgment. — Three odd bighas of land which form the subject-matter of this suit formed part of a holding consisting of 7 bighas odd which was held by one Bata Bibi under the Bhowanipore Zamindari Co. One of the terms of the lease by which Bata Bibi's tenancy which was a mourashi mukar-rani one was created was as follows:

"If you transfer the lands of this jama to anybody then the purchaser would be bound to pay into my sarkar as mutation fee one-fourth of the amount which would be the fair price for the land at the time; if such fee is not paid the transfer will not be valid."

Bata Bibi sold the land in suit to the appellant in 1920. The appellant did not pay the chouth. In 1924 the landlords sued Bata Bibi for rent of the entire tenancy for 1327 to 1330 B. S., obtained a decree and in execution of that decree put up the holding to sale at which the respondent purchased it. In 1923 the respondent, as plaintiff, commenced this suit for ejecting the appellant. The suit was decreed by the trial Court and that decree has been affirmed by the Subordinate Judge on appeal. The respondent rested his case upon the clause in the lease referred to above, alleging that the chouth had not been paid by the appellant and so the appellant's purchase was invalid. A number of decisions have been cited before me on behalf of the appellant in support of a contention that the stipulation itself is invalid as a covenant in restraint of alienation and offending against the rule of perpetuity: *Basaratali Khan v. Manerulla* (1) was a case in which in a permanent lease the covenant was that the lessee

"shall not be able to dig pits or tanks or to transfer the land in any way without a letter (from the lessor) to that effect,"

and there was no right of re-entry re-

served. It was held that the covenant was not void, but the assignment was operative notwithstanding the covenant. It was pointed out that in such a case damages might be awarded on that footing as was done in *Williams v. Earle* (2), and that that was the view taken in *Parameshri v. Vettappa* (3). Another case is *Swarna Kumar v. Prahlad Chandra* (4), in which in a permanent lease the stipulation was that the lessee would not be able to transfer in favour of a third party without the lessor's permission but that in the case of a transfer in favour of a co-sharer of the lessor no such permission would be necessary. It was held that the stipulation was void as offending against the rule of perpetuity. A third case cited in *Rajendra v. Moheslata, A. I. R.* 1926 Cal. 533, in which in a permanent lease there was an absolute restraint of transfer provided by a clause which run thus,

"you will have no right to sell your right in the land held under the lease,"

but there was no right of re-entry reserved. It was held that the restriction is inoperative. The cases referred to above are all distinguishable because in the case before me there is no restriction as to transfer, but the stipulation is that the transferee whoever he may be will have to pay a chouth and if he does not pay it the transfer would be invalid. Such a covenant in a lease is a valid covenant for the benefit of the lessor and is in my opinion operative. The covenant in this case is in its essence similar to that in the case of *Dinobandhu Roy v. W. C. Banerjee* (5). Such a restrictive covenant runs with the land and remains operative during the entire period of the lease: see *Sarada Kripalala v. Bepin Chandra Pal* (6.) The lessor could treat the purchaser as a trespasser and in fact did so by ignoring the appellant and suing Bata Bibi for the rent of the tenancy notwithstanding the transfer. The only question that remains to consider is whether the respondent is entitled to treat the appellant in the same way.

It cannot be denied that Bata Bibi would have been estopped from ques-

2. (1868) 8 Q B 780=9 B & S 740=37 L J Q B 231=19 L T 289.

3. (1903) 26 Mad 157=12 M L J 189.

4. AIR 1922 Cal 474=67 I C 719.

5. (1892) 19 Cal 774.

6. AIR 1923 Cal 679=74 I C 555.

1. (1909) 36 Cal 745=2 I C 416.

tioning the validity of the transfer she had made in favour of the appellant. But the respondent as purchaser at the auction-sale has in no sense acquired a derivative title from the judgment-debtor or to be bound by any such estoppel. His rights must be determined upon the terms of his own sale certificate. The sale certificate purported to convey to him:

"the right, title and interest of the judgment-debtor Bata Bibi in the entire holding in arrears."

To construe these words one must find out not merely what the right, title and interest which the judgment-debtor actually had, but what was in fact put up to sale and sold. As has been pointed out in the case of *Akhoy Kumar Soor v. Bejoy Chand Mahatap* (7), the terms "right, title and interest of the debtor" as used in the sale certificate and order, must be construed with reference to the circumstances under which the sale took place as well as the proceedings leading up to the sale. The respondent having made his purchase at a rent execution sale is in my opinion entitled to treat the appellant as one with no title to remain on the land. The result is that in my opinion the view taken by the Courts below is correct. The appeal accordingly must be dismissed with costs.

R.K.

Appeal dismissed.

7. (1902) 29 Cal 813.

*A. I. R. 1933 Calcutta 508

GUHA AND M. C. GHOSE, JJ.

Pulin Chandra Sen—Plaintiff — Appellant.

v.

Amin Miah Muzaffar Ahmad and others—Defendants—Respondents.

Appeal No. 384 of 1931, Decided on 8th July 1932, from appellate order of Addl. Dist. Judge, Noakhali, D/- 7th April 1931.

(a) Limitation Act (1908), S. 6—Applicability to proceedings to obtain final decree in mortgage suit.

Section 6 can have no application in the case of proceedings to obtain a final decree in a mortgage suit as such proceedings are not proceedings in execution, but are proceedings in the suit for enforcement of the mortgage: 89 All 682 and AIR 1922 All 383, *Rel on*. [P 508 C 2]

* (b) Civil P. C. (1908), O. 32, R. 10—Suit on mortgage by next friend of minor—Preliminary decree—Death of next friend—No new next friend appointed—Application for passing of final decree by minor within three years of attaining majority but three years

after expiry of period of grace is in time—Civil P. C. (1908), O. 34, R. 5—Limitation Act (1908), Art. 181.

Where the next friend of a minor brings a mortgage suit and dies after the preliminary decree and no new next friend is appointed, the suit does not abate, and cannot be treated as having been dismissed. It is incumbent upon the Court to appoint a new next friend or to treat the suit as a pending one, till the minor plaintiff attains majority. Hence an application for passing a final decree by the minor within three years after attaining majority but three years after the period of grace fixed in the preliminary decree is not barred by time: AIR 1915 Mad 461, *Rel on*. [P 509 C 1]

Chandra Sekhar Sen—for Appellant.

Guha, J.—This appeal is directed against the decision of the learned Additional District Judge of Noakhali, affirming an order of the learned Subordinate Judge, Noakhali, passed on 17th March 1930, in Suit No. 104 of 1917, dismissing an application made by the appellant in this Court, for the passing of a final decree in the said suit for enforcement of a mortgage. The appellant was a minor at the time when the suit was instituted and was represented in the suit by his father as his next friend for the purpose of the suit. The preliminary decree in the suit was passed on 1st December 1917; and the period of grace expired on 1st June 1918. It appears that the father representing the plaintiff in the suit, the appellant before us, died and no step was taken to get a next friend appointed. The appellant, within three years from the date of his attaining majority, filed his application to the Court, on 30th November 1928, 1929? for a final decree in the suit. The primary Court, as mentioned above, dismissed the application on the ground that inasmuch as the application was not one for execution, S. 6, Lim. Act could not extend the time; that as the application was made more than three years after 1st June 1918, when the right to apply accrued, the application must be held to be barred by limitation. The learned Additional District Judge on appeal agreed with the view taken by the primary Court and dismissed the appeal before him.

There can be no doubt that the Courts below have rightly held that S. 6, Lim. Act, could have no application in the case before them: proceedings to obtain a final decree in a mortgage suit were not proceedings in execution, but were proceedings in the suit for enforcement of the

mortgage : see *Ramji Lal v. Karan Singh* (1) and *Sital Singh v. Baijnath Prasad* (2). In the case before us, on the death of the next friend after the passing of the preliminary mortgage decree, there was no appointment of any next friend to represent the minor plaintiff in the suit who attained majority on 4th January 1929. On the facts and in the circumstances of the case therefore regard being had to the provision contained in O. 32, R. 10, Civil P. C., the proceedings in the mortgage suit must be deemed to have remained in abeyance, as the position contemplated by law was the stay of proceedings in the suit, until the appointment of a next friend in the place of the next friend who was dead. The suit did not abate, and could not be treated as having been dismissed. It was incumbent upon the Court to appoint a new next friend or to treat the suit as a pending one, till the minor plaintiff attained majority: see *Venka-teswara v. Chewseri* (3). In the above view of the case before us, the application that was filed by the appellant on 30th November 1929, for a final decree for sale, and which was governed by Art. 181, Sch. 1, Lim. Act, was within three years from the date when the right to apply accrued to him, on his attaining majority on 4th January 1929, up till which time the suit was to be deemed as a pending proceeding.

In our judgment the decision arrived at by the Courts below, that the application under O. 34, R. 5, Civil P. C., out of which this appeal has arisen, was barred by limitation is erroneous and unsustainable, and must be set aside, and we direct accordingly. In the result this appeal is allowed, the orders passed by the Courts below are set aside, and the case is remitted to the Court of the Subordinate Judge, so that the application made in that Court for the passing of a final decree for sale, in Suit No. 104 of 1917, may be dealt with on the merits, in accordance with law. The record of the case shows that there can be no objection to a final decree being passed in favour of the appellant, now that the decision of the Courts below on the question of limitation is set aside.

The records of the case are to be returned without delay.

M. O. Ghose, J.—I agree.

K.S.

Appeal allowed.

*A. I. R. 1933 Calcutta 509

RANKIN, C. J. AND COSTELLO, J.

Chittya Ranjan Das and others — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 243, 270 and 330 of 1932, Decided on 1st December 1932.

* (a) Criminal P. C. (1898), S. 298 — Caution against approver's testimony being not sufficient for conviction in absence of independent corroboratory evidence not given — Conviction set aside.

Where it would seem as if the jury had made up their minds to act upon the testimony of the approver even in cases where that testimony had not been supported by corroboration in the sense in which that requirement is intended by the rule which says that the evidence of an accomplice is not to be accepted unless there is corroboration implicating a particular accused person that corroboration being in itself of independent value, that is to say not tainted evidence, and where the Judge had not added to this portion of the charge a statement to the effect that it would be very dangerous indeed to convict upon the approver's testimony alone and that the mention of the name in the confession is no corroboration such as is generally to be exacted by the jury in the evidence of an accomplice.

Held: there was misdirection and conviction was set aside. [P 510 C 2 ; P 511 C 1]

(b) Criminal P. C. (1898), S. 298—Scope.

When a Judge speaks of no other corroboration and the evidence to which he is referring is in law no corroboration at all, the matter is somewhat on the border line whether there was insufficient direction. [P 511 C 1]

* (c) Criminal P. C. (1898), S. 299—Scope.

The jury on a proper direction thinking fit to act on the evidence of the approver is committing no illegality whatever and High Court has no right to interfere with it. [P 511 C 1]

Sures Chandra Talukdar, Sailes Chandra Talukdar, Madhu Sudan Dutt, Pashupatinath Ghose and Sukumar De— for Appellants.

Khundkar and Jitendra Mohan Banerji — for the Crown.

Rankin, C. J.—In this case, twelve persons were put upon their trial before the Assistant Sessions Judge of Faridpur and a jury on various charges in connexion with a dacoity alleged to have taken place on 26th-27th March 1931. The prosecution case was that the complainant Nibaran Chandra Saha went to bathe in the river Brahmaputra leaving his married daughter Nanibala and some other relatives at home; that on the

1. (1917) 39 All 532=40 I C 424.

2. AIR 1922 All 383=44 All 668=75 I C 485.

3. AIR 1915 Mad 401=25 I C 597."

next day at about midnight several men broke open the door of the building of his house and entered the room in which Nanibala and her three children were sleeping with other persons; that they broke open an almirah that was in the room and took away various gold ornaments; that they were heard and the villagers began to arrive and that when Nibaran returned home on Saturday he gave to the police a list of the missing articles. The case was one in which the evidence was all connected up by the evidence of the approver who seems to be a young man of good family and rather an exceptional person to be in a position of confessing in taking part in a dacoity. The result was that of the 12 people who were charged one was acquitted by the jury. Of the 11 who were convicted, one Jagabandhu has not appealed. He, it may be stated, was convicted largely on the strength of his own confession. We have before us however three appeals by the remaining ten accused. In Appeal No. 243 the appellants are Chittya Ranjan Das, Sona Mia and Jainuddi; in Appeal No. 270, we have Naba Kisore Banik and Madhusudan Gope as appellants and, in Appeal No. 330 there are five appellants—one Bhuban Mohan Saha and one Ramesh Chandra Ghosh and three others whose cases will have to be dealt with together, namely, Mati Lal Dutta, Aswini Kumar Kar and Ainaddi.

Mr. Talukdar in the first two appeals—and he has been followed by the learned advocate for the appellants in the third appeal—has made some comments as to the general direction of the Judge in his charge to the jury; but I am not impressed with the criticisms which have been made. It appears to me that the learned Judge has taken a good deal of pains in giving his charge to the jury and that there is nothing wrong in his exposition of the law. Indeed, he has in some respects gone at a great length into the law in detail and applied it to the facts of the case. He has after discussing the law and discussing the facts taken up in his charge the evidence against the accused persons one by one; and, on a consideration of the evidence against them, I am of opinion that there was no misdirection or insufficient direction in the charge which would entitle us in any way to interfere with the con-

viction of Chittya Ranjan Das or Naba Kisore Banik or Bhuban or Ramesh. The evidence against each of these persons is in such a state that it is impossible to say that the jury's verdict could have been influenced by any of the suggestions or criticisms that have been made against the charge. As regards these persons, it is impossible, in my judgment, to interfere with their convictions and their appeals must be dismissed. The position however disclosed by the record is this: that it would seem as if the jury had made up their minds to act upon the testimony of the approver even in cases where that testimony had not been supported by corroboration in the sense in which that requirement is intended by the rule which says that the evidence of an accomplice is not to be accepted unless there is corroboration implicating a particular accused person; that corroboration being in itself of independent value, that is to say, not tainted evidence. After telling the jury in a general manner all the relevant principles to be applied to the case, the learned Judge comes to set out at the end of his charge the condition of the evidence against each person. When he comes to Sona Mia and Jainuddi, he simply says this:

"The only evidence against these two persons is that of the approver. Sona Mia was named in the confession of the accused Jagabandhu."

It is said by Mr. Talukdar that, in these circumstances, he ought to have added to this portion of the charge a statement to the effect that it would be very dangerous indeed to convict upon the approver's testimony alone and that the mention of the name in the confession of Jagabandhu is no corroboration such as is generally to be exacted by the jury in the evidence of an accomplice. Again, we find that when dealing with the case of Madhu Sudan Gope he tells the jury that the only evidence against him and Naba Kisore Banik is the evidence of the approver and of one witness. It turns out that the one witness does corroborate the approver as regards Naba but that witness does not corroborate him as regards Madhu Sudan Gope at all; the learned Judge having made some little slip not unnaturally between Madhu Sudan Gope and another of the accused, namely, Bhuban Mohan Saha. It appears to me therefore quite clear

that the conviction as against Madhu Sudan Gope cannot stand and that his appeal should be allowed and he should be acquitted. I think however that as there was one witness to corroborate the approver as regards Naba, it is not possible to interfere with his conviction. As regards Bhuban and Ramesh, appellants in Appeal No. 380, the evidence against them seems to be considerable and I do not think that the learned Judge has given any misdirection or insufficient direction as regards them. But as regards Mati Lal Dutta, Aswini Kumar Kar and Ainuddi, the position is that the learned Judge tells the jury that against these three accused there is the evidence of the approver. He says

"that they were in Gangaprosad Cutchery on the day of the dacoity has been proved by three or four prosecution witnesses; but there is no other corroboration of the allegations of the approver against these three accused. Mati Dutta was named by the accused Jagabandhu in his confession."

Then again we have to consider whether in view of the previous warnings that the learned Judge has given in his charge, the general principles he has laid down and what he has said in particular about the evidence of witness 27; we can regard this as an insufficient warning to the jury, whether we ought not to say that the learned Judge having laid down quite correct principles and then having stated the condition of the evidence against these three people should have directly for the benefit of the jury applied the principles that he has so well laid down and given them a firm and particular warning to the effect that when he speaks of no other corroboration the evidence to which he is referring is in law no corroboration at all. The matter is somewhat on the border line. I do not for one moment desire to depart in this case or in any other case from the elementary principle of law that the jury on a proper direction thinking fit to act on the evidence of the approver is committing no illegality whatever and this Court has no right to interfere with it; but I do think that it is a fair criticism of the learned Judge's charge that the very able exposition which he has given of the principles applicable to the evidence has not been brought home as it should have been brought home when he comes to state the condition of the evidence against

each man. In this view, I am of opinion, that, as regards the convictions of Sona Mia and Jainuddi and also of Mati Lal Dutta, Aswini Kumar Kar and Ainuddi, the appeals should be allowed and their convictions should be set aside. As regards the appellants other than these and Madhu Sudan Gope, we have been asked to consider whether the sentence of six years is not too much having regard to all the circumstances of the case; but I am quite satisfied that a heavy sentence for an offence of dacoity is highly necessary at present and I am not minded to reduce sentences in any way.

Costello, J.—I agree.

V.V.

Order accordingly.

* * A. I. R. 1933 Calcutta 511

PATTERSON AND AMEER ALI, JJ.

Ban Behari Chatterji and others—
Judgment-debtors—Petitioners.

V.

Bhukhan Lal Choudhury—Decree-holder—Opposite Party.

Civil Revn. Petn. No. 1134 of 1932, Decided on 18th November 1932; against order of Sub-Judge, First Court, 24-Parganas, D/- 5th September 1932.

* * Civil P. C. (1908), O. 21, R. 66 (2) (e)—Scope of Court's duty to make valuation pointed out.

It is the duty of the Court (apart from exceptional circumstances) to make a valuation the result of which is to be included in the sale-proclamation. Such duty (save in exceptional circumstances) is not discharged by merely stating the values respectively put upon the property by the parties. The Court should make its own inquiry and arrive at a single figure. If by reason of exceptional circumstances the course indicated above is found to be impracticable, such circumstances should be clearly set out in the order: *AIR 1930 Cal 781, Foll.; Case-law fully reviewed.* [P 512 C 1]

K. C. Chakraborty and P. Ghosal—for Petitioners.

Karunomoy Ghose—for Opposite Party.

Judgment.—This is an application under S. 115, Civil P. C. We are asked to revise an order of the Subordinate Judge of the 24-Parganas, passed on 5th September 1932, whereby in a matter under O. 21, R. 66, Civil P. C., he directed that the sale proclamation should show the value put upon the property to be sold as given by the decree-holder, as also that given by the judgment-debtor. In this case the discrepancy between the two values, though not so large as in

some of the decided cases, is yet considerable, viz., Rs. 40,000 as against Rs. 1,00,000. The application for revision and for stay of sale has, as usual, been made at the last minute. There is a conflict of evidence as to what took place before the learned Subordinate Judge. It is possible that at that stage the judgment-debtor did not press the point argued before us. We do not however, propose to discuss the merits or bona fides of the application since we think it desirable to give a decision on the point of principle involved.

The relevant enactment of the Code, viz., O. 21, R. 66 (2) (e), with which may be read, Form 29, App. E, does not in terms cast upon the Court the duty of making any valuation of the property to be sold. The provision in question however chiefly as a result of a decision of the Privy Council in 1898, *Saadathmund Khan v. Phool Coomar* (1), became entrusted with a mass of judicial authority. In one volume of the reports alone 35 C. W. N. are to be found three reported cases. We appreciate that it is not easy from the decisions referred to, to arrive at a definite result, and that for this reason the Court, in dealing with matters under O. 21, R. 66, finds some difficulty in knowing the extent of its duties. We propose as concisely as possible to give our view of the general effect of the cases: (1) Following *Saadathmund Khan v. Phool Coomar* (1), all agreed that if the Court includes its valuation in the sale proclamation, "the value being a material fact must be fairly and accurately stated," (2) The authorities however, do not agree that it is the duty of the Court in all cases, or even in a normal case, to make a valuation. As pointed out in subsequent cases, in particular *Lachman Prasad v. Ganga Prasad* (2); *Daulat Bhaiya v. Rahisa Banu* (3) and *Saadathmund Khan's* case (1), does not lay down the proposition that the Court must do so. Sir John Woodroffe in *Surendra Mohan v. Harak Chand* (4), left this question open. In *Lachman v. Ganga* (2), valuation is treated as a duty of the Court. In *Bejoy Singh v. Ashu-*

tosh Gossain (5), valuation by the Court is treated as desirable. The same in *Debendra Nath v. Radha Kissen* (6). On the other hand in *Daulat Bhaiya v. Rahisa Banu* (3), it is treated as a matter within the discretion of the Judge. In *Lachiram v. Rameshwar Singh* (7), Suhrawardy and Graham, JJ., again treated valuation as a duty of the Court but in a later case, *Pashupati Nath v. Bank of Behar* (8), the same Judges having regard to the earlier cases of the same year, left the question open. The matter is not carried any further by the decision of Costello, J., in *Basanta Kumar v. Sylhet Loan Co., Ltd.* (9). The difficulty which we feel in this state of the authorities on this point is as follows:

Unless it is definitely laid down that it is the duty of the Court (apart from exceptional circumstances) to make its own valuation, it is difficult to decide that the Court is guilty of a material irregularity in inserting the values given respectively by the parties, i. e., where the Court merely includes in the last column of the proclamation the fact that A values the property at Rs. and B values it at Rs. These figures might well be of themselves "things considered by the Court material for the purchaser to know in order to judge of the nature and value of the property." Where however the Court purports to insert a value as the Court value, but for this purpose instead of making its own inquiry, inserts the parties' figures, again the authorities are agreed that (apart from exceptional circumstances) this would be a material irregularity: *Surendra v. Harekchand* (4); *Bejoy v. Ashutosh* (5); *Debendra v. Radha Kissen* (6); *Pashupati v. Bank of Behar* (8) and *Lachiram v. Rameshwar Singh* (7). Where in any of the above cases the course taken by the Judge has been upheld, the Court on appeal found that the circumstances of the case were exceptional: see *Bejoy v. Ashutosh* (5) and *Debendra v. Radha Kissen* (6).

In the present case we think that the figures given by the parties were inserted as and by way of Court valuation. There is nothing to show that the case

1. (1898) 20 All 412=25 I A 146=7 Sar 380 (P C).
2. (1910) 6 I C 180.
3. AIR 1931 Cal 490=191 I C 853=58 Cal 819.
4. (1908) 12 C W N 542.

5. AIR 1924 Cal 589=88 I C 480.
6. AIR 1931 Cal 520=132 I C 687=58 Cal 577.
7. AIR 1930 Cal 781=127 I C 257.
8. AIR 1932 Cal 141=136 I C 468.
9. AIR 1932 Cal 576=139 I C 225.

is exceptional in the sense that independent valuation by the Court is impossible, and therefore on the view taken by us of the authorities, we feel bound to set aside the order. We appreciate the doubt felt by the Judges who have decided many of the above cases, whether the Code originally contemplated putting the burden of valuation upon the Court; but in view of the fact that this Court has consistently held such valuation to be desirable, and in view of the difficulty above indicated unless the matter is carried to its logical conclusion we propose to express our view on this point. Following the decision in *Lachiram v. Rameshwar Singh* (7), we consider: (i) that it is the duty of the Court (apart from exceptional circumstances) to make a valuation the result of which is to be included in the sale proclamation; (ii) such duty (save in exceptional circumstances) is not discharged by merely stating the values respectively put upon the property by the parties. The Court should make its own inquiry and arrive at a single figure, (iii) If by reason of exceptional circumstances the course indicated in (i) and (ii) is found to be impracticable, such circumstances should be clearly set out in the order.

For the reasons indicated above rule is made absolute and the Subordinate Judge is directed to assess the value of the attached property after holding such inquiry as the circumstances of the case may require and to issue a fresh sale proclamation in due course. In view of the long delay that has already occurred in bringing the attached property to sale and in view of the allegation made on behalf of the decree-holder that the attached property is likely to depreciate in value in the event of any further delay, we direct that the valuation be made with the utmost expedition and we may add that in our opinion it should be possible for the necessary inquiry to be completed within one month. Both parties will bear their own costs in this Court.

K.S.

Order accordingly.

* A. I. R. 1933 Calcutta 513

MITTER AND PATTERSON, JJ.

Nawab Ali—Appellant.

v.

Hanuman Jute Mill—Respondents.

Appeal No. 525 of 1929, Decided on 27th April 1931, against original order of Commissioner, Workmen's Compensation, Bengal, D/- 11th September 1929.

(a) Legal Practitioner—Admission on point of law.

An admission by a legal practitioner on a point of law is not binding on his client. [P 514 C 1, 2]

* (b) Workmen's Compensation Act (1923)—Test as to whether accident is one arising out of employment indicated.

The question as to whether the accident arose out of the employment cannot be determined on any general view of facts. It is dependent on the facts of each particular case. There is one test which is always applicable. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. And the question whether the workman did his duty negligently or not arises only where the workman was doing something which it was his duty to perform: *Lancashire and Yorkshire Railway v. Hilly*, (1917) A C 952, *Foll.*

[P 514 C 1, 2; P 515 C 1]

Surajit Chandra Lahiri—for Appellant.

Nanda Gopal Banerjee—for Respondents.

Mitter, J.—This is an appeal from a decision of Mr. Lethbridge, Commissioner Workmen's Compensation, Bengal, refusing compensation to the appellant. The appellant who was the applicant for compensation was a viceman of the Fitter Roving Department employed by the respondent in the Mills in the month of Kartick 1335 B.S.; and in that month he received personal injury by accident which he alleges arose out of and in the course of his employment. The case put forward by the applicant was that the cause of the injury was the petitioner's tightening one slack ring in a wheel in the Roving Department No. 1. The applicant sustained several injuries which are noticed in para. 2 of his petition. The result of the injuries was that three fingers of the applicant had to be amputated in the Howrah General Hospital. The applicant accordingly claimed that he was entitled to receive as compensation a lump sum of Rs. 500 as the applicant, over and above the injuries spoken of had been suffering, from

time to time from eruptions over his body. A written statement was put in on behalf of the respondent Sri Hanuman Jute Mill in which they admitted that the applicant, the appellant before us, received injuries by accident in the course of his employment as a Roving viceman. But they denied that the accident arose out of the employment as stated by the workman.

The respondents also denied that the injuries were due to the applicant's attempting to tighten a slack ring in a wheel and the respondents definitely stated in the written statement that the applicant received these injuries owing to putting his hand inside the gearing box of the said Roving machine with the object of removing tools therefrom, and that in so doing his hand was caught in the wheels of the machine which was in motion at the time. It is also stated by the respondents that in attempting to put his hand inside the gearing box of the said machine while in motion the applicant took upon himself an added and unnecessary risk which it was no part of his normal employment to take. On these pleadings several issues were framed and the learned Commissioner, after taking evidence on those points, came to the conclusion that the appellant's case as to the reason of the accident has not been established. On the other hand he accepted the case of the respondents that the accident was due to the cause as alleged in the written statement. Before the Commissioner, it appears, it was not argued that on the facts the accident could arise out of the employment. Against this decision of the Commissioner the present appeal has been brought and it has been argued for the appellant that the learned Commissioner has taken an erroneous view of the law in coming to the conclusion that the accident did not arise out of the employment. It has just been observed that as a matter of fact that this question was abandoned before the learned Commissioner. But the appellant has been permitted to argue this question by his pleader as it may be that the admission may not be binding on his client, as it is an admission on the point of law and we therefore allow the appellant to take this point before us. The question as to whether the accident arose out of the employment cannot be determined on

any general view of facts. It is dependent, as has been pointed out by Lord Sumner in a recent case on the facts of each particular case. In the case of *Lancashire and Yorkshire Railway v. Highly* (1), Lord Sumner in delivering the judgment, said this (at p. 372) :

"I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first, are often resorted to, but in the last analysis each case is decided on its own facts. There is however in my opinion one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this : Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment; if nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely was an added peril and outside the sphere of employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury."

These words furnish a test to guide us on the present occasion. It appears clear that the applicant for compensation was a viceman whose duty was, as he himself states in his evidence, to mend the machine when it goes out of order. For this purpose he had to be, as he says in his deposition, in possession of a screw-driver. The screw-driver is so long that he could not hold it in his pocket and there is a fair amount of use for a big screw-driver and Mistria frequently walk up and down the lines with a screw-driver in their hands. It appears clear from the evidence on behalf of the opposite party that he had nothing to do with the moving machine and that his business was to mend the machine while it was not working. It was argued for the appellant that the test in such cases as this case is as to whether the workman negligently did his duty or not. A distinction has been drawn between the cases where there has been negligence by the workman in the performance of his duty and where the workman had been doing some work which he was not employed to do and met with the accident in the course of

1. (1917) A C 862=86 L J KB 715=116 L T 767=83 T L R 286=61 S J 397=10 B W C C 241.

such outside work. That distinction seems to be a good distinction. It appears to us that in the present case there was no justification for the workman to interfere with the moving machine for the purpose of finding out a screw-driver which he required for the purpose of his work. In doing so we do not think that he was within the sphere of his employment as a viceman. The accident could not have occurred in the course of his employment and we think that the view taken by the Commissioner is right. The result is that this appeal must be dismissed. There will however be no order as to costs.

Patterson, J.—I agree.

K.S. *Appeal dismissed.*

*** A. I. R. 1933 Calcutta 515**

MITTER, J.

Abdul Latif Munshi and others—Accused—Petitioners.

v.

Ahmad — Complainant — Opposite Party.

Criminal Ravn. Petn. No. 802 of 1932, Decided on 24th November 1932.

*** (a) Criminal P. C. (1898), S. 421—Court should record reasons for rejection.**

Notwithstanding the provisions of the statute, it is desirable that a final Court of facts should record concisely some reason in rejecting an appeal summarily in order to enable the High Court in revision to appreciate the final findings of the lower appellate Court on facts and to see if any question of law arises on those findings : 17 All 241 (F B) ; 21 Cal 92 ; 20 Bom 540 and 32 Cal 178, *Ref.* [P 515 C 2]

(b) Criminal P. C. (1898), S. 421—Practice of admitting appeals without any hearing cannot be defended.

The practice by which all appeals except jail appeals are admitted without any hearing except on the question of bail is a practice, which cannot be defended : 36 Cal 385, *Ref.*

[P 515 C 2 ; P 516 C 1]

A. K. Fazlul Huq and Hamidul Haq Chowdhury—for Petitioners.

Judgment.—This Rule was issued on ground 1 stated in the petition and is directed really against the order of the appellate Court confirming the conviction and sentence of the petitioners under S. 379, I. P. C. The complaint is that the Additional District Magistrate was not justified in not giving any reason for dismissing the appeal summarily and further that the appeal should not have been dismissed summarily as the defence raised a question of the right of the accused in the disputed land from which paddy was cut. The defence of the petitioners

was that they were in possession of the plot in dispute and that they cut away ripe paddy grown by them and that the opposite party at the instigation of his brother Serajul Huq started a false case solely with the object of creating false evidence in support of his title to the land to which neither Serajul nor his wife had any share. Cause has been shown in this Rule by Mr. Talukdar and he contends that it is not necessary for the appellate Court in rejecting an appeal summarily to record any reason.

It appears to me however that where a particular judgment or a particular conviction and sentence is liable to revision the Court should record shortly its reason for rejection. It was pointed out in a Full Bench case of the Allahabad High Court, *Queen-Empress v. Nanuha* (1), that it was advisable for a lower Court whose order may be challenged by an application for revision to record something which might be a guide to the Court acting in revision. There is some conflict of opinions so far as this point about the necessity of recording reasons is concerned. In the case of *Rash Behari Das v. Bal Gopal Singh* (2) it was held that on rejecting an appeal under S. 421, Criminal P. C., the lower appellate Court need not give its reasons for the decision. A similar view was also taken in Bombay : see the case of *Queen-Empress v. Warubai* (3). On the other hand in the case of *Hikkowrie Mookerjee v. Emperor* (4) it was held that an appellate Court without going to the length of writing an elaborate judgment should in deciding a criminal appeal notice briefly but clearly the objections urged in appeal, and how they were disposed of. Notwithstanding the provisions of the statute it is desirable as I have stated that a final Court of facts should record concisely some reason in order to enable the Court in revision to appreciate the final findings of the lower appellate Court on facts and to see if any question of law arises on those findings. In this Court it has been pointed by Holmwood and Ryves, JJ., in the case of *Ramtohal Dusadh v. Emperor* (5) that both in this province as well as in the United Pro-

1. (1895) 17 All 241=(1895) A W N 68 (F B).

2. (1894) 21 Cal 92.

3. (1896) 20 Bom 540.

4. (1905) 32 Cal 178.

5. (1909) 36 Cal 385=9 Cr L J 401=1 I O 868.

vinces the practice in the mofusil is that appeals are admitted without any hearing except on the question of bail, the only cases which are usually dealt with under S. 421, Criminal P. C., being jail appeals.

It seems to me that this practice is a practice which cannot be defended regard being had to the plain provisions of S. 421, Criminal P. C. The real test in a case of this kind is to consider whether in the particular circumstances of a case where questions of title to immovable properties are raised by the defence the lower appellate Court will be justified in rejecting an appeal summarily without recording its findings on the defence and without considering the defence which may have some bearing on the question of dishonest intention necessary to sustain a conviction for theft. In my opinion it will not be justified; and that is the present case. In these circumstances this Rule is made absolute and the case sent back to the District Magistrate in order that he may re-hear the appeal in accordance with law and dispose of it after recording reasons for his decision.

K.S.

Rule made absolute.

* A. I. R. 1933 Calcutta 516

MALLIK AND PATTERSON, JJ.

Jogendra Mohan Guha—Appellant.

V.

Emperor—Opposite Party.

Criminal Appeal No. 390 of 1932, Decided on 1st September 1932, from order of Chief Presidency Magistrate and Special Magistrate, Calcutta, D/- 29th April 1932.

(a) Arms Act (1878), S. 20—The two parts of S. 20 are quite independent of one another.

Concealment at the time of search is specifically dealt with in the second part of S. 20 yet the first part of the section does apply to cases where arms are found on a search being made under S. 25 of the Act. The two parts of S. 20 are quite independent of one another.

[P 517 C 1]

* (b) Arms Act (1878), S. 19 (f) — Mere possession is punishable under S. 19 while concealment is under S. 20 — Intention is inferred from circumstances — Arms Act (1878), S. 20.

Mere possession of an unlicensed weapon is punishable under S. 19 (f), but if the circumstances indicate an intention that the possession may not be known to the police, the offence is punishable under S. 20. Whether such intention exists or not is a pure question of fact to

be determined in each particular case with reference to facts proved in that case.

[P 518 C 1, 2]

* (c) Arms Act (1878), S. 20—Loaded revolver concealed in a locked trunk raises rebuttable presumption of concealment.

From the very nature of the weapon, and, especially in view of the severe restrictions imposed by the authorities on the possession of revolvers, there is a strong presumption that a person in unlicensed possession of a revolver, who cannot or will not account for such possession, has procured it for unlawful purposes and has a fixed intention that such possession shall not become known to the authorities. This presumption is however one that can be easily rebutted in the case of persons whose only fault is carelessness, thoughtlessness or ignorance of the law. Actual physical concealment is not necessary ingredient.

[P 517 C 2]

(d) Bengal Emergency Powers Ordinance (11 of 1931), S. 31 — The expression "cases under the Ordinance" relates to trial of cases by special Magistrates and does not mean "offences punishable under the Ordinance."

Section 31 relates exclusively to questions of procedure and has nothing to do with the powers of special Magistrates appointed, under the Ordinance. The expression "Cases under the Ordinance," as used in S. 31 of the Ordinance, clearly relates to the trial of cases by special Magistrates appointed under the Ordinance, and does not, mean the same thing as the expression "offences punishable under the Ordinance" as used in Ss. 30 and 31. The latter expression clearly relates to offences created by the ordinances, viz., offences created by S. 15 or by rules framed under S. 17.

[P 519 C 2]

* (e) Practice—Detention in jail under conviction after Ordinance expiry is not illegal—General Clauses Act (1897), Ss. 6 and 30.

If the conviction and sentence were legal at the time the Magistrate delivered his judgment, the continued detention of the appellant cannot become illegal by reason of the expiry of the terms of the ordinance. But this is not a question that the High Court, sitting as a Court of appeal, can properly adjudicate on. [P 519 C 2]

H. M. Bose and Phaneendramohan Sanyal—for Appellant.

Deputy Legal Remembrancer, Khundkar and Anilchandra Ray Chaudhuri—for the Crown.

Patterson, J.—The main facts of the case out of which this appeal arises are not disputed and are briefly as follows: The appellant, Jogendramohan Guha, was arrested in Sukea Street on 16th March 1932, in consequence of certain information which had been received by the police. Later in the day, he was taken to the house of his cousin, Babu Lalitmohan Guha, at No. 2, Kalu Ghosh Lane, where he had been living for some time back and working as private tutor to certain members of the family in return for his board and lodging. He had

been sharing a room with Lalit Babu's son, Haripada, and when the police were about to search this room, the appellant showed them a locked steel trunk, and told them that what they wanted was in that trunk. The key of the trunk was produced from a drawer under the direction of the appellant, and on the trunk being open a loaded revolver was found therein, concealed among some books and clothes belonging to the appellant. A note book (which is said to contain instruction and formulas for making bombs, though there is no evidence on this point), as well as a manuscript copy of a Bengali poem (said to be of a seditious character) were also found in the trunk along with the revolver. The appellant made no attempt to account for his possession of the revolver, which is an unlicensed weapon, and in all probability a smuggled weapon which never has been licensed.

On the above allegations, the applicant was, in due course, placed on his trial before a special Magistrate appointed under the provisions of Ordinance No. 11 of 1931, with the result that he was convicted under S. 20, Arms Act, and sentenced to six years' rigorous imprisonment. The other occupant of the room, Haripada, was tried along with the appellant and was acquitted, the Magistrate holding that he had no knowledge of the contents of the appellant's trunk. Possession being admitted, the only question for determination in this appeal is whether the circumstances were such as to bring the offence within the mischief of the first part of S. 20, Arms Act, that is, whether the circumstances were such as to indicate an intention on the part of the appellant that his possession of the revolver should not be known to the police. It has been pointed out, on behalf of the appellant, that concealment at the time of search is specifically dealt with in the second part of S. 20 and it has been contended that the question for determination in the present appeal ought to be whether the offence comes within the mischief of that part of the section, that the first part of the section does not apply to cases where arms are found on a search being made under S. 25 of the Act. In my opinion there is no force in this contention. The two parts of S. 20 are quite independent of one another, and what

we are concerned with in the present case is the character of the appellant's possession of the revolver prior to the time of the search.

In deciding this question, it has to be borne in mind that a revolver is not an ordinary weapon intended for purposes of sport or display, or for occasional use in the event of its possessor becoming involved in a fight, or something of that sort. It is intended for use at close quarters, and owing to its deadliness and to the ease with which it can be used and concealed, it is par excellence the chosen weapon of the murderer and the robber, and especially of the secret assassin. This being so, and especially in view of the severe restrictions imposed by the authorities on the possession of revolvers, there is, in the nature of things, a strong presumption that a person in unlicensed possession of such a weapon, who cannot or will not account for his possession thereof, has procured it for unlawful purposes, and has a fixed intention that his possession thereof shall not become known to those public servants, namely the police, whose duty it is to enforce the provisions of the Arms Act with a view to the protection of the ordinary private citizen and the law abiding public generally. Lest it be said that such a presumption would tend to place in jeopardy persons who have through carelessness, thoughtlessness or ignorance of the law, offended against the provisions of the Arms Act in respect of the possession of such weapons, it should be pointed out that the intention referred to in the first part of S. 20 is only one of the factors that would have to be taken into consideration in deciding what sentence would be appropriate in any particular case, and that it does not follow that a person who has been convicted under the first part of S. 20 will necessarily receive a heavier sentence than would have been inflicted on him under S. 19 (f) of the Act.

It should also be pointed out that the presumption referred to above is one which could very easily be rebutted in the case of persons whose only fault has been carelessness, thoughtlessness or ignorance of the law and who have not been inspired by any deliberate intention of keeping the fact of their being in possession of an unlicensed revolver from the knowledge of the authorities. In the

present case the appellant has not attempted to rebut the presumption referred to above, or to give any explanation of his having been found in possession of an unlicensed revolver. In the present case moreover the appellant had, as the evidence clearly shows, kept the fact of his having a revolver—and a loaded one at that—in his possession, a dead secret from all his relations, including even Haripada with whom he shared a room. The evidence is that the trunk was always kept locked, that the key always remained with the appellant, and that the latter used never to open the trunk when anyone else was present.

It has rightly been contended on behalf of the appellant that mere concealment of an unlicensed weapon may not of itself be sufficient to bring the offence within the mischief of the first part of S. 20, more especially if the circumstances are such as to indicate that the intention of the offender was merely to keep the weapon concealed from his friends, relations and other private persons, and not necessarily from the police, but it should be pointed out that actual physical concealment is not a necessary ingredient of the offence, but a mere piece of circumstantial evidence, which may be taken into consideration along with other circumstances with a view to ascertaining the real intention of the offender. It may also be pointed out that, although in the case of a revolver, the immediate object of keeping such a weapon concealed may be to prevent the offenders' friends and relations from getting to know about it, the main and ultimate object would in the majority of such cases be to guard against the possibility of any information regarding the offender's possession of the weapon reaching the ears of the authorities and especially of the police.

Learned counsel on both sides have drawn our attention to various decisions of the Courts regarding the applicability of S. 19 (f) on the one hand, and the first part of S. 20 on the other hand, to certain sets of facts. We have looked into those decisions, but, speaking for myself, I have not been able to derive much assistance from them. The position, as I understand it, is this: mere possession of an unlicensed weapon is ordinarily punishable under S. 19 (f), but, if the circumstances are such as to indicate an

intention that the possession may not be known to the police, the offence is punishable under S. 20. Whether the intention referred to above exists or not is a pure question of fact, and this question must therefore be determined in each particular case with reference to the facts proved in that case. Each case has to be considered on its own merits, and the decisions of other Courts in other cases are therefore of very little assistance in coming to a conclusion. It is impossible to lay down any hard and fast rule that will apply to all cases of this kind, but, so far as the present case is concerned, it is, in my opinion, abundantly clear that, up to the moment when his room was about to be searched, it was the deliberate intention of the appellant to do all he possibly could to prevent the fact of his having a revolver in his possession from coming to the knowledge of the police. The appellant must therefore be held to have committed an offence under the first part of S. 20 of the Arms Act, and to have been rightly convicted under that section. Another point urged before us on behalf of the appellant relates to the power of the special Magistrate who tried the case, to impose a sentence of imprisonment for more than two years.

The argument, so far as I have been able to follow it, is to this effect: although any offence under the Arms Act is a "scheduled offence" as contemplated by the Ordinance, the trial of such an offence by a special Magistrate appointed under the Ordinance is not a "trial under the Ordinance" within the meaning of S. 31, sub-S. (1), in the absence of a clear finding to the effect that the offence was committed in furtherance of or in connexion with the terrorist movement. It is said that there is no such finding in the present case, and no evidence on which such a finding could properly be based. It is therefore contended that the trial was not a "trial under the Ordinance" within the meaning of S. 31, sub-S. (1), and that, this being so, the special Magistrate who tried the case is, under sub-S. (2), to be deemed to be merely a Magistrate of the First Class, and that his powers, as such are limited by the Criminal Procedure Code to two years' rigorous imprisonment. In my opinion this argument is not only fallacious, but is based on a mis-

understanding of the very clear provisions of the relevant sections of the Ordinance. I do not therefore propose to discuss the matter in detail, but shall content myself with pointing out that nowhere in the sections relating to the appointment, powers and procedure of special Magistrates is there any reference to "offences committed in furtherance of or in connexion with the terrorist movement" and that S. 31, on which special stress is laid, relates exclusively to questions of procedure and has nothing to do with the powers of special Magistrates appointed under the Ordinance. It may further be remarked that the expression "Cases under the Ordinance," as used in S. 31 of the Ordinance, clearly relates to the trial of cases by special Magistrates appointed under the Ordinance, and does not, as has been contended, mean the same thing as the expression "Offences punishable under the Ordinance" as used in Ss. 30 and 31. The latter expression clearly relates to offences created by the Ordinance, viz. offences made punishable by S. 15 or by rules framed under S. 17. The argument under discussion appears to be founded on these and other misconceptions, and is in my opinion entirely devoid of substance. It has also been suggested that, even if the conviction and sentence were legal at the time the Magistrate delivered his judgment the continued detention of the appellant has since become illegal by reason of the expiry of the term of the Ordinance. This is not a question that this Court, sitting as a Court of appeal, can properly adjudicate on, but it may be remarked that S. 6, General Clauses Act, would, if read with S. 30 of that Act, appear to be an insuperable bar to any such objection being successfully urged before any Court.

All the points urged on behalf of the appellant having failed, it must be held that he has been rightly convicted and that the sentence of six years' rigorous imprisonment imposed on him was not in excess of the powers of the Magistrate who tried the case. Apart from the question of the legality of the sentence, I am of opinion that the sentence is by no means excessive, and I would accordingly dismiss the appeal.

Mallik, J.—I agree.

V.V.

Appeal dismissed.

* A. I. R. 1933 Calcutta 519

C. C. GHOSE, AG. C. J. AND MITTER, J.
Prasaddas Pal—Appellant.

v.

Jagannath Pal and others—Respondents.

Appeal No. 51 of 1932, Decided on 31st August 1932, from Original Decree and Judgment of Lord-Williams, J., in Original Suits Nos. 933 and 838 of 1930.

* (a) Words — *Bangsa* ordinarily means family and not merely lineal descendants.

The word "*bangsa*" means family. It would be too restricted an interpretation of the word "*bangsa*" to confine it to the lineal descendants, where the executant states that "in the absence of any such grandson or grand-daughter who are the lineal descendants one of my *bangas* who is competent in this behalf shall be the 'she-bait'."

[P 521 C 1]

* (b) Deed—Construction — Provision for *debsheba*, and if income increases for feeding students, does not make endowment a public one.

Where the provision was that the whole of the income of the debuttar property shall be wholly spent for the purposes of the *debsheba* and if the income of the debuttar property increases, to the feeding of the poor and the students, the provision does not make the endowment a public charitable one. Provision about feeding of the poor is part and parcel of the *debsheba* and cannot be regarded as "independent charity in which any class of the public was to have a direct and independent interest, since the feeding of the poor is really incidental to the *pūja* : 14 *Mad 1, Foll.*

[P 521 C 1, 2]

(c) Trust—Private trust—Scope.

In the case of a private trust, where there are more trustees than one, all must join in the execution of trust.

[P 521 C 2]

N. N. Sircar, J. C. Hazra and J. K. Ghose—for Appellant.

Pugh and P. N. Chatterjee—for Respondents.

C. C. Ghose, Ag. C. J.—I have had the advantage of reading the judgment which has been prepared by my learned brother and I agree with him in the conclusions summarized in his judgment.

Mitter, J.—This is an appeal from the judgments and decrees of my learned brother Lord-Williams, J., and arises in two suits. The appellant *Prasaddas Pal* was the plaintiff in suit No. 933 of 1930 and defendant in suit No. 838 of 1930. *Jagannath Pal and others* are plaintiffs in the latter suit. The suit brought by *Prasad* was dismissed, whereas the suit brought against him was decreed.

It appears that one *Nilmani Pal*, who was governed by the *Dayabhaga* school of Hindu law, executed, at Calcutta, a deed of endowment, on or about 25th July 1911, by which he dedicated

the house and premises No. 61, Clive Street and the house and premises No. 105, Balaram De Street, to the sheba of the idol Shree Shree Annapoorna, established by him in the latter house and premises; and for feeding the poor and carrying out other charitable objects. He appointed himself as the shebait and five other persons as assistant shebait for carrying out the sheba of the deity as also for carrying out the charitable objects. These assistant shebait are named in para. 2 of the plaint in suit No. 838 of 1930. The first three plaintiffs of the suit are three of the five assistant shebait. It was further provided that, on the death of the said Nilmani Pal, the five assistant shebait should do the work of the sheba and his wife, Kusumkumari Dasee, will get the shebait's salary and shall reside in the thakur barhi. It was further provided that, on the death of Kushumkumari, his daughter-in-law, Nirmalasundari, would be next shebait and, and on her death, his grandson would be the shebait and on his death, his grand-daughter shall be the shebait. Then follows a clause in the deed of endowment which has been the subject of much controversy both before the learned Judge and before us. That clause runs as follows :

"In the absence of any such grandson or grand-daughter one of the members of my family who is competent shall be the shebait."

The following pedigree will show the state of the family of Nilmani Pal at the time of the suit :

Ramchandra Pal

Baikanthanath Pal (deceased) (died before Nilmani Pal)	Jadunath Pal (deceased) (died before Nilmani Pal)	Nilmani Pal (deceased) wife Kusumkumari Dasee (died 26th Oct. 1914.)
Manendranath Pal (deceased) died before Nilmani Pal	Krishnadhona Pal (deceased) died 16th Dec. 1916.	Narendranath Pal (deceased) wife Nirmalasundari Dasee (died 24th Oct. 1914.)
Prasaddas Pal (claimant.)	Jagannath Pal (minor.)	Sm. Durgeshnandini Dasee (deceased), died 3rd Dec., 1929.

On the death of Durgeshnandini, the assistant shebait became entitled to

select and nominate a person from amongst the descendants of the brothers of Nilmani to act as shebait according to the directions in the deed of endowment. The three plaintiffs, being three out of the four assistant shebait, selected Jagannath Pal, who is plaintiff 4 in the suit and nominated him to act as shebait. The plaintiffs allege that the defendant Prasaddas Pal, although he was not selected to act as shebait, has been wrongfully asserting that he is the proper person to act as shebait and has taken wrongful possession of one of the properties, viz., 105, Balaram De Street. The plaintiffs made certain allegations against defendant Seetanath Pal in para. 11 of the plaint, but we are not concerned in the present appeal with the relief asked for against him. The fourth surviving assistant shebait Ramchandra Sreemani did not join as plaintiff in the suit and has been made a defendant to the suit. The defendant Prasad, in his defence, stated inter alia that he is the proper person to act as shebait and that the nomination of Jagannath to act as shebait is invalid. On 9th May 1930, Prasaddas Pal filed Suit No. 933 of 1930, in which he asked for a declaration that he is a fit and proper person to be appointed shebait under the deed of trust dated 25th July 1911, and that the defendant Jagannath Pal is not such a person, for an order removing the defendant Jagannath Pal from acting as trustee and the other defendants as co-shebait, for an inquiry as to who should be appointed co-shebait in place of the present co-shebait, for the framing of a scheme of worship to carry out the worship according to the deed of trust dated 25th July 1922, for an account of moneys received by the defendants since the death of Sreematee Kusumkumari Dasee, for receiver, injunction and costs of this suit. The answer to this suit was a denial of Prasad's right to be the shebait. The defendants also pointed out that this suit was really a counterblast to the suit brought by the defendants, i. e., Suit No. 838 of 1930.

In both these suits, two issues were raised: (1) whether the word *bangsa* in the deed of endowment means "lineal descendants" or "members of my family"; and (2) whether the consent of all the assistant shebait for the time being

was necessary for the election of the shebait. Both these issues were decided by the learned Judge in favour of the plaintiffs in the earlier suit and against the appellant Prasad Pal, and the suits were decided in the manner already indicated. Against the decrees in the two suits the present appeal has been brought. The learned Advocate-General (Sir Nripendranath Sircar) who appears for the appellant Prasad raises three contentions before us: (1) that the learned Judge has put a wrong construction on the deed of endowment in question in holding that the word *bangsa* should be taken to mean "members of my family"; (2) that the finding of the learned Judge that the endowment was partly a public one was wrong, whereas he should have held that it was a private and not a public charitable endowment; (3) that if the trust is a private trust, then, on the statement of the law made by the learned Judge, the consent of all the assistant shebaites, and not simply of the majority of them, was necessary in order to make the election of Jagannath Pal as shebait valid, and, if this position is established, plaintiffs' Suit No. 838 of 1930 should be dismissed. I will deal with the respective contentions in the order in which I have stated them. Taking the first contention, I am of opinion that the word *bangsa* means family. It would be too restricted an interpretation of the word *bangsa* to confine it to the lineal descendants of Nilmani Pal's family. That this was the meaning which was intended by the founder would appear clearly from the context in which occurs. The founder states that

"in the absence of any such grandson or grand-daughter who are the lineal descendants one of my *bangsas* who is competent in this behalf shall be the shebait."

This clearly shows that the member of the founder's family, who is to be elected as shebait, must be outside the line of lineal descendants like grandson or grand-daughter. We have therefore no hesitation in rejecting the contention of the Advocate-General. With regard to the second contention, it is argued that the provision that the whole of the income of the debuttar property shall be wholly spent for the purposes of the *debsheba* and the feeding of the poor does not make the endowment a public

charitable one. It is argued that this provision about feeding of the poor is part and parcel of the *debsheba* and cannot be regarded as independent charity in which any class of the public was to have a direct and independent interest. The argument is that the feeding of the poor is really incidental to the *puja*. Mr. Pugh, who appears for the respondent, argues that the trust is principally public, seeing that the feeding of the poor and the feeding of students of educational institutions have been provided for in the deed of endowment. We are unable to accept this contention of the respondent, for it seems to us that the feeding of the poor and the feeding of students, if the income of the debuttar property increases, are really incidental to the main purposes of the endowment, namely, the *puja* of the deity. The view we take is supported by the decision of *Sathappayyar v. Periasami* (1). We are therefore of opinion that the learned Judge was not right in the view that this trust was partly of a private and partly of a public nature and not one wholly of a private nature. This being our view, the third contention of the Advocate-General must be given effect to. On the authorities cited by Lord-Williams, J., it is clear that, in the case of a private trust, where there are more trustees than one all must join in the execution of the trust. In the present case it is conceded that all the assistant shebaites have not joined in electing Jagannath as a shebait. In the circumstances, the appeal must be allowed and the judgment and decree in both the suits set aside and in lieu thereof it is declared that, subject to the election of a shebait, in place of Durgeshnandini, deceased, by all the assistant shebaites, pursuant to directions that may be given by the Master of this Court, a scheme may be framed for the worship of the deity Shree Shree Ishwar Annapoorna Debee and for carrying out the other objects of the endowment, in a manner so that the scheme might follow as closely as possible the intention of the founder. In our view both Jagannath and Prasad might be appointed shebaites, alternately and a scheme may be framed for a *pala* of either six months or one year as may be convenient, considering all the cir-

circumstances of the case. The framing of the scheme is referred to the Master of this Court, who, after framing the scheme, will submit it for the approval of the Judges sitting on the Original Side. Costs of this appeal and of the two suits including a sum of Rs. 200 on account of the costs of both sides in the reference now pending before the Assistant Referee will come out of the estate.

V.V. *Appeal allowed.*

A. I. R. 1933 Calcutta 522

MUKERJI AND BARTLEY, JJ.

Nrishinha Charan Nandi Chaudhuri—Appellant.

v.

Nagendra Bala Debee and another—Respondents.

Appeals Nos. 146 to 149 of 1929, Decided on 5th July 1932.

(a) Bengal Land Revenue Sales Act (1859), S. 28—Sale of Tauzi after acquisition by Collector—Compensation for acquisition of proprietary and ganti interest goes to original proprietor—Otherwise it goes to auction-purchaser—Land Acquisition Act (1894), S. 16.

Where the Collector takes possession of lands under a tauzi acquired under the Land Acquisition Act after making an award which allows abatement of Government revenue for the lands acquired from the kist previous to taking possession and on a subsequent date the tauzi is sold for arrears of revenue, the auction-purchaser does not purchase the acquired lands at all, but it is the original proprietor and not the auction-purchaser who is entitled to the compensation in respect of the proprietary and ganti interest if any in the lands although the date of default to which auction-purchaser's title relates back under the law may be prior to the acquisition.

But where the award and possession by the Collector take place after the revenue sale, the auction-purchaser is entitled to the compensation allowed in respect of the proprietary interest and also of the ganti interest if he has validly annulled the same: *A. I. R. 1914 P. C. 82*; *A. I. R. 1927 P. C. 135* and *32 Cal. 27 (P.C.)*, *Ref. [P 523 C 2; P 524 C 1]*

(b) Land Acquisition Act (1894), Ss. 23 and 24—Right in owners of holders of interest to compensation as at date of declaration is not created.

Sections 23 and 24 only lay down rules for determining the market value and do not create any right on the part of the owners of the lands or the holders of interest therein to obtain compensation on the footing of their respective rights as at the date of the declaration. *[P 523 C 1]*

Sarat Chandra Basak, Sateendranath Mukerjee and *Satees Chandra Munshi*—for Appellant.

Bijan Kumar Mukherji—for Respondents.

Mukerji, J.—These four appeals have arisen out of four apportionment cases dealt with by the Land Acquisition Judge of 24-Parganas under S. 30, Land Acquisition Act. The claim of the appellant for being awarded the compensation in respect of a ganti interest has been disallowed and hence these appeals. There are cross-objections in connexion with three of these appeals, the same being directed against the compensation, which has been awarded to the appellant on account of his proprietary interest in the touzi. The facts are quite simple. The ganti consists of the lands of a certain village named Rahara, which appertains to seven amalgamated touzis, of which touzi No. 188 is one. The respondents were the owners of the said touzi and were also gantidars in the lands of the said village, having a three annas gantidari interest under their touzi No. 188. For arrears of revenue defaulted on 28th March 1925, the touzi was sold on 18th September 1925. In pursuance of a declaration, dated 11th December 1924, some lands were acquired under the Land Acquisition Act. In respect of the lands concerned in Appeals Nos. 146, 147 and 148 the Collector made his awards and took possession on 16th September 1925, and as regards the lands of Appeal No. 149 he did so on 22nd December 1925. In the awards so made, certain amounts were awarded to the respondents as proprietors of the touzi, and some further amounts were awarded to them for their gantidari interest. The appellant, after his purchase at the revenue sale, applied to the Collector on 3rd October 1925, for a reference praying to be allowed all the amounts so awarded. The Judge, as already indicated, awarded the compensation for the proprietary interest to the appellant and that for the gantidari interest to the respondents.

Some argument has been addressed to us on behalf of the appellant to establish that there was no ganti under touzi No. 188, and that the ganti, that there was, was under the other six touzis or some of them. We think the existence of three annas ganti interest under touzi No. 188 has been established beyond doubt, and indeed its existence was not a matter disputed in the Court below. As regards all the appeals, the substantial contention, urged on behalf of the

appellant, is that he is entitled to the entire compensation for the lands, that is to say the amounts awarded both to the proprietors and to the gantidars, because, under S. 28, Revenue Sale Law (Act 11 of 1859), his title as purchaser dated back to the date of the default and, as such purchaser, he annulled the ganti at the earliest possible opportunity. On behalf of the respondents, it has been urged, so far as Appeals Nos. 146, 147 and 148 are concerned, that, inasmuch as before the sale these lands had been acquired under the Land Acquisition Act and so lost to the touzi, what the appellant purchased was not the touzi, but the touzi minus the acquired lands, and consequently he was not entitled to get either of the amounts awarded as compensation. In the aforesaid appeals as well as in Appeal No. 149, a further argument was advanced on behalf of the respondents, namely, that what was said in the petition of the appellant of 3rd October 1925, was not sufficient to annul the ganti. Now, S. 15, Land Acquisition Act, says that

"in determining the amount of compensation, the Collector shall be guided by the provisions contained in Ss. 23 and 24."

Under S. 23 (1), Cl. 1, the market value at the date of the publication of the declaration under S. 6 has to be taken, and under S. 24, Cl. 7, any outlay, for improvements or disposal since that date, but without the Collector's sanction, is not to be regarded. These sections, however, only lay down rules for determining the market-value and do not create any right on the part of the owners of the lands or the holders of interest therein to obtain compensation on the footing of their respective rights as at the date of the declaration. In the case of *Surja Kanta Acharjya v. Sarat Chandra Roy* (1), the Judicial Committee observed that, on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited, or rather determined, and that, under such a sale, what is sold is not the interest of the defaulting owner, but the interest of the Crown subject to the payment of the Government assessment. The same view has also been expressed by their Lordships in the case of *Narayan Das v. Jatindra Nath* (2).

And under S. 28 and Sch. A, Revenue Sale Law (Act 11 of 1859), the title of the purchaser is to be deemed to have vested in him on the date of default. But, as observed by their Lordships of the Judicial Committee in the case of *Shyam Kumari v. Rameswar Singh* (3) at p. 39 :

"When the Act is considered as a whole it seems clear that when a sale or purchase is spoken of in connexion with time, the time meant is that at which the sale takes place in fact, not that to which its operation is carried back by relation."

Also, under S. 16, Land Acquisition Act, on the Collector taking possession of land after making an award under S. 11, the land vests absolutely in Government free from all encumbrances. If these propositions are applied to the concrete facts of these cases, the position seems to be the following : So far as the lands of all the four cases are concerned, the respondents' interest as proprietors of the touzi and so of all the lands thereof was forfeited or rather determined on 28th March 1925. The acquired lands of Appeals Nos. 146, 147 and 148 vested in the Collector free from incumbrances on 16th September 1925, and those of Appeal No. 149 on 22nd December 1925. At the sale, which took place on 18th September 1925, the appellant purchased the interest of the Crown in the lands of the touzi, which were subject to the payment of the Government assessment. By the awards that were made, on 16th September 1925, in the cases, out of which Appeals Nos. 146, 147 and 148 have arisen, abatement of Government revenue was allowed for the acquired lands from the kist previous to the date of taking possession ; and so, at the time of the sale, the said lands were no longer subject to the payment of Government assessment and the capitalized value of the Government revenue due on them had already been realized under the award that had been made. The appellant never purchased the said acquired lands, though, in respect of the lands that he purchased, his title on purchase related back to the default. In our opinion therefore the appellant cannot be regarded as having acquired any interest in the lands of Appeals Nos. 146, 147 and 148 by the purchase that he made.

1. A I R 1914 P C 82=25 I C 809 (PC).

2. A I R 1927 P C 135=102 I C 198=54 I A 218=54 Cal 669 (PC).

(1904) 32 Cal. 27=81 I A 178=8 Sar 688=8 C W N 786 (PC).

The late proprietors, that is to say, the respondents, were entitled to the surplus of the purchase money under S. 31, Act 11 of 1859 as regards the lands that were sold. They are, in our opinion, the persons also entitled to compensation for what could not be sold, the acquisition having taken place in the meantime. So far as these three appeals are concerned, no question of annulment of the ganti arises, because the appellant never purchased the lands themselves.

As regards Appeal No. 149, the award not having been made for possession taken by the Collector till 22nd December 1925, and the sale having taken place on 18th September 1925, the appellant purchased at the sale the lands which were subsequently acquired. He was therefore clearly entitled to the compensation in respect of the proprietary interest in the lands as lands of the tauzi. On 3rd October 1925, he made the petition, in which he claimed the compensation that was to be awarded for the ganti, and thus signified his intention to annul the ganti. As he did so before the award was made and when the ganti was yet subsisting, though liable to annulment at his option, he was entitled to get the compensation for the land which the award, subsequently made, divided into two parts, one for the proprietary interest and the other for the gantidari interest. His title as proprietor related back to the date of default, but the annulment could only operate from the date it was made. The result, in our opinion, is that Appeal No. 149 should be allowed to the extent of 3/10ths of the compensation awarded for the gantidari interest, and Appeals Nos. 146, 147 and 148 being dismissed, the cross-objections therein should be allowed to the extent of the entire amounts claimed. There will be no order for costs in any of these appeals and cross-objections.

Bartley, J.—I agree. Appellant bought estate No. 188 at a revenue sale on 18—9—1925. What then passed was the interest of the Crown subject to the payment of revenue, the estate on which the Crown assesses revenue and which can be sold for arrears. This estate has been limited to the land, which is subject to the payment of revenue and in respect of which the proprietor is entered in the general register of revenue

paying estates: *Narayan Das Khettry v. Jatindra Nath Roy Chowdhury* (2). Now in three of these appeals, there was acquisition on 16th September 1925, two days before appellant bought certain lands of the estate vested absolutely in the Crown, and the interests then existing in these lands were assessed at a money value payable to the respective owners. At the same time an abatement of land revenue was granted. I take the effect of this to have been that, on the one hand, the amount of land subject to the payment of revenue decreased, and on the other, the interest of the Crown diminished, as is evidenced by the fact that the Crown assessed that interest, the land revenue, at a lower figure.

The appellant, who, on 18th September 1925, bought the interest of the Crown, bought something less than had existed before 16th September 1925, the date of the acquisition, though his title to what he bought related back to March. In this view of the matter, appellant is entitled to nothing in respect of the lands acquired on 16th September 1925. In the last case, he took the interest of the Crown, with a right to annul the ganti. If his claim to the value assessed on it in the subsequent land acquisition proceedings is construed as a formal annulment, he gets both sums and I accept this construction.

M.N.

Order accordingly.

A. I. R. 1933 Calcutta 524

Special Bench

RANKIN, C. J., BUCKLAND AND
COSTELLO, JJ.

(*Peter William*) Cresswell—Petitioner.

v.
(*Olive Catherine*) Cresswell—Opposite Party.

Divorce Suit No. 2 of 1931, Decided on 28th November 1932, from decision of District Judge, Darjeeling.

Divorce Act (1860), S. 2—Enquiry of domicile on legal principles is necessary.

Before giving a decree under the Indian Divorce Act it is necessary to carefully enquire on proper legal principles into the question of domicile: *A. I. R. 1931 Cal. 823 (S.B.)* and *A. I. R. 1932 Cal. 161, Rel on.* [P 525 C 1]

Rankin, C. J.—This is a husband's petition for dissolution of marriage on the ground of the adultery of the wife. The learned District Judge of Darjeeling

has granted a decree of divorce and the facts appear to be borne out by the evidence so far as the merits of the case are concerned. It is necessary however to point out to the learned District Judge that he has not properly dealt with the question of domicile of the parties. Unless the parties are of Indian domicile, they do not come under the jurisdiction conferred by the Indian Divorce Act, but under a different jurisdiction altogether. In his petition the husband alleges that he was born in British India and has always resided there and is at present residing at Kalimpong. In his evidence, he says: "I am a Christian, I was born in the Dooars, British India". This Court has pointed out before, for the benefit of the learned District Judges, that evidence such as this is not proper evidence of domicile. There are many Europeans who are born in British India but are not of Indian domicile. It is necessary to have regard to the circumstances and to carefully enquire on proper legal principles into the question of domicile. It may be quite plain that these parties belong to the domiciled community. All I can say is that there is no evidence of that. Nothing appears from the name Cresswell which is an ordinary European name. The learned District Judge has exercised a jurisdiction without having proper proof that he is entitled to exercise it.

I may add that this defect in the treatment of divorce cases is constantly causing trouble and I must really ask the District Judges to appreciate the rulings on this subject of domicile [*Wright v. Wright* (1) and *Stroud v. Stroud* (2)] and to take care to see that in all cases there is proper proof of Indian domicile before giving a decree under the Indian Divorce Act. The case must be sent back to the learned District Judge for further enquiry on this point. He will take such additional evidence as may be necessary and certify its result to this Court.

Buckland, J.—I agree.

Costello, J.—I agree.

R.E.

Case remanded.

A. I. R. 1933 Calcutta 525

MUKERJI, J.

Mangal Namadas—Defendant—Appellant.

Kali Sundar Bhadra and others—Plaintiffs—Respondents.

Appeal No. 508 of 1931, decided on 21st March 1933, against decree of 3rd Class Sub-Judge, Mymensingh, D/- 21st July 1930.

Bengal Tenancy Act (1885), Ss. 29 and 52—For S. 52 addition in area is necessary—Kabuliyat mentioning certain area and certain rent—Stipulation for addition or abatement of rent if increase or decrease in area—Provision is not against S. 29 in absence of evidence that same rent was paid for tenancy prior to lease.

Section 52 contemplates that there must be an addition of land to the original tenancy. But if in the kabuliyat a certain area is mentioned and a certain rent is also mentioned as the rent for the area and there is a stipulation that if at any time the lands are measured with a certain standard measurement and it is found on such measurement that there is any quantity of land either more or less than the area stated, the tenants will have to pay additional rent or will get abatement of rent as the case may be, S. 52 will not be applicable. To bring the case however within S. 29 there must be proof of the same rent having been paid for the tenancy by the tenant even before the execution of the kabuliyat. In the absence of such evidence it cannot be suggested that the intention of the stipulation was to get round the provisions of S. 29. [P 526 C 1, 2]

Abinash Chandra Ghose and Annada Charan Karoon—for Appellant.

Kalikinkar Chakrabarty—for Respondents.

Judgment.—I am of opinion that the decision complained of in this appeal is correct. The tenant holds under a kabuliyat executed in 1905. An argument has been advanced to suggest that the contract embodied in this kabuliyat was void because there is nothing to show that there any consideration passed. I am not prepared to entertain this contention at this stage because the specific grounds upon which the kabuliyat was challenged in the Courts below were grounds to the effect that it was not genuine and also in the alternative, that it was executed by the defendants without knowledge of its contents, grounds which have been overruled by both the Courts below. The kabuliyat therefore must be treated as embodying the binding contract between the parties. That being the position, the other facts of the case have got to be examined in

1. A I R 1931 Cal 388 = 53 Cal 259 = 192 I C 89 (8B).

2. A I R 1932 Cal 161 = 53 Cal 1892 = 185 I C 445.

order to deal with the other arguments that have been addressed to me on behalf of the appellant. The tenancy concerned in the present case is a very old one. The trial Court found that it has been in existence for three or four generations. This finding has, to a certain extent, been modified by the Subordinate Judge. Although the Subordinate Judge was not able to agree with the trial Court in finding as a fact that the tenancy has been in existence for three or four generations, he has still upheld the view that it has not its origin in the kabuliyat in 1905 but that it has been in existence from a long time before.

It may be conceded also, as found by the trial Court—a finding which has not been upset or touched by the Subordinate Judge—that the land comprised in the kabuliyat had all along constituted the lands of this tenancy. As regards measurement, it has been found by both the Courts below that although the plaintiff's case was that at the time when the kabuliyat was taken there was a measurement of the lands, the materials that have been adduced in support of that allegation are not sufficient for coming to an affirmative finding in plaintiff's favour. It must be accepted as being the true position that at the time when the kabuliyat was executed or for the matter of that at any time before there was no measurement in respect of the lands. It may also be conceded, because there is no evidence to the contrary, that the tenant has at any time over-stepped the boundaries of the lands which originally constituted the tenancy and there is nothing to show that there has been any encroachment of the khas lands of the landlords by the tenants or that land had accreted to the holding in any other way so as to be regarded as additional lands which have been added to the tenancy in some way or other. These being the facts, we have got to see whether the decree for additional rent on the ground of excess area can be justified or not. I am prepared to concede that the facts which have been found now would not sustain such a decree if that decree is to be made on the footing of S. 52, Ben. Ten. Act. That section contemplates that there must be an addition of land to the original tenancy. But I am clearly of

opinion that in view of the contract the parties as contained in the kabuliyat of 1905 the decree for additional rent that has been made by the Subordinate Judge is amply supported. In the kabuliyat a certain area is mentioned and a certain rent is also mentioned as the rent for the area. Then there is a stipulation, which is of very great importance, that if at any time the lands are measured with a certain standard of measurement and it is found on such measurement that there is any quantity of land either more or less than the area stated, the tenants will have to pay additional rent or will get abatement of rent as the case may be. It has been argued that not much importance should be placed upon a stipulation of this character because if all the lands which were covered by the kabuliyat at the time when it was executed had really been assessed to rent and the rental that was mentioned in the kabuliyat was a rental fixed for all those lands, a stipulation of this character would only be a sort of a colourable device to get round the provisions of S. 29, Ben. Ten. Act. That undoubtedly is so. But in order to establish that position there must be some material on the record which would suggest that the rent that was mentioned in the kabuliyat was a rent fixed for all the lands of the tenancy irrespective of the figures that are given in the kabuliyat as regards the area of those lands. One indication in support of that position would be afforded by proof of the fact that the same rent had been paid for this tenancy by the tenant even before the execution of the kabuliyat. With regard to this matter there is absolutely no evidence. Therefore it cannot be said for a moment that there is anything here to suggest that the intention of this stipulation, to which I have referred, was to get round the provisions of S. 29, Ben. Ten. Act.

On the other hand, the kabuliyat was only for a period of three years and that also suggests that what was intended by the parties was that the lands which were then considered to be as being of a particular area were on that footing assessed to a certain rent but the parties agreed that if and when in future the lands would be measured, their exact area would be ascertained

and the rent would be adjusted either by increasing or diminishing it as the case may be. I am clearly of opinion that the stipulation of this character is a good stipulation and on the strength of it alone the plaintiff would be entitled to get the decree which the learned Subordinate Judge had made in his favour. It has further been argued that the Courts below should have in view of the provisions of Ss. 35 and 36, Ben. Ten. Act, made an order for progressive enhancement. So far as this matter is concerned, the enhancement under S. 30, Ben. Ten. Act that was made by the trial Court was not challenged by way of an appeal, or a cross-appeal by the present appellants in the lower appellate Court. This argument, if at all, can therefore apply to such enhancement as the learned Subordinate Judge has made. But I find that the learned Subordinate Judge in assessing additional rent has made no enhancement whatsoever under the provisions of S. 30 of the Act. He has made a decree for additional rent for the excess area at the old rate. In these circumstances this contention in my opinion cannot possibly be given effect to. The result is that the appeal fails and must be dismissed with costs.

R.K.

*Appeal dismissed.***A. I. R. 1933 Calcutta 527**

MUKERJI, J.

Mohanta Bhagawan Das—Defendant
—Appellant.

v.

Bhupendranarayan Singha—Plaintiff
—Respondent.

Second Appeal No. 1866 of 1930, Decided on 23rd November 1932, against decree of Dist. Judge, Murshidabad, D/- 17th March 1930.

(a) Bengal Tenancy Act (1885), Ss. 3 (5) and 153—Suit for recovery of excess cess is one for rent—Civil P. C. (1908), S. 102.

The definition of "rent" as contained in S. 8, sub-S. (5) is sufficiently wide to include cesses which are payable by the tenant to the landlord and as a consideration for the use and occupation of the lands of tenancy. A suit relating to recovery of excess cess is therefore one for rent : *AIR 1927 Cal 965* and *AIR 1932 Cal 800, Foll.*

[P 528 C 1]

(b) Landlord and Tenant—Rent—Suit for—Plaintiff registered under Land Registration Act—He alone can maintain suit.

In a suit for rent, the plaintiff is entitled to include rent for four years and that the name of

the plaintiff, having been registered under the provisions of the Land Registration Act, he is perfectly entitled to institute the suit alone and maintain the action. [P 528 C 1]

(c) *Lease—Construction*—"Rajashwa" includes cess—Cess whether appropriated by Government or District Board makes no difference.

The word "rajashwa" is wide enough to include cess payable under the Cess Act. It is immaterial whether the cess is appropriated by the Government or is appropriated for the purpose of the District Board. It is the Government that imposes the cess and, if under the law, it has got to be appropriated to definite purposes, which had been assigned to a particular public body, still the imposition must be taken as an imposition by the "hakiman." [P 528 C 2]

Gunadasharan Sen and Prasantabhooshan Gupta—for Appellant.

Seetaram Banerji and Prakashchandra Basu—for Respondent.

Judgment.—This appeal has been preferred by the defendant in a suit, which was instituted by the plaintiff—Raja Bhupendranarayan Singha Bahadur—for recovery of excess cess in respect of a certain patni mehal for four years together with damages, on the basis of certain terms in a kabuliyat, under which the defendant holds the same. The suit has been decreed by both the Courts below. A preliminary objection was taken as regards the maintainability of the appeal on the ground that the suit, out of which this appeal has arisen, was a suit for recovery of money and that therefore no second appeal lay. This preliminary objection, if it succeeds, would land the respondent at once into two difficulties, of which one is a question of defect of parties and the other is the question of limitation so far as one year's cesses are concerned. It may be stated here that the respondent's position in the Courts below was that what was claimed was not money but rent and in that way he was able to ward off the two contentions, as regards defect of parties and limitation, that were levelled against him by the defendant. The appellant, also, equally contrary to what his case in the Courts below was, contends that the suit was a suit for recovery of rent and not for recovery of money and that for that reason he is entitled not only to maintain the appeal, but also to put forward the aforesaid contentions, together with an additional contention, which was also put forward by him, as regards the interpretation of the clause in the document, upon which

the plaintiff relies. The latest decision relevant to the question, as to whether a suit of this nature is a suit for money or a suit for rent, is a decision of this Court in the case of *Nawab Bahadur of Murshidabad v. Bhupendra Narayan Sinha* (1), but in that case no very clear decision appears to have been pronounced on this question. On the other hand, there is a very clear decision in an earlier case, namely, the case of *Bhupendra Narayan Sinha v. Midnapur Zamindary Co. Ltd.* (2), directly bearing upon this question. There, the suit was instituted upon a kabuliyat the terms of which were very similar to the terms of the document in the present case and the relief claimed in the suit was exactly of the same description, and in the appeal, which was preferred in that case, a preliminary objection was taken as regards its maintainability.

In that case, it was held that, although the suit related to recovery of excess cess, the suit was a suit for rent, the learned Judges observing that rent as defined in the Bengal Tenancy Act includes cesses and the dispute, between the parties to the suit in that case, was a dispute as to the "rent." The definition of "rent" as contained in S. 3, sub-S. (5), Ben. Ten. Act, in my opinion, is sufficiently wide to include cesses which are payable by the tenant to the landlord and as a consideration for the use and occupation of the lands of the tenant. I am not prepared to put a narrow construction upon that definition and I think, I must hold, agreeing with the Courts below, that the present suit was a suit for rent. The suit does not offend the provision of S. 153, Ben. Ten. Act, and therefore a second appeal is competent. That being the position, two of the contentions of the appellant, namely, the one as regards limitation and the other as regards defect of parties, cannot prevail for the simple reason that, in a suit for rent the plaintiff is entitled to include rent for four years and that the name of the plaintiff, having been registered under the provisions of the Land Registration Act, he was perfectly entitled to institute the suit alone and maintain the action. It may also be stated here that the defendant's case that the plaintiff has got a son is not

sufficiently specific, inasmuch as it has not been proved that, at the date when the suit was instituted, the son had been born.

The third contention, namely, the one relating to the interpretation of the clause in the document aforesaid certainly requires consideration. There again the terms of the kabuliyat in the case of *Bhupendra Narayan Sinha v. Midnapur Zamindary Co. Ltd.* (2), so far as may be gathered from the report, were very similar to those of the document in the present case. It was held in that case that the word "rajashwa," which was used in that document, is wide enough to include cess payable under the Cess Act. I have considered the terms of the whole of the document, which has been placed before me, and I am fully in accord with what was said by the learned Judges in the other case, namely, the case of *Bhupendra Narayan Sinha v. Midnapur Zamindary Co. Ltd.* (2). Mr. Sen has contended that a different interpretation should be put upon this document, because the imposition that has been made is an imposition of cess, which is not really payable to Government and which the Government does not at all appropriate for its own purposes, but which is wholly used and appropriated for the purpose of the District Board. That, in my opinion, makes no difference. It is the Government that imposes the cess and, if under the law, it has got to be appropriated to definite purposes, which had been assigned to a particular public body, still the imposition must be taken as an imposition by the 'hakiman,' which is the word used in the document. On the whole, I find no reason to dissent from what was held by Richardson, J., in the case referred to above.

In my opinion, the decisions arrived at by the Court below are correct. The appeal, accordingly, must be dismissed with costs. The application for revision is rejected. Leave to appeal under the Letters Patent has been asked for, but I do not consider that it is a fit case in which such leave should be granted.

R.K.

Appeal dismissed.

1. AIR 1927 Cal 965=106 I O 851.

2. AIR 1922 Cal 200=69 I C 987.

A. I. R. 1933 Calcutta 529

LORT WILLIAMS, J.

Kandarpamohan Goswami—Plaintiff.

v.

Akshayachandra Basu—Defendant.

Original Suit No. 837 of 1931, Decided on 9th January 1933.

(a) Hindu Law—Will.

Where the settlors are Hindus, the deeds must be construed, so far as is possible, in accordance with Hindu law. [P 531 C 1]

(b) Hindu Law—Religious endowment—Shebaitship—Succession.

The office of shebait is a kind of property and not merely an office, and the rules laid down in the case of *Tagore v. Tagore* apply to it: *A I R 1932 Cal 791, Foll.* [P 531 C 1]

(c) Hindu Law—Religious endowment—Shebaitship—Succession—Provision for succession of some heirs to exclusion of others is invalid.

Although the settlors may provide for succession to the office of a shebait, they must not in so doing attempt to create an estate unknown to Hindu law, and a provision that the succession is to be held by certain heirs of the founder to the exclusion of others in a line contrary to the Hindu law of inheritance is invalid. This rule applies equally to provision for succession by certain heirs or descendants of a shebait, who has been validly appointed, to the exclusion of others among his heirs or descendants, who, but for the provision, would have rights of inheritance. [P 531 C 1]

(d) Hindu Law—Gift—Unborn person.

A gift cannot be made to a person who is not in existence at the time of the gift. [P 531 C 1]

(e) Hindu Law—Gift—Construction—Rule as to, laid down—Gift may be valid as to persons qualified to take as gift though not by inheritance.

A document ought to be construed in such a way that the intention of the maker shall be given effect to, so far as his meaning can be ascertained from the document, and so far as his intention is in accordance with law. If therefore a gift is made to a certain person and his heirs according to a line of succession, not in accordance with the law of inheritance, the gift may be valid so far as those persons are concerned who are qualified to take as a gift, though not by way of inheritance. [P 531 C 1]

(f) Hindu Law—Will—Constructions.

Two Hindu sisters dedicated a certain piece of land and a temple and a house erected thereon to a certain deity and appointed themselves to be the shebaita for their lives, with power by deed or will to appoint their successors. In default of such appointment, their respective spiritual guides, or, in case of death of either of them, his eldest male heir, was to act jointly with the surviving settlor; and, after the death of both settlors, the two spiritual guides or their eldest male heirs were to act jointly and thenceforth their eldest male descendants. Every future shebait was to have power to appoint, by deed or will, his successor in office. One of the settlors acted as a shebait and died without appointing her successor, when her spiritual guide became a shebait and continued as such until his death. His eldest male heir K claimed to be

a shebait under the terms of the deed. The other settlor never acted as a shebait and, on her death, since her spiritual guide was then dead, his only son A claimed a shebaitship:

Held: (1) that the settlors attempted to provide for succession to the office of shebait, partly by way of gift and partly by way of inheritance, and that the latter part was invalid because it was contrary to law. [P 531 C 1]

(2) That A was validly appointed. [P 531 C 2]

(3) That the deed did not provide for a gift over to K upon the death of his father: 52 Bom. 178, Dist. [P 531 C 2]

(4) That the gift K would be of an uncertain and shifting character and was never intended by the settlors. [P 531 C 1]

J. C. Hazra and S. Hazra—for Plaintiff.

S. N. Banerjee (Jr.) and H. C. Majumdar—for Defendant.

Judgment.—By a deed of settlement, dated 13th September 1916, Surabala Dasee and Sarojabala Dasee dedicated a certain piece of land and a temple and a house erected thereon to a certain deity, which they had installed and consecrated therein, and appointed themselves as shebaita, and conveyed to themselves, as such shebaita, the said properties upon trust, to supervise and manage the sheba and periodical festivals thereof, and defray the expenses out of money to be paid to them by trustees of the temple, derived from properties to be settled thereafter for the maintenance of the sheba. The shebaita were to have no proprietary interest in the temple, land or house, but were to be entitled to a share of the daily offerings. The deed further provided that the settlors should be the shebaita for their lives, with power by deed or will to appoint their successors:

"In default of such appointment by the said Sreemati Surabala Dasee her spiritual guide, Babu Mahendranath Chatterji of Salkea, or, in case of his death, his eldest male heir, and in like default by the said Sreemati Sarojabala Dasee, her spiritual guide, Babu Harimohan Goswami or in case of his death, his eldest male heir, jointly with the survivor of the said settlors and after the death of both of the said settlors, and in default of such appointment as aforesaid the said two spiritual guides or their or his eldest male heir shall act as joint shebaita of the said deity, and thenceforth the future shebaita shall consist of the eldest male descendant of the said Mahendranath Chatterji and the said Harimohan Goswami, provided always that every future shebait of the said deity shall have like power to nominate and appoint by deed or will his successor in office."

In case any shebait should become incapable or unfit, he could be removed, and the person next entitled to become shebait was to succeed in his place, and

on failure thereof, the trustee or trustees for the time being of the temple and the dedicated properties was to nominate and appoint a proper shebait in the office, it being the intention of the settlors that at no time should there be less than two shebait of the deity.

By an indenture made at the same time, Sarojabala Dasee, in order to provide for the maintenance of the sheba, settled the whole of her property including certain property in Calcutta, on trust, and appointed the defendant Akshaychandra Basu to act as trustee, with power to manage the said property and to supervise the management of the shebait appointed under the deed of dedication, and apply the income to be derived from the settled property as therein directed, and appoint shebait in case of failure under the terms of the deed of dedication. By her will, dated 29th December 1916, Sarojabala Dasee left all her property on trust to the said Basu, to secure an income for the maintenance of the sheba and by a further settlement, dated 13th March 1917, she made a further settlement dedicating the Calcutta property to the deity.

Sarojabala acted as shebait until she died in April 1917, without appointing her successor. Thereupon, the said Harimohan Goswami acted as shebait. Surabala never acted as shebait. On 19th July 1921, Harimohan Goswami died, without having appointed any successor. Thereupon, the plaintiff acted as shebait in his place. On 20th April 1931, Surabala died, without appointing her successor. In this suit, the plaintiff, who is the only son and therefore the eldest male heir of Harimohan Goswami alleges that he is the shebait under the terms of the deed of dedication and sues defendant 1, A. C. Basu, as trustee of the Thakur and of Sarojabala's property and defendant 2, Abinashchandra Chatterji, as shebait, on the ground that he succeeded Surabala under the terms of the deed, being the eldest male heir of Maneendranath Chatterji. Both the plaintiff and Abinashchandra Chatterji were alive at the time when the three deeds and the will were made.

The plaintiff states that defendant 1 has failed to carry out the directions contained in the deeds of settlement and dedication and claims various re-

liefs against him. No relief is claimed against defendant 2. Further, he makes a claim against defendant 1, in respect of another idol, which belongs to defendant 1. In my opinion this claim cannot be made in this suit, which is brought against defendant 2 in his representative capacity only, by the plaintiff as the shebait of a different idol. By his written statement, defendant 1 asks the Court to construe the deeds and decide whether the plaintiff and Abinashchandra Chatterji or either of them is entitled to be shebait. He further alleges that the plaintiff is a person of licentious and criminal habits and unfit to be a shebait, and that he has brought this suit to forestall defendant 1, who was about to take steps to remove him from the office of shebait. Defendant 2 says that the plaintiff has wrongfully excluded him from acting as shebait.

The following issues were raised :

(1) That the plaintiff is not a shebait, and has no right to sue because; (a) the settlors were not the founders of the sheba; (b) the deed of dedication prescribes a line of inheritance unknown to the Hindu law. (2) That the plaintiff is not a shebait, on the ground that, as no property was given to the idol, the dedication was not valid. (3) That the suit was not brought in the name of the idol as it should have been. (4) That the suit is time-barred. (5) That the plaintiff has been paid already more than he is entitled to, and that it is for him to account to the defendant and not vice versa. (6) That the personal claim with regard to the other idol cannot be included in the suit.

I have already decided the last issue in favour of the defendant. Issue 5 is a matter of account and I have not investigated it. No. 4 has not been pressed and, in my opinion, the suit is not barred by limitation. I find No. 3 in favour of the plaintiff. It is sufficient in this case for the plaintiff to bring the suit in his own name, but in his representative capacity as shebait of the named idol. There is no substance in No. 2, which I find in favour of the plaintiff. Apart altogether from the property settled in the hands of the trustees, the deed of dedication vested a temple, a dwelling-house and a piece of land in the hands of the shebait. As

to issue 1 (a), I hold that Surabala and Sarojabala were the founders of the sheba as appears from the deed of dedication.

There remains to be decided issue 1 (b), upon which defendant 1 has mainly relied. This raises questions which are not free from difficulty, but certain rules are now beyond dispute. The settlers were Hindus, and the deeds must be construed, so far as is possible, in accordance with Hindu law. The office of shebait is a kind of property and not merely an office, and the rules laid down in the case of *Tagore v Tagore* (1) apply to it: *Manohar Mukherji v. Bhupendranath Mukherji* (2). Thus, although the settlers may provide for succession to the office, they must not in so doing attempt to create an estate unknown to Hindu law, and a provision that the succession is to be held by certain heirs of the founder to the exclusion of others in a line contrary to the Hindu law of inheritance is invalid. This rule, in my opinion, applies equally to a provision for succession by certain heirs or descendants of a shebait who has been validly appointed, to the exclusion of others among his heirs or descendants, who, but for the provision, would have rights of inheritance. Subject to certain statutory exceptions, which are immaterial in the present case a gift cannot be made to a person who is not in existence at the time of the gift. On the other hand, a document ought to be construed in such a way that the intention of the maker shall be given effect to, so far as his meaning can be ascertained from the document, and so far as his intention is in accordance with law. If therefore a gift is made to a certain person and his heirs according to a line of succession, not in accordance with the law of inheritance, the gift may be valid so far as those persons are concerned who are qualified to take as a gift, though not by way of inheritance.

Applying these principles to the facts of this case, it is clear that the settlers attempted to provide for succession to the office of shebait, partly by way of gift and partly by way of inheritance,

and that the latter part is invalid because it is contrary to law. The former part is valid, because it provided that at the death of Sarojabala, and in default of appointment by her by deed or will, her successor in office should be, Harimohan Goswami, with a like power to appoint, and Harimohan Goswami was alive at the time of her death and accepted the gift. Similarly, in my opinion, defendant 2, A. C. Chatterji, was validly appointed. The deed provided that at the death of Surabala, Maneendranath Chatterji, or, in case of his death, his eldest male heir, should be her successor. This, in my opinion, means, that if Maneendranath Chatterji is dead at the time of Surabala's death then his eldest male heir is to take by way of gift. Maneendranath Chatterji was dead at that time, and A. C. Chatterji, was his eldest male heir, and was then alive, and accepted the gift, and acted as shebait, so far as he was allowed to do so by the plaintiff:

The only question therefore which remains is whether the plaintiff can be said to have taken by way of gift over upon the death of his father Harimohan Goswami, or whether he could only take by way of inheritance, under a provision which was and is invalid. That depends upon whether an intention that he should take by way of gift over can be ascertained from the document. He was alive, and was the eldest male heir of Harimohan Goswami at the time when the settlement was made, and therefore may have been within the contemplation of the settlers as an individual apart from his heirship. In my opinion the deed does not provide for a gift over to the plaintiff upon the death of Harimohan Goswami. It means only, as I have already stated, that if Harimohan Goswami happens to be dead at the time when Sarojabala dies, without having made any appointment, then his eldest male heir is to take by way of gift, but not otherwise. If Harimohan Goswami happens to be alive, then he is to take by way of gift, and after his death his eldest male heir is to take by way of inheritance. This distinguishes the present case from *Madhavrao Ganpatrao v. Balabhai Raghunath* (3).

1. (1872) 9 B L R 377 = 1 A Sup Vol 47 = 18 W R 859 = 2 Suth 692 = 3 Sar 82 (P O).
2. AIR 1932 Cal 791 = 141 I C 544 = 60 Cal 452 (F B).

3. AIR 1928 P O 83 = 107 I C 119 = 52 Bom 176 = 55 I A 74 (P O).

It is just possible to argue, though this argument was not raised by counsel on behalf of the plaintiff that although the gift vested in Harimohan Goswami, at the death of Sarojabala, and upon his death, without having made any appointment, the right of appointment then vested in the trustees as provided in the deed; yet the deed further provided that, after the death of both the settlors, and in default of appointment by them, the two spiritual guides or their or his eldest male heir should act as shebait, and therefore the shebaitship vested in the plaintiff by way of gift upon the death of Surabala. Such a gift would be of an uncertain and shifting character, somewhat similar to that which was described in *Tagore v. Tagore* (1), and in my opinion, was never intended by the settlors. The result is that the plaintiff has not been appointed validly as shebait, and is not a shebait under this settlement. Consequently, he cannot bring this suit, and there must be judgment in favour of the defendants with costs.

R.K.

*Suit dismissed.***A. I. R. 1933 Calcutta 532**

M. C. GHOSE, J.

Nishikanta Chatterji—Petitioner.

v.

Behari Kahar—Opposite Party.

Criminal Revn. No. 883 of 1932, Decided on 13th December 1932.

(a) Penal Code (1860), S. 182—Evidence of both parties heard—Conviction is not illegal merely because accused is not given opportunity to prove truth of his case.

Where the evidence adduced by the police officer and also the evidence on the side of the accused person is taken and the Magistrate has given his decision after hearing fully both sides, conviction under S. 182 is not illegal merely because the accused was not given opportunity to prove truth of his case. [P 538 C 1]

(b) Criminal P. C. (1898), S. 370—Trial by Presidency Magistrate—Fine less than Rs. 200—Judgment written—Magistrate must state findings supporting conviction.

No doubt in a case of fine of less than Rs. 200, a Presidency Magistrate is absolved under S. 370 from making a brief statement of the reasons for his conviction, but if he chooses to write a judgment then he must state the points which it is the duty of the prosecution to prove and his findings upon those points. [P 538 C 2]

Pareshlal Shome—Petitioner.*Sudhanshushekh Mukherji*—for Opposite Party.

Order.—This is a Rule obtained by Nishikanta Chatterji, who has been convicted by a Presidency Magistrate under S. 182, I. P. C., and sentenced to a fine of Rs. 100. The first point taken is that, upon a police report that the petitioner's case was false, the Magistrate proceeded to try him under S. 182, I. P. C., without giving him an opportunity to substantiate his own case, although he had filed a narazi petition. The facts are these: On 29th April the petitioner Nishikanta Chatterji went to the police station and made a case that, on the previous night, there was a theft from his room at 50, Ramtanu Basu Lane, in respect of a sum of Rs. 480 odd, and that he suspected his servant Behari Kahar, who had absconded. The police officer questioned Behari Kahar, who stated that the case against him was totally false, that he had been a servant of the petitioner, that he had no wages for five months and when he asked for his wages the petitioner refused to pay him and threatened to put him in trouble and that there was a quarrel after which he left the service. The police officer, after hearing both sides, came to the conclusion that the petitioner's complaint was false. The police report was submitted on 3rd May requesting that the petitioner, Nishikanta Chatterji, might be summoned under S. 182, I. P. C. The summons was issued on 4th May, calling upon him to appear on 19th May. He actually appeared on 1st June, but he did not file his narazi petition until 10th June. The Magistrate postponed action on the narazi petition and proceeded with the trial of the case under S. 182, and, on 22nd August, convicted and sentenced him to a fine of Rs. 100.

It is urged, on the authority of the cases of *Gunamony Sapui v. Empress* (1) and *Isser v. Emperor* (2) that the procedure adopted by the trial Magistrate was wrong, that he should have postponed the trial of the case under S. 182, I. P. C., and that he should have first proceeded to hear the narazi petition and given him an opportunity to prove the truth of his complaint. The learned advocate, who has appeared for the Crown, argues that it would have been the proper course if the Magistrate had given the petitioner an

1. (1899) 8 O W N 758.

2. (1910) 6 I C 415=11 Cr L J 354.

opportunity of proving the truth of his complaint in open Court. But the petitioner's grievance on account of the omission of the Magistrate to give him the necessary opportunity should have been ventilated in due time and not kept for ventilation after he had been convicted under S. 182, I. P. C. It is pointed out that, in all the reported cases, where the High Court stated that the petitioner ought to be given an opportunity to prove his case, the petitioner had moved the High Court before he was convicted on a charge under S. 182, I. P. C. In my opinion, the argument has much force. It is one thing to postpone a trial while an opportunity is given to the petitioner to prove the truth of his complaint and quite another thing to quash a conviction on the ground that the opportunity was not given to the petitioner. As pointed out by Cuming, J., in the case of *Emperer v. Baharali Husnas* (3), there is no provision in the law that before a Magistrate can inquire into a case under S. 182, I. P. C., on the complaint of a police officer, he must give the accused party an opportunity of proving the truth of his case, and that if the accused person is convicted without any preliminary opportunity being given to prove the truth of his case, the conviction is not illegal on that account. In this case, it would have been a better procedure if the Magistrate had given the petitioner an opportunity to prove the truth of his case. But the trial cannot be said to have been illegal. The evidence adduced by the police officer was taken and all the evidence on the side of the accused person was taken and the Magistrate has given his decision after hearing fully both sides.

The next point taken is that the Magistrate came to no finding that the accused gave the information knowingly and believing it to be false, that he overlooked the fact that the petitioner did not make a charge of theft against Behari Kahar, but merely suspected him, that the learned Magistrate wrongly placed the onus upon the accused person, that he ought to have held that the onus lay on the prosecution to prove that the information lodged by the petitioner was false and that he lodged it knowing

and believing it to be false, and that the findings of the Magistrate are not sufficient for a conviction under S. 182, I. P. C. The record has been fully placed by the learned advocates on both sides. The learned Presidency Magistrate has written a judgment in which he has merely discussed the evidence of the defence witnesses. He has not stated the points which it is the duty of the prosecution to prove, nor has he stated his findings upon any of these points. After criticising the defence evidence he merely says : "I find the accused guilty under S. 182, I. P. C." The learned advocate for the Crown points out S. 370, Criminal P. C., which lays down that, instead of recording a judgment in manner provided in the preceding sections, a Presidency Magistrate shall record only certain particulars and in all cases in which he inflicts imprisonment or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

It is argued therefrom that the Presidency Magistrate is absolved from the necessity of writing a judgment, but he need only make a brief statement of the reasons for his conviction, and that he need not even do that where it is a case of a fine less than Rs. 200. It is urged that, in this case, the fine was less than Rs. 200 and the order "I find the accused guilty under S. 182, I. P. C.," was sufficient, and nothing more was necessary under S. 370. This argument would have been a good argument if the learned Magistrate had written no judgment at all but merely convicted the accused under the section. But he has chosen to write a judgment of more than 30 type-written lines in which he has shown how he approached the case. That judgment begins with a statement that the accused is charged under S. 182, I. P. C., for bringing a false case against his servant Behari Kahar on 28th April 1932, and the accused pleads not guilty. Thereafter, he goes on discussing the defence evidence till he comes to his conclusion, "I find the accused guilty under S. 182, I. P. C." Even in discussing the defence evidence, he appears to have misdirected himself. He thought that the accused showed an entry, Ex. 3 (1), to the effect that the landlord, Manmathanath Chatterji, deposited Rs. 300 with him. As a matter of

fact, it was the Sub-Inspector who proved the entry and not the accused. The case of the accused is that a sum of Rs. 486 odd was in the balance, and except only three notes of Rs. 10, all was stolen away during the night and the account which was exhibited in the case would show how the balance was arrived at. In assuming that the accused relied upon this entry, Ex. 3 (1), the trial Magistrate appears to have misdirected himself, and, as stated above, he has not said one word about the prosecution evidence, nor has he come to any finding on the points sought to be made out by the prosecution.

The learned advocate for the Crown read the prosecution evidence and showed that Behari deposed that he had a quarrel with the petitioner, who refused to pay him the arrears of five months' wages and threatened to put him in trouble. A mistri, P. W. 1, deposed that he heard Behari quarrelling with his master. Assuming that the evidence of Behari is correct and that the petitioner wrongly suspected him, the Magistrate has not come to any finding that the complaint of theft made by the petitioner was false or that he knew the case to be false. The mere fact that the police officer found the case to be false is not a sufficient reason for saying that the petitioner is guilty under S. 182, I. P. C. In every criminal case, the onus lies on the prosecution to prove the guilt of the accused. The onus does not lie on the accused person to establish his innocence. In this case, the learned Presidency Magistrate appears to have approached the case altogether from a wrong point of view. The judgment recorded by him is not in accordance with law. It is accordingly reversed. The question then is whether an order should be made directing a fresh trial of the petitioner. Having regard to the circumstances of the case, it does not appear necessary to pass such an order. The result is that this rule is made absolute and the conviction of the accused is set aside. The fine if paid will be refunded to the accused.

R.K.

*Rule made absolute.***A. I. R. 1933 Calcutta 534**

JACK AND MITTER, JJ.

Priyambada Debee—Petitioner.

v.

Bholanath Basu—Opposite Party.

Civil Revn. No. 826 of 1932, Decided on 20th December 1932, against order of Sub-Judge, Burdwan, D/- 9th July 1932.

(a) Civil P. C. (1908), O. 21, R. 100—Events subsequent to delivery of possession must be considered—Practice, subsequent events.

In an application under O. 21, R. 100, the Court acts with material irregularity in the exercise of its jurisdiction in refusing to look at events subsequent to delivery of possession.

[P 535 C 1]

(b) Practice—Duty of Court—Court must shorten litigation and preserve rights of parties—Practice, subsequent events.

It is the duty of the Court, which still retains control of the judgment, to take such action as will shorten litigation, preserve the rights of both parties and best subserve the ends of justice. In exceptional cases it is not only competent, but it is the duty even of a Court of appeal to take notice of events, which have happened since the order challenged in appeal was made: 6 C L J 102, *Ref.*

[P 535 C 1]

Sitaram Danerji and Prakashchandra Basu—for Petitioner.

Mitter, J.—This Rule is directed against an order of the Subordinate Judge of Burdwan, by which he allowed an application made under O. 21, R. 100, Civil P. C., by some of the opposite parties to the present Rule. Sreemati Priyambada Debee, the petitioner in the present Rule, is the patnidar of the lot mahal Pingur in Burdwan. The opposite parties Nos. 1 to 10 claim to be the sepatnidars of the said mahal. She brought a suit for recovery of the darpatni rent for the years 1331 to 1334 B. S. against Praphulla Datta and others, the darpatnidars. The suit was decreed and in execution of the rent decree she purchased the darpatni on 2nd December 1929. The opposite parties made an application for setting aside the sale. That application was numbered as Misc. Case No. 28 of 1930. A compromise was arrived at between the parties and it was agreed that, if the opposite parties deposited the decretal amount by 29th April 1931 the sale would be set aside, otherwise the sale would be confirmed. The payment not having been made as agreed, the sale was confirmed on 2nd May 1931 and the petitioner took possession through Court on 9th July 1931. On 6th August the op-

posite parties Nos. 1 to 10 applied under O. 21, R. 100, Civil P. C.

The petitioner came to know on 9th July 1931 that the opposite parties Nos. 1 to 10 were in possession as sepatnidars and she had a notice served on them under S. 167, Ben. Ten. Act, to annul their incumbrance and the notice was served on 16th January 1932. The learned Subordinate Judge allowed the opposite parties' application under O. 21, R. 100 of the Code, and directed that the opposite parties Nos. 1 to 10 do recover possession from the petitioner. The present Rule has been obtained by the petitioner against the order of the Subordinate Judge. The Subordinate Judge in his judgment noticed the fact that the opposite parties disputed the allegations of the petitioner, (1) that the decree was a rent decree and (2) that the notice under S. 167, Ben. Ten. Act, had been served, but proceeded to base his judgment on the assumption that the petitioner had established both these allegations, and held that, as at the date of their application under O. 21, R. 100, the opposite parties were in possession on their account, their application should succeed and this notwithstanding the fact that at the time of the hearing of the application the sepatni had been annulled by notice duly served under S. 167, Ben. Ten. Act.

It is contended for the petitioner that the Court below has acted with material irregularity in the exercise of its jurisdiction in refusing to look at events subsequent to delivery of possession. We are of opinion that this contention is right and must be given effect to. We think that it is the duty of the Court, which still retains control of the judgment to take such action as will shorten litigation, preserve the rights of both parties and best subserve the ends of justice: see *Ramyad Sahu v. Bindsawari Kumar* (1). Courts have gone so far as to hold that in exceptional cases it is not only competent, but it is the duty even of a Court of appeal to take notice of events which have happened since the order challenged in appeal was made. Here, the event, viz., service of notice, had been effected before the judgment was rendered in the proceeding under O. 21, R. 100, and the sepatni had been annulled, as the notice was

served within a year of the date of the confirmation of sale, so, at the date of the order the sepatnidars could not be held to be in possession on their account within the meaning of O. 21, R. 100.

The opposite parties have not placed sufficient materials before the Court to show that the sepatni was created before the darpatni, which was avoided by the sale, so as to entitle the Court to hold that the sepatni was not an incumbrance created by the defaulting patnidar and could not be avoided by the patnidar. No patta and kabuliyat are forthcoming with respect to the sepatni and it would seem from the evidence of Nalinakhy Basu, witness 1 for the applicant, that the sepatnidars were paying the darpatni rent to the patnidar under an arrangement with the darpatnidar and that they pay Rs. 33 as munafa to the darpatnidar. All this would go to show that the sepatni was created by the defaulting darpatnidars or their predecessors in interest and the incumbrance of the sepatni was annulled by notice under S. 167, Ben. Ten. Act. It is unfortunate that the opposite parties have not appeared before this Court to show cause; but we have examined the records and we are of opinion that the Rule must be made absolute and the order of the Subordinate Judge must be set aside. The application of the opposite parties under O. 21, R. 100, Civil P. C., must be dismissed. There will be no order as to costs.

Jack, J.—I agree.

R.K.

Rule made absolute.

A. I. R. 1933 Calcutta 535

LORT-WILLIAMS, J.

Jalpaiguri Banking and Trading Corporation, Ltd.—Petitioner.

v.

Samaresh Chakrabarti — Opposite Party.

Appln. in Original Suits Nos. 1771 of 1929 and 1753 of 1930, Decided on 5th January 1933.

Deed—Construction—Sufficient description of property—Further incomplete description should be disregarded.

Where an incomplete description has been added to an already sufficient description, then the added description may be disregarded under the maxim of *falsus demonstrat*. [P 537 C 1]

All zamindari lands and rights, known as the "Chakrabarti estate," in certain parganas, were mortgaged. In the subsequent enumeration of

the properties comprised in the description of the estate in the deed of mortgage, certain tauzis in those parganas were omitted although they were known to be part of the estate.

Held: that the description of the property as "Chakrabarti estate" was sufficient to render certain what the mortgagor intended to mortgage, and that the subsequent erroneous enumeration of the properties comprised within that description ought not to have any effect. [P 537 C 1]

Sudhish Ray—for Petitioner.

B. N. Ghosh—for Imperial Bank of India.

Order.—The petitioners obtained a decree against the executors of the late Byomkesh Chuckerbutty for over four lakhs of rupees, which decree remains wholly unsatisfied. By an indenture, dated 7th September 1927, Byomkesh Chuckerbutty mortgaged to the Imperial Bank of India certain properties mentioned in Schs. 1, 2 and 3 to the deed of mortgage together with all lands, buildings and structures thereon, and all rights, liberties, privileges, advantages, easements and appurtenances whatsoever belonging or relating to the said property. Schs. 1 and 2 refer to the mortgagor's property in certain buildings in Calcutta. Sch. 3 reads as follows:

All those zamindari lands and rights known as the Chakrabarti estate comprising: (a) Datia pargana being situate in district and registration office of Khulna, tauzi Nos. 72-2, 82 and 413, Mauzas Nagarhata, Daulatpur, Sarsa, Banstarhi, Raita, Pakurhia, Jaipur and all lands with sudder tahsil thana; (b) Saidpur pargana being situate in district and registration office of Jessore, tauzi Nos. 5515, 4212, 4463, 4876, 4147, 4356, 175, 181, 152, 1129 and 64B (Ghurania), Mauzas Rajganj-Laksbmanpur, Juranpur, Bajiapur, Khanpur, Bhomardaha and all lands with sudder tahsil thana; (c) Bharpkata Jungpur pargana being situate in district and registration office of Jessore, tauzi No. 4205, Mauza Gangalia, and all lands with sudder tahsil thana; or howsoever otherwise this estate is or was described or known.

The petitioners allege that certain properties belonging to Byomkesh Chuckerbutty and situate in Saidpur and Bharpkata Jungpur parganas are not included in this mortgage. Those properties are (1) tauzi No. 20-B. 1 (siddhaniskar); (2) Khatiyon No. 471 (siddhaniskar); these properties are situate in Saidpur pargana; (3) Khatiyon No. 59 (patni); (4) Khatiyon No. 61 (patni). These properties are situate in Bharpkata Jungpur pargana. And the petitioners ask that these properties should be sold in execution of their decree. The Imperial Bank, on the other hand, contends that these properties formed part

of an estate belonging to Byomkesh Chuckerbutty, which is called and is known as the "Chakrabarti estate," and consists of zamindari land and rights arising out of land situate in the Datia pargana, which is in Khulna District, and in the Saidpur and Bharpkata Jungpur parganas which are in the Jessore District. Under orders of this Court, Mr. K. C. Lahiri was appointed receiver, so far back as 1930. He has given evidence and says that he took possession of the whole of what was stated to him by the executors to be included in the Chakrabarti estate, among which properties were those which the petitioners allege were not included in the mortgage, and that he has been in possession of all those properties ever since, and has managed them and collected the rents. Further, he says that they are known as the "Chakrabarti estate," but he says further that the properties referred to by the petitioners, though they lie within the area of the Saidpur and Bharpkata Jungpur parganas, are not within the area of any of the tauzis mentioned in Sch. 3.

I am satisfied that Byomkesh Chuckerbutty intended to mortgage, and did mortgage, the whole of his estate lying within these parganas and known as the Chakrabarti estate, including the properties mentioned by the petitioner. The meaning of the description of the Chakrabarti estate referred to in Sch. 3 is not clear. At first sight it seemed to me that the estate according to the description comprised the whole of the parganas mentioned, but according to the receiver only a comparatively small portion of the area comprised in those parganas belonged to Byomkesh Chuckerbutty. According to the evidence of the receiver, all that Byomkesh Chuckerbutty owned in the Datia pargana were tauzis Nos. 72/2, 82 and 413, and he owned the whole of the area contained in these tauzis. In Saidpur pargana he owned the whole of the area contained within the tauzis mentioned in the schedule and also tauzi No. 20-B. 1 (siddhaniskar) and khatiyon No. 471 (siddhaniskar), to which I have already referred. In Bharpkata Jungpur pargana he owned the whole of tauzi No. 4205 and khatiyans Nos. 59 (patni) and 61 (patni).

It seems therefore at first sight that the meaning of the description is that

the estate comprised only the areas covered by the *tanzi* numbers mentioned. But the description does not end there, but mentions a number of *mauzas* by name and "all lands with *sudder tahsil thana*." The meaning of the part of the description is not free from doubt, but so far as I can understand from the evidence it means that certain *mauzas* and other lands have erected upon them *sudder tahsil thana*, or in other words, collecting *kacharies*, and that these *kacharies* are included in the mortgage. The mortgagor, as I have said already, conveyed the land and buildings and structures thereon, but I agree with the learned counsel for the petitioners that it was necessary to mention these particular structures in the schedule, otherwise it might have been contended that they had been excluded by the schedule and that, to that extent, the schedule must be held to restrict the general expression in the earlier part of the deed. No evidence has been advanced why the properties mentioned by the petitioners should have been excluded from the mortgage. They form a comparatively small part of the whole of the property which is alleged to be known as the "Chakrabarti estate," and I am satisfied that the mortgagor's property in these *parganas* is sufficiently described by the name "Chakrabarti estate," and that Byomkesh Chuckerbutty's lands and rights in these *parganas* are known collectively as the "Chakrabarti estate," and include the properties mentioned by the petitioners.

In my opinion this is a case where one description—and that an incomplete one—has been added to an already sufficient description, and that this added description may be disregarded under the maxim of *falsa demonstratio*. The principle upon which cases bearing on these points have been decided has been stated by Romer, J., in *Cowen v. Truefitt, Ltd.* (1). In accordance with this principle I think that the description of the property as "Chakrabarti estate" is sufficient to render certain what the mortgagor intended to mortgage, and that the subsequent erroneous enumeration of the properties comprised within that description ought not to have any effect.

For these reasons, the petition must be dismissed with costs.

R.K.

Petition dismissed.

A. I. R. 1933 Calcutta 537

RANKIN, C. J. AND COSTELLO, J.

Abdul Majid and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 450 and 589 of 1932, Decided on 12th December 1932, against order of Special Magistrate, Chinsura, D/- 19th May 1932.

Emergency Powers Ordinance (2 of 1932), Ss. 32, 37 and 52—Trial by Special Magistrate—Approver tendered pardon—Commitment to Sessions is not compulsory—Ordinance prevails over Criminal P. C. (1898), S. 337 (2-A).

The provisions of the Code are to apply in the case of special Magistrates so far as they are not inconsistent with the Ordinance. When the provisions of the two conflict, those of the Ordinance prevail. Where therefore a special Magistrate trying a case under Ordinance 2 of 1932, has tendered pardon to the approver sub-S. (2-A), S. 337, Criminal P. C., does not make it obligatory upon him to commit the accused for trial to the Court of Sessions. [P 538 C 2]

Sudhanshukumar Sen—for Appellants.

Khundkar—for the Crown.

Rankin, C. J.—In this case we have first of all, two accused, who appeal from jail and next, two other accused, whose cases have been argued very carefully before us by their learned advocate. These persons have all been tried under Ordinance 2 of 1932, by a special Magistrate, who has convicted them on the charge of conspiracy to commit dacoity and also on a charge under S. 402, I. P. C.—preparation for committing dacoity—and has given them sentences of three years and five years respectively to run concurrently. The case is one in which the approver was examined after the special Magistrate had commenced the trial. He was tendered a pardon and made a prosecution witness and his story was that the appellants now before us had all taken part with him in a conspiracy to go to a place called Chak near Haripal and carry out a dacoity in the house of a certain barrister. The police had received intimation that a dacoity in this house was contemplated and, on the night of 6th February, certain persons went down from Calcutta to Haripal station by the night train and a number

of constables were watching out for suspicious persons projecting this dacoity. The evidence is that the accused persons went to the end of the platform, crossed the railway lines and took the road towards Chak. The police party, followed by some of the employees of the railway thereupon proceeded to overtake them and arrested them. So far as regards the appellants with whom we are concerned, the first thing to notice is that, as regards the accused, Majid, no railway ticket was found in his possession; but when the party was arrested, this man attempted to attack the police officer with a dagger until another police officer came to his rescue and prevented it. As regards Mir Billal Hossain, there were found upon him a false moustache, a pencil sketch of the house where the dacoity was contemplated, a torchlight and a return railway ticket. As regards the other two persons before us, namely, Hossainuddin alias Maharam and Harendra, we find that a six-chambered revolver and a single ticket No. 2544 were found on Harendra and a ticket No. 2542 and dagger were found on Maharam.

Now the suggestion put forward on behalf of Majid is that he was a person who was arrested at the railway station, that he had gone to Haripal in order to see whether he could get an employment as a bus driver, that he had no connexion with the people who carried the revolver or with the man who carried the false moustache and that he had nothing to do with the dacoity. All the excuses that were given by the different appellants before us were of a vague character and entirely unsupported by any evidence whatsoever. The approver, having been examined before the special Magistrate, gave a long and detailed account of the part played by the different people in the conspiracy.

It is quite clear that the appellants before us were known to the approver and the approver to them. It is said about Majid that, according to the approver, he came to the station with a revolver and, as no revolver was found with him, the approver's story has not been corroborated. Of course that is not so at all. The man who procured and found the revolver was not necessarily the man who and entrusted to use it. We find that the approver's story is cor-

roborated by the fact that these people were all arrested together and that they were all obviously out to commit this dacoity. As regards Majid though somebody else at that stage had the revolver, he had a dagger and he immediately proceeded to use it. As regards Maharam his ticket is consecutively numbered with two other tickets found with his party and he had a dagger with him. I have no doubt that the special Magistrate was quite right in coming to the conclusion to which he came and that the appeals so far are to be dismissed.

It is right to notice the contention that was put forward to the effect that the proceedings before the special Magistrate were bad. It is said that his having tendered pardon to the approver [sub-S. (2-A), S. 337, Criminal P. C.] made it obligatory upon him to commit the accused for trial to the Court of Session. It is not disputed that, under the Ordinance (2 of 1932), he certainly could not commit the accused for trial to any Court of Sessions. When we look at the Ordinance, we find that there is an express provision that the provisions of the Code are to apply in the case of special Magistrates so far as they are not inconsistent with the Ordinance and similar phrasing is used more elaborately in S. 32 and also in connexion with Sessions Judges in S. 32. It makes no difference whatever, so far as I can see, whether the Magistrate tendering the pardon had been the District Magistrate and not the Magistrate trying the case. The provisions of sub-S. (2-A) would apply equally whoever had been the Magistrate tendering the pardon and it is quite clear that the special Magistrate is the Magistrate who, under the Ordinance, is to try the case. Unless therefore we were to hold that no approver could ever give evidence before a special Magistrate, the appellants would not succeed in making the argument logical. But it is quite clear that, in so far as the Ordinance is inconsistent with sub S. (2-A), the Ordinance prevails and there is no ground for supposing that it is impossible for the special Magistrate to hear the evidence. The appeals must therefore be dismissed.

Costello, J.—I agree.

R.K.

Appeals dismissed.

* A. I. R. 1933 Calcutta-539

MUKERJI AND BARTLEY, JJ.

Brajendra Kishore Roy and others—
 Plaintiffs—Appellants.

v.

Iswar Kaibarta and others—Defen-
 dants—Respondents.

Appeal No. 13 of 1929, Decided on 6th July 1932, against original decree of Addl. Sub-Judge, Third Court, Sylhet, D/- 30th July 1928.

* (a) *Profits a Prendre* — Claim leading to destruction of subject-matter over which it is claimed is unknown to law, and custom supporting it is bad and unreasonable—Custom.

A claim to profits a prendre over the soil of another, such as a right to fish without stint and for commercial purposes, which might lead to the destruction of the subject-matter, is a claim of right unknown to law, and a custom which may be alleged to support it is bad and unreasonable. [P 541 C 1]

(b) *Fishery—Custom as to—Mere payment of a fee does not convert customary right into a license if custom is otherwise good.*

If a custom as to right of fishing is otherwise good the fact that a fee has to be paid or that such a fee is not a fixed fee but fee of a reasonable amount is no real objection. [P 541 C 2]

(c) *Custom—Essentials for validity.*

Custom in order to form the basis of a right should be definite and reasonable and should have the elements of antiquity and continued user as of right. [P 541 C 2]

* (d) *Limitation Act (1908), S. 26—Fishing right through hired men cannot be acquired by prescription.*

The acquisition of a right of fishing through hired men is not such a right as can be acquired by prescription: 9 Cal 698, *Ref.* [P 541 C 2]

(e) *Fishery—Tenancy as to—Rent being paid according to number of persons that each holder of kheo may employ is unknown to law.*

A tenancy in which rent is paid not for each kheo that is held, but according to the number of persons that each holder of a kheo may choose to employ, is a tenancy unknown to law. [P 542 C 1]

(f) *Prescription—Onus of proof is on him who claims right on lost grant—Evidence Act (1872), S. 101.*

To establish that there is a permanent right by a lost grant the onus is on the person who claims it: A I R 1924 P C 65 and A I R 1929 P C 156, *Ref.* [P 542 C 1]

(g) *Fishery — Permanent right — Holding where permanency is not the universal and integral incident—Mode of proving permanency.*

Where permanency is not the universal and integral incident of a holding, and if permanency is claimed, it must be established, and this may be done by proving custom, contract or title, and possibly by other means: A I R 1920 P C 67, *Full.* [P 543 C 2]

(h) *Adverse Possession — Fishing done under leave and license—No question of*

limitation or adverse possession arises—Fishery.

Where the fishing was done under a leave and license, implied and not necessarily express:

Held: that no question of limitation or adverse possession can possibly arise. [P 542 C 2]

*Brojajal Chakrabarty, Hemendra Kumar Das and Charu Chandra Chowdhury—*for Appellants.

*S. C. Basak, Birendra Chandra Das and Chandra Sekhar Sen—*for Respondents.

Surjya Kumar Aich and Profulla Chandra Chakrabarty for Deputy Registrar—*for* Minor Respondents.

Judgment.—Plaintiffs 1 to 25 are proprietors of a beel of which they have in 1324 granted settlement to plaintiff 26 for catching fish near the banks by setting up dalkatas or kheos (twigs and branches of trees put up as a contrivance for intercepting the fish). They instituted this suit in 1919 for restraining the defendants from catching fish in the said beel on certain declarations, the object of which was to negative a right of fishing which the defendants set up, and they also claimed damages from the defendants for having caught fish from the beel under colour of such a right. The Subordinate Judge having dismissed the suit, the plaintiffs have preferred this appeal. The right which the defendants claimed is described in the written statement of the answering defendants in these words:

Para. 16.—"The answering defendants are dealers in fish and fishing is their only means of livelihood. Thinking that it would be convenient to earn their livelihood by fishing, the predecessors of the answering defendants came to reside in the vicinity of the beel in dispute and erected houses there, and the answering defendants and numerous other men of the Kaibarta class and their co-villagers and residents of the adjoining villages, who are also fishermen, have been earning their livelihood by catching fish by means of various kinds of floating nets in the said jalashay from generation to generation and from time immemorial, openly and as of right without interruption and peacefully. Thus the jalkar of the said beel is the absolute right of the answering defendants and their neighbours. To whomsoever the bed of the said beel may belong the answering defendants and their neighbours have been enjoying the jalkar right in the said beel from generation to generation and from time immemorial. No one had or has any right to object thereto."

Para. 17.—"The answering defendants have been catching fish in their respective kheos by erecting kheos by dalkata in the places near the banks of the said beel from generation to generation and from time immemorial. And for the convenience of catching fish in their respective kheos, they have been erecting khalas on the

banks of the beel and have been using and possessing their respective kheos and khalas. And in respect thereof, every one has been paying a jama of 8 annas year by year to the owners of the bed of the said beel from generation to generation according to long-standing usage from time immemorial. The maliks have no right to claim any money in excess of the said amount of 8 annas. The said jama is fixed for ever and is unchangeable. The answering defendants and their predecessors have been enjoying the right to erect kheos and khalas as above from time immemorial peacefully, without interruption, as of right and openly. The maliks have no right to jeopardise that right. The places of these kheos and khalas are fixed and demarcated for ever."

It should be stated at the outset that the two paragraphs of the written statement just quoted should be read together, and that though in para. 16 it was stated that the jalkar of the beel belonged to the defendant in absolute right, what was really claimed was the right to fish at the places and in the manner specified in para. 17. The Subordinate Judge found as a fact that the defendants and their forefathers have been fishing in the beel from time immemorial by establishing kheos in its sides on payment of 8 annas per head of the persons fishing and that each defendant and his father, grandfather and so on have been in possession of each particular kheo on such payment. He held that it was a customary right which the defendants were thus enjoying. He also held that from such long user a lost grant or some legal origin might be presumed, and that inasmuch as right of fishery is immovable property the defendants having paid rents all along and regularly were people with the status of settled raiyats and the plaintiffs were incompetent to take khas possession of the kheos without determining the rights of the defendants in a legal manner. He held further that the defendants having had possession of the different kheos separately and continuously as an interest in land i. e., of a right of fishery, for a period of long over 12 years before the beel was attached in 1902 as a consequence of proceedings under S. 145 between the plaintiffs and the proprietors of a neighbouring estate, the suit was barred by limitation, estoppel and acquiescence.

A very unsatisfactory feature of this case is that neither in the pleadings nor in the evidence has any attempt been made to describe, elucidate or establish

the different elements of the right that was claimed, and nowhere has it been clearly, definitely or expressly said what the origin of the right claimed was. The witnesses examined in support of the claim have spoken to one or other of the characteristics of the right and it is only by taking into consideration the cumulative effect of their testimony that one has got to form an idea of the nature of the claim. The general trend of the evidence, it cannot be disputed, establishes that the defendants and their ancestors have been fishing in the respective kheos in the manner indicated above, without any interruption or opposition and on payment of 8 annas per head for each person fishing. To resist the plaintiffs' claim for injunction however a right on the part of the defendants to fish in the aforesaid manner will have to be found.

From the judgment of the Court below it would appear that the Subordinate Judge was of opinion that the defendants had succeeded in proving a custom or customary right entitling them to fish in the manner described. The elements of this right according to the witnesses examined on behalf of the defendants, are the following: that the inhabitants of certain villages, to wit, Shalla, Kadirpur, Nagar, Nayanagar, Birat, Udhabpur and Ajniri, which are villages lying by the side of the beel, have this right; that 200 or 250 Kaivartas live in these villages for generations; that the right is confined to the Kaivartas of those villages; that there are 180 to 200 kheos, in all, which are capable of being mortgaged or sold or transferred in other ways when necessary and are divided amongst the heirs of a holder who is dead; that no permission is to be taken by them for fishing but fishing is done as a matter of right; that all the kaivartas of all the said villages do not exercise the right, that there is no certainty of the number of men who actually fish in the beel in any year but their number varies from year to year; that the Kaivartas who fish in this way engage other men of their villages as well as outsiders, paying them salaries for the season, and there is no limit to the number of men who can be so employed; that payment of 8 annas has to be made not as per each kheo but per head of the men fishing; and that the

said amount has not to be paid nor has any permission to be taken before fishing, but the payment is made after the fishing is over. While these are some of the salient features of the right that is claimed there is evidence showing that one of these villages is of very recent and another of a comparatively modern origin, that not all the Kaipartas of the villages but only some of them enjoy or exercise the alleged right, and that persons who have come to live in one or other of these villages quite recently have also been fishing under the supposed right. There is therefore considerable uncertainty as regards the particular persons or families in which the right claimed lies. Then there is evidence to the effect that when a transfer is made of a kheo the transferee also goes on fishing as if he was a member of the body to which the so-called right belonged. These features sufficiently indicate that the case as to the customary right being confined to the Kaiparta inhabitants of the villages specified and descensible amongst their heirs is not a true one. Indefiniteness as to the persons in whom the alleged right lies is a thing which militates against its being supported on the ground of custom. A claim to profits *a prendre* over the soil of another such as a right to fish without stint and for commercial purposes, which might lead to the destruction of the subject-matter, is a claim of right unknown to law and a custom which may be alleged to support it is bad and unreasonable: see *Caulson and Forbes's Law of Waters*, 4th Edn., p. 398, and the cases cited there. In the case of *Subramania Chetty v. Vija Raghunatha Pillai* (1) *Krishnan, J.*, expressed the view that the aforesaid principle was not applicable to the case of a right in gross vested in the inhabitants of a particular village, but in that case the learned Judge found that the right that was claimed was not unlimited in its character. So far as the present case is concerned it is true that the right is claimed on the part of the Kaiparta inhabitants of the seven villages only and it is only the right to take fish at some specified spots that is so claimed; but the fact that the fish is to be taken for commercial purposes and the fact that any of these persons has the right

to bring in as many others as he chooses are factors which stamp the custom with an unreasonableness that stands in the way of its being pleaded as having created a right. It has also been argued on behalf of the appellants that the fact that a fee has to be paid is antagonistic to the idea of a customary right which must be a right enjoyable without leave and license. It is true that if every act of fishing was by license, there is no enjoyment as of right so as to give rise to a custom, but if the custom is otherwise good the fact that a fee has to be paid or that such a fee is not a fixed fee but fee of a reasonable amount is no real objection if the plea is taken in this light, namely, that there is the alleged customary right in the defendants and there is also the customary right on the part of the plaintiff to realize the fee: see *Mills v. Mayor of Colchester* (2). But, as already observed, the custom pleaded in the present case is indefinite and unreasonable and so cannot form the basis of a right which the defendants have claimed; and moreover the evidence that has been adduced, as already stated, is not sufficient to establish the elements of antiquity and continued user as of right which are essential to establish its existence as a custom.

The right claimed on behalf of the defendants has next been sought to be supported on the ground that they and their predecessors have acquired a prescriptive right under S. 26, *Lim. Act.*, to fish in the beel in the manner alleged. All the grounds given for holding against the acquisition of a customary right, in our judgment, also apply to this contention that has been advanced. The present case, in our judgment, is covered by the decision of this Court in the case of *Luchmeeput Singh v. Sadaulla Nushyo* (3) except upon two points, which place it in a position of greater disadvantage than the case cited. In the first place the payment of a fee itself suggests some sort of permission to be obtained or implied. And in the next place the acquisition of a right of fishing through hired men is also not such a right as can be acquired by prescription. Of course, if the defendants

2. 2 G B 476.

3. (1888) 9 Cal 698=12 O L R 382.

instead of relying on a customary right had pleaded and proved that each particular defendant had acquired by prescription a right to fish in the beel by user on the part of himself or of some person through whom he claimed, the case would have been taken out of the decision in the case above cited. And if adverse possession could be proved it would have been governed by the decision in the case of *Parbuti Nath Roy v. Mudho Parol* (4). But the facts are otherwise in the present case.

Thirdly it has been argued, as the Subordinate Judge has also found, that the defendant have the status of settled raiyats who have been paying a rent in the shape of the fees that they have always paid. That the amount so paid is rent was the position that was taken by the defendant all along until recently when they began to rely on the alleged customary right. A tenancy of the kind alleged, rent being paid not for each kheo that is held but according to the number of persons that each holder of a kheo may choose to employ is a tenancy unknown to law. But there are other difficulties also in regarding the defendants as raiyats or of defending their claim on that footing. It cannot be disputed that Tenancy Act would not apply to the defendants: see *Juggobundhoo Saha v. Pramatha Nath Roy* (5), and it is not possible to imagine how their status can be regarded as that of settled raiyats. Of course, apart from custom, the only reasonable footing on which the defendants may rest their claim would be grant either in existence or of which, though lost, the existence may be presumed by reason of the time during which the right may have been exercised. But here again beyond the fact that there has been no opposition so far there is nothing else proved which would entitle us to hold that there ever was a grant, which implies a definite body of men in whose favour it was made and definite terms on which it was made. To establish that they have a permanent right in the kheos the onus was on the defendants: *Nainapalli Marakayar v. Ramana-than Chettiar* (6), *Subramaniya Chettiar*

v. Subramaniya Mudaliyar (7). In the decision just cited, their Lordships affirmed what was said by Sir Lawrence Jenkins in delivering the judgment of the same Board in the case of *Setu-ratnam Aiyar v. Venkatachala Gounden* (8), namely, that where permanency is not the universal and integral incident of a holding (in that case the holding of an under-raiyat) if permanency is claimed it must be established, and this may be done by proving custom, contract or title, and possibly by other means. In our opinion no permanency has been proved in this case.

In our opinion, the true view to take of the evidence in this case is to hold that the defendants or such of them or of their predecessors would care to fish in the beel were permitted to do so so long as a fee of as. 8 per every fisherman was paid and that fee perhaps was considered sufficient to ensure reasonable profit to the proprietors. But no customary right nor any right by prescription accrued to those who fished under such a condition. And there was no grant of any kind which might form the foundation of any right on the part of the fishermen. On the other hand the fact that a fee was charged is sufficiently indicative of a leave and license, not necessarily express but certainly implied, which strikes at the foundation of the supposition as to the acquisition of a right. On the finding that the fishing was done under a leave and license, implied and not necessarily express, no question of limitation or adverse possession can possibly arise. It may not be out of place to state that in England it has been held that where the public have been allowed to fish in private waters even from time immemorial, the permission is revocable at any time at the will of the proprietor: *Holford v. Bailey* (9). In connexion with cases of this nature it is well to bear in mind what was said by Bowen, L. J., with regard to the claim of the public to fish in non-tidal waters, in *Blount v. Layard* (10).

There is another most important matter to be recollected as regards such streams as the

(7) A I R 1929 P C 166=56 I A 248=52 Mad 549=116 I C 601 (P C).

(8) A I R 1920 P C 67=47 I A 76=48 Mad 567=56 I C 117 (P C).

(9) (1878) 8 Q B 1000.

(10) (1891) 2 Ch. 699.

(4) (1877) 3 Cal 276=1 C L 12. 92.

(5) (1878) 4 Cal 767.

(6) A I R 1924 P C 65=51 I A 83=47 Mad

387=52 I C 226 (P C).

Thames, viz., that although the public have been in the habit as along as we can recollect and so long as our forefathers can recollect of fishing in the Thames, the public have no right to fish there—I mean they have no right as members of the public to fish there. That is certain law. Of course they may fish by the license of the lord or owner of a particular part of the bed of the river or they may fish by the indulgence or owing to the carelessness or good nature of the person who is entitled to the soil, but right to fish themselves as the public they have none, and whenever the case is tried the jury ought to be told this by the judge in the most emphatic way, so as to prevent them from doing injury under the idea that they are establishing a public right. There is no such right in law."

We are sorry to have to hold against the practice which has hitherto obtained in respect of fishing in this beel, but when the right of the defendants has been denied we have to determine whether the right and not merely the practice exists. As regards the claim for damages which the plaintiffs have made, we are of opinion that there are no materials on which we can hold that such claim or any part of it has been established as against which of the defendants, if any. The plaintiffs have adopted the curious course of laying a claim against all the defendants jointly on the footing that they had a common cause and without making any effort to establish their individual liabilities. We are not satisfied that plaintiff 26 on the strength of the settlements obtained by him from the other plaintiffs in 1324 has a subsisting right entitling him to any relief in this suit. The result therefore is that the suit, in so far as it is a suit of plaintiff 26, is dismissed, that so far as the other plaintiffs are concerned they will obtain a permanent injunction restraining the defendants from fishing with dalkatas or khoes on the side of the beel without obtaining a settlement from the said other plaintiffs or some person or persons who may have derived title from them and that the rest of the claim in the suit should be dismissed. The appeal is allowed, and the decree of the Court below being set aside, a decree will be made to the above effect. The costs of this litigation will be borne by the parties for themselves.

M.N.

Appeal allowed.

A. I. R. 1933 Calcutta 543

MALLIK AND JACK, JJ.

*Parabi Bibi and others—Appellants.**Birendra Nath Sarkar and others—Respondents.*

Appeal No. 634 of 1930, Decided on 24th March 1933, against appellate decree of Sub-Judge, Jessore, D/- 30th September 1929.

Landlord and Tenant—Zamindar carving out tenure—He is competent to interpose between himself and his tenants an intermediate holder.

A zamindar who has carved out a tenure is competent to interpose between himself and his tenants an intermediate holder. Therefore where the patnidars are liable to pay their rent to the zamindar and if the zamindar transfers his right to realize rent from the patnidars, to the plaintiff by the document that is created in favour of the latter, the position of the patnidars is not prejudiced in any way and the patnidar cannot escape from his liability to pay rent to the plaintiff: 9 C W N 656; A I R 1918 Cal 156 and A I R 1922 Cal 412, *Rel on*; 4 I C 471, *Expl*; A I R 1923 Cal 189, *not Foll.*

[P 544 C 2]

Braja Lal Chakrabarti Sastri and Ramdas Mukherjee for Manindra Nath Banerjee—for Appellants.

Srish Chundra Dutt and Parimal Mukherjee—for Respondents.

Mallik, J.—This appeal arises out of a suit for recovery of arrears of rent for the years 1330 to 1333 B.S. The defence inter alia was a denial of relationship of landlord and tenant. This defence was negatived by both the Courts below and the Courts below gave a decree to the plaintiff. Some of the defendants are appellants before us. On behalf of the appellants it was contended that as the defendants are patnidars under the zamindar, defendant 20, and as the plaintiff based his claim on an ijara obtained by him from that zamindar, defendant 20, and as zamindari interest of defendant 20 was sold away before the period for which the rents were claimed, the plaintiff was not entitled to realize any rent from the defendants. There are two points which are involved in this argument advanced on behalf of the appellants. The first one is whether the zamindari interest of defendant 20 had been sold away before the period in suit, and the second one is whether defendant 20, the zamindar, could create a tenure, intermediate between his zamindari interest and the patni interest of the defendants.

As regards the first point noted above an attempt was made on behalf of the respondent to show that the zamindari interest of defendant 20 had not in reality been sold away. But the lower appellate Court distinctly found that the zamindari interest of defendant 20 had been sold away on 21st November 1923. In second appeal we cannot go behind this finding which is a finding of fact. In support of his contention that defendant 20 could not create a tenure intermediate between his zamindari interest and the patni interest of the defendants Mr. Sastri relied mainly on two decisions of this Court; *Jarao Kumari v. Hanifuddin Akand* (1) and *Rajendra Narain v. Abu Nasar* (2). The learned Judges in the case of *Jarao v. Kumari v. Hanifuddin Akand* (1), no doubt made an observation to the effect that they were inclined to take the view that a zamindar could not create such an intermediate tenure. But this observation as has been noted in a later decision of this Court, was only an obiter. Besides it is significant that the attention of the learned Judges was not drawn to an earlier decision of the Court in the case of *Raj Kumar Mazumdar v. Probal Chandra Ganguly* (3) in which a contrary view had been taken.

Then as regards the decision in *Rajendra Narain v. Abu Nasar* (2) it would appear that that was a case in which a patni was created by the zamindar intermediate between his zamindari interest and another patni that had been created before and the learned Judge held that in view of the peculiar incidents of a patni taluk such a thing could not be done. On the other hand there have been three decisions of this Court where the view has been accepted that a zamindar can create a tenure intermediate between his zamindari interest and a patni. First of all there is the case referred to above, namely, the case of *Raj Kumar v. Probal Chandra* (3). Then there is the case of *Nilambar Ghose v. Mir Mohasanuddin* (4), where it was held that a zamindar can create a tenure between a zamindari interest and a patni which had already been created under it. Lastly, there is a decision

in the case of *Johar Mull Bhutra v. Jatindra Nath Bose* (5), where it was held that a zamindar who has carved out a tenure is competent to interpose between himself and his tenant, an intermediate holder who may realize the rent payable to himself by his original tenant provided that he does not thereby prejudice the position of the first tenant.

The creation of the ijara by defendant 20 in the present case in favour of the plaintiff cannot, in my opinion, be said to have prejudiced in any way the position of the defendants patnidars. The defendants patnidars were liable to pay their rent to the zamindar and if the zamindar transferred his right to realize rent from the patnidars, to the plaintiff by the document that was created in favour of the latter the position of the defendants patnidars was not prejudiced in any way. Holding therefore that a zamindar who has carved out a tenure is competent to interpose between himself and his tenants an intermediate holder, I am of opinion that the defendants patnidar would not in the present case escape from his liability to pay rent to the plaintiff. In the result I would dismiss the appeal with costs to the plaintiff respondent only.

Jack, J.—I agree.

v.s. *Appeal dismissed.*
5. A I R 1922 Cal 412=49 Cal 495=67 I C 103.

A. I. R. 1933 Calcutta 544

S. K. GHOSE, J.

Kaliram Majumdar—Appellant.

v.

Dulalram Choudhury and another—Respondents.

Appeal No. 2673 of 1930, Decided on 22nd December 1932, against appellate decree of Special Sub-Judge, Assam Valley, D/- 31st March 1930.

(a) Transfer of Property Act (1882), S. 54—Property of value less than Rs. 100—Delivery of possession not possible—Sale deed must be registered.

In the case of a sale deed of property having its value less than Rs. 100 where delivery of possession is not possible, the deed in order to be valid must be registered. In such a case merely delivery of title-deed is not enough to constitute delivery of possession: 34 Cal 207; A I R 1919 Cal 325 and A I R 1921 P O 8, *Rel on.* [P 545 C 2]

(b) Adverse Possession—Requirements of, stated.

Possession in order to be adverse must be by a person claiming as of right as against the true

1. (1910) 4 I O 471.

2. A I R 1928 Cal 189=50 Cal 146=71 I C 827.

3. (1935) 9 C W N 656.

4. A I R 1918 Cal 156=47 I C 105.

owner, it must be continuous for the statutory period and open and notorious; it would not do if the possession is merely permissive, nor will it do if the person against whom adverse possession is sought is not entitled to immediate possession, nor will it do if the circumstances show that that person had no knowledge of the hostile claim. [P 546 C 1]

Nirmal Chandra Chakravarty—for Appellant.

Janhavi Ch Das Gupta and Jnananath Borah—for Respondents.

Judgment.—This appeal arises out of a suit for delivery of possession of 12 bighas of land on declaration of title. These and other lands originally belonged to one Bhakratram who died on 30th March 1908 leaving a will by which he bequeathed the lands in suit to his daughter Annapriya, the wife of the plaintiff. She died on 21st August 1910 leaving her mother Parbatipriya as her heir. Parbatipriya died on 16th February 1925. The defendant Dulalram alleged that he had purchased the property from Parbatipriya and he resisted the claim in suit. It appears that on 20th July 1910 Annapriya executed a deed of sale in favour of Parbatipriya. About a month later Annapriya died. On 3rd September 1910 Parbatipriya mutated her name as heir to her deceased husband. On 21st February 1915 she executed a deed of sale in favour of the defendant Dulalram who is the brother's son of Bhakratram. On 22nd February 1915 Dulalram mutated his name. As mentioned already Parbatipriya died on 16th February 1925 and the plaintiff brought the present suit on 20th August 1925. The main defence was that Parbatipriya purchased the property from Annapriya and then sold it to Dulalram and consequently plaintiff had no title. Both the Courts took the view that the deed of sale executed by Annapriya in favour of Parbatipriya and that executed by Parbatipriya in favour of Dulalram were invalid for want of registration, and consequently the property devolved on the plaintiff. The first Court decreed the suit, but the learned Judge took the view that Parbatipriya had acquired title by adverse possession and in that view he dismissed the suit. The learned Judge further held that the defendant redeemed certain mortgages to the extent of Rs. 130 and that in any case the plaintiff was not entitled to immediate possession with-

out repaying the amount of Rs. 130 to the defendant. As to this last point there is no appeal.

In this second appeal by the plaintiff the only point is that the learned Judge was wrong in holding that the suit was barred by limitation. It is contended in the first place that the learned Judge overlooked the fact that, as regards the plaintiff, the cause of action did not arise until after the death of Parbatipriya. The learned Judge took the view that Parbatipriya was holding adversely to Annapriya at least from the date of the deed of sale which was 20th July 1910. This deed of sale was held to be invalid for want of registration. It is contended for the respondents in this Court that this view is wrong because the consideration was less than Rs. 100 and according to the finding of the learned Judge Parbatipriya was already in possession of the property. It appears that of the 12 bighas, 8 or 9 bighas were under mortgage. The learned Judge seems to hold that after Bhakratram's death the lands continued to be in the possession or under the management of Parbatipriya. From this it does not follow that no delivery of possession was required in order to validate the deed of sale under S. 54, T. P. Act. It has been held that in such a case, where delivery of possession is not possible, the deed in order to be valid must be registered. This view was taken in the case of *Sibendrapada Banerjee v. Secy. of State* (1) and again in the case of *Hushmat v. Jamir* (2). It has also been held that mere delivery of title-deed is not enough to constitute delivery of possession: see the case of *Mathura Prosad v. Chandra Narayan* (3). Both the Courts have found that the evidence does not show that there was any sort of delivery of possession and consequently under S. 54, T. P. Act, the deed of sale in favour of Parbatipriya and that in favour of Dulalram were invalid for want of registration.

Then the learned Judge took the view that adverse possession started from the date of the deed of sale of Parbatipriya. But Annapriya died only a month later and Parbatipriya was entitled to some

1. (1907) 84 Cal 207=5 C L J 890.

2. A I R 1919 Cal 326=52 I O 558.

3. A I R 1921 P C 8=33 I O 770=49 I A 127=49 Cal 509 (PC).

into possession as her heir. Plaintiff was not entitled to immediate possession and the contention for the appellant is quite correct that, so far as the plaintiff was concerned his cause of action did not arise until after the death of Parbatipriya. Possession in order to be adverse must be by a person claiming as of right as against the true owner; it must be continuous for the statutory period and open and notorious; it would not do if the possession is merely permissive, nor will it do if the person against whom adverse possession is sought is not entitled to immediate possession, nor will it do if the circumstances show that that person had no knowledge of the hostile claim. Here the circumstances are that the matter was between the mother and the daughter. A deed of sale was executed, but it was not registered and there was no delivery of possession. The mother continued to manage the property as before and on the death of the daughter she remained as her heir ostensibly. She mutated her name after the daughter's death.

So far as the plaintiff is concerned the learned Judge has expressly found that he was ignorant as to how his wife managed the lands or how they were let out. In these circumstances it cannot be said that the possession of Parbatipriya was adverse as against the plaintiff. It may be said that possession became adverse when Dulalram purchased from Parbatipriya. That was on 21st February 1915 and, as the trial Court pointed out, counting from that date, the suit is within time. It seems to me therefore that the learned Judge was wrong in holding that the suit is barred by limitation. His decision must therefore be reversed and it must be declared that the plaintiff is entitled to possession on declaration of title as claimed by him. The decision of the learned Judge that the plaintiff must before recovering possession repay the amount of Rs. 130 to the defendant must stand. The suit will be decided as follows: The suit is decreed subject to the condition that the plaintiff will pay to the defendant the amount of Rs. 130. The plaintiff will be entitled to his costs in all the Courts. The amount of Rs. 130 will be set off as against the costs; and if there is any balance due, the plaintiff is entitled to

take out execution for that amount. The appeal is allowed with costs.

V.S.

Appeal allowed.

*** A. I. R. 1933 Calcutta 546**

MALLIK, J.

Bhutnath Ta and others—Appellants.

v.

Barindra Nath Bhattacharya and others—Respondents.

Reference under Court-fees Act, Decided on 29th August 1932, made by Registrar, Appellate Side, High Court, D/- 5th August 1932.

* Civil P. C. (1908), O. 21, R. 50 (3)—“Conditions as to appeal or otherwise as if it were a decree”—Meaning and scope.

The exact meaning of the words “conditions as to appeal or otherwise as if it were a decree” is “the conditions whether as to appeal or in other respects as if it were a decree;” and these words include conditions imposed by orders or rules outside the Code of Civil Procedure. Therefore an appeal from an order under O. 21, R. 50 (2) should be treated as a regular appeal and should be stamped with an ad valorem duty; and not as a miscellaneous appeal stamped with a fixed fee. [P 547 C 1]

Rupendru Kumur Mitra—for Appellants.

Nasim Ali—for Government.

Mallik, J.—This is a Reference under S. 5, Court-fees Act, made by the Taxing Officer, in the present case, the Registrar of the appellate side of the High Court. It has arisen in this way: There was a suit for recovery of money against a firm, named Madhabchandra Ta and Ramratan Chaudhuri. On 31st March 1931, the suit ended in a decree for about Rs. 4,700 against the firm. A year later, the plaintiff decree-holder applied under O. 21, R. 50, sub-Cl. (2), to have a declaration that Bhutnath Ta and some other persons were partners of the firm. Bhutnath Ta and others appeared and denied their partnership. But the Court, after trying the matter, found that they were partners at material times. Against this order, Bhutnath and others filed an appeal in this Court and there was a dispute between the Stamp Reporter and the advocate filing the appeal as to whether the appeal should be registered as a Miscellaneous Appeal stamped with a fixed fee or as a regular First Appeal and stamped with an ad valorem duty. The decision of this question will, as observed by the Stamp Reporter, depend on a correct interpretation of the words in sub-Cl. (3), O. 21, R. 50, Civil P. C., and for that purpose the Taxing Officer has re-

ferred three questions to this Court. These three questions are :

"1. What is the exact meaning of the words "conditions as to appeal or otherwise, as if it were a decree" in sub-Cl. (3), R. 50, O. 21, Civil P. C. ? 2. If the words have the more extensive meaning attributed to them by the first interpretation I have placed on them, do they include conditions imposed by orders or rules outside the Code of Civil Procedure; and 3. If a more restricted interpretation is to be placed on them, can they be made to refer merely to the appealability or otherwise of the order (if that order had been a decree) and, if so, can such appeals be accepted as Miscellaneous Appeals and stamped with a fixed court-fee only ?

As regards the first question the words "conditions as to appeal or otherwise" cannot, in my opinion, mean anything but "whether as to appeal or in any other respects." The dictionary meaning of the word "otherwise" is "in other respects," and there is no reason why the word should not be taken in that ordinary dictionary meaning. This interpretation would not only be grammatical but logical also. Sub-Cl. (2), O. 21, R. 50, lays down that when the liability as a partner is disputed, this liability may be tried and determined in any manner in which any issue in a suit may be tried and determined; and sub-Cl. (3) lays down that an order passed after such a trial is to have the same force as if it were a decree. If the legislature intended that such an order is to have the force of a decree, there is no reason why, in the absence of anything explicit to show to the contrary, it is to be considered as a decree for certain purposes only and not for others. This wider interpretation may in some cases operate as hardship. But the remedy of this hardship lies elsewhere, as, under S. 35, Court-fees Act, the Local Government has powers to reduce or remit the fees leviable under the Court-fees Act. Mr. Rupendrakumar Mitra, the learned advocate for the appellant, as also Mr. Syed Nasim Ali, the learned Government Pleader, conceded that the more extensive meaning should be given to the words "as to appeal or otherwise." The questions referred to me therefore are thus answered :

Question No. 1.—The exact meaning of the words "conditions as to appeal or otherwise" as if it were a "decree" is "the conditions whether as to appeal or in other respects as if it were a decree."

Question No. 2.—The answer is in the affirmative.

Question No. 3.—In view of the answers given to questions Nos. 1 and 2, this question does not arise.

I make no order as to costs of this hearing.

K.S.

Reference answered.

A. I. R. 1933 Calcutta 547

C. C. GHOSE, AG. C. J. AND MITTER, J.
Sundarji Shibji—Defendant—Appellant.

v.

Mangtural Bagaria — Plaintiff—Respondent.

Appeal No. 107 of 1931, Decided on 30th August 1932, from Original Suit No. 490 of 1930.

Practice—Judgment—Effect of subsequent order vacating former one is that former was not law when made—Insolvency.

If a decision is either reversed or set aside, the subsequent decision is a legal adjudication that the prior one was not law at the time it was made.

A suit therefore by the manager of an estate brought when an insolvency order with respect to the estate was subsisting is maintainable if the insolvency order is subsequently vacated, as the effect of the decision vacating the insolvency order is that there was no decision vesting the estate in the official assignee at the date of the institution of the suit so as to prevent the plaintiff from maintaining the suit: *Woodruff v. Woodruff*, 52 N Y Ct App 53, *Rel on*.

[P 548 C 2]

Page and P. C. Basu—for Appellant.

Sircar and S. M. Bose—for Respondent.

C. C. Ghose, Ag. C. J.—The present appeal arises out of a suit to recover a sum of Rs. 24,216-10-0 said to be due for minimum royalties, in terms of a lease, dated 7th November 1919, and for an enquiry as to what further sum is payable on account of royalties. The plaintiff is one Mangtural Bagaria. He succeeded in the Court below and hence the present appeal by Sundarji Shibji, who is one of the defendants. Only one point has been argued before us, namely, that Mangtural Bagaria was incompetent to bring this suit for the reasons which are set out in the judgment of the Court of appeal in the case of *Hiralal Murarka v. Mangtural Bagaria* (1). If it is not necessary for me to set out at length the reasons which led the Court of appeal to hold in the last-mentioned case that the plaintiff Mangtural Bagaria was

was not entitled to bring a suit of the description as in the present case. The facts in that other case and the facts in this case are all alike so far as the point raised before us is concerned and they are all set out in the judgment of the learned Chief Justice and there is no question that if nothing else had happened since the date of the judgment of the learned Chief Justice the present appeal would have been governed entirely by that judgment. But what has happened is that as soon as the judgment of the Court of appeal was delivered, an application was made to Ameer Ali, J., as a Judge of this Court exercising insolvency jurisdiction, for vacating the order of 4th August 1924. That application was successful, the date of the order of Ameer Ali, J., being 6th July 1932. The order of 4th August 1924, having been vacated, as if it never existed, it cannot now be disputed that Mangtulal Bagaria was and is competent to maintain the suit out of which the present appeal has arisen. This is the view taken by Pankridge, J., in *Mangtulal Bagaria v. Gordhandas Manisankar Bhatt* (2) decided on 4th August 1932, and I agree with the same. The result therefore is that the sole point taken by the appellant in this appeal fails and the appeal must be dismissed with costs.

Mitter, J.—I agree with the learned Acting Chief Justice that this appeal should be dismissed. It appears that at the date of the institution of the suit, for recovery of a sum of Rs. 24,216-10-0 due for minimum royalties, the estate had vested in the Official Assignee under an order of this Court which is dated 4th August and a defence was taken in the suit that the suit was not maintainable at the instance of Mangtulal Bagaria, the respondent in this appeal, as he had no title to the estate—the estate having vested in the Official Assignee. This defence did not prevail with Buckland, J., who heard the suit. After the appeal was filed, circumstances have intervened which go to show that the order of 4th August 1924 is no longer in existence. Ameer Ali, J., has vacated that order. It is contended on behalf of the appellant that the order of Ameer Ali, J., cannot have the effect of giving title to the plaintiff to sue at the date when admittedly the

order was in existence. A curious question consequently arises in this case, namely that if a decision is either reversed or set aside, what is the position of persons who have acted in accordance with the original decision? The question arises: Was the previous decision good law till it was vacated or was it a mere mistake upon which persons acted at their peril? It is to be observed however that in the present case the rights of third parties have not intervened. I am of opinion that a subsequent decision is a legal adjudication that the prior one was not law at the time it was made. There is some authority to be found for this view in some of the decisions of the American Courts: See the case of *Woodruff v. Woodruff* (3), a case which I find cited in Sir Thomas Holland's classic book on the Elements of Jurisprudence.

It remains to notice an argument which has been advanced by learned counsel for the appellant that where a plaintiff has no title at all he cannot carry on the suit by subsequently acquiring a new title and amending the bill accordingly. In support of this position learned counsel for the appellant has referred to the case of *Evans v. Bagshawe* (4). That case is obviously distinguishable, for here the effect of the decision of Ameer Ali, J., is that there was no decision vesting the estate in the Official Assignee at the date of the institution of the suit so as to prevent the plaintiff from maintaining the present suit. Ameer Ali, J., said distinctly that the effect of his decision was as if the prior decision vesting the estate in the Official Assignee had not existed at all. Ameer Ali, J., was merely emphasizing what the law implied. In this view, I think, the appeal ought to be dismissed and I have the satisfaction that this decision of ours does not affect the rights of any innocent third party.

B.K.

Appeal dismissed.

3. 52 N Y Ct App 58.

4. (1870) 5 Ch 340=39 L J Ch 145=18 W R 657.

* A. I. R. 1933 Calcutta. 549

JACK AND MITTER, JJ.

Rajendranath Paramanik—Petitioner.

v.

Tushtamayee Dasee—Opposite Party.

Civil Revn. No. 1147 of 1932, Decided on 7th December 1932, against order of First Sub-Judge, Howrah, D/- 4th July 1932.

* Civil P. C. (1908), O. 33, Rr. 15, 5 and 7—Application rejected for default of paying process fees and before opposite party is called to reply—Subsequent application is not barred.

Where an order rejecting the previous application to sue in forma pauperis is passed for default in paying the process fees and before the opposite party is called upon to reply to the grounds urged by the pauper and when the case has not reached the state of O. 33, R. 7, such an order cannot be regarded as an order refusing to allow the applicant to sue as a pauper within the meaning of O. 33, R. 15 and the order does not operate as a bar to any subsequent application of the like nature. The subsequent application is not barred unless the previous application has been refused under O. 33, R. 7: *A I R 1924 Cal 1089* and *20 Bom 86, Dist.*; *33 I C 812, Expl. and not Foll.*; *A I R 1926 Mad 875* and *A I R 1926 Rang 200, Foll* [P 549 C 2; P 550 C 1]

Manmathanath Ray and Urukamdass Chakrabarti—for Petitioner.

Heeralal Chakrabarti—for Opposite Party.

Jack, J.—This Rule was issued on the opposite party to show cause why an order giving leave to the plaintiff to sue as a pauper should not be set aside and why the plaintiff's suit should not be dismissed. The ground, on which this Rule has been pressed, is that the Court below ought to have held that the application of the plaintiff opposite party was barred under the provisions of O. 33, R. 15, Civil P. C. It appears that a previous application to sue as a pauper had been made in 1930 and that application was dismissed for default, because the process fee paid for the issue of notices on the opposite party in that application as required under O. 33, R. 6 was insufficient. It is urged, therefore that under the provisions of O. 33, R. 15 the present application is barred. The wording of R. 15, O. 33, is as follows:

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature to be made by him in respect of the same right to sue."

The wording of this rule corresponds with the wording of O. 33, R. 7, which says:

"On the day so fixed, namely, by R. 6, or as soon thereafter, as may be convenient, the Court

shall examine the witnesses (if any) produced by either party,"

and hear arguments and then shall "either allow or refuse the application to sue as a pauper." On the other hand the wording in O. 33, R. 5 is that "the Court shall reject the application for permission to sue as a pauper in the circumstances mentioned therein. Prima facie therefore it would appear that the subsequent application was not barred unless the previous application had been refused under O. 33, R. 7. The present Rule is supported on the authority of the decision in *Ali Afzal v. Purna Chandra* (1), in which it has been held that "an order, rejecting an application for default, operates as a bar under R. 15, O. 33. That case, however is distinguishable from the present case, inasmuch as there notices were actually issued on the opposite party under R. 6 and it was only when the case came up for disposal under R. 7 that the application was dismissed. The language used in that decision also shows that the previous order was passed under R. 7, O. 33. In the present case, since no notices were issued on the opposite party, as required under R. 6, no order under R. 7 could be passed; and the order in fact passed was one dismissing the suit for default, because the pauper applicant had failed to carry out the orders of the Court under R. 6.

It is urged that there is no real distinction here, inasmuch as the order in that case was not passed under R. 5, as the Court has held that "there does not appear any reason for the throwing out of the application under O. 33, R. 5."

If the case came up to the stage of O. 33, R. 7, then the application would ordinarily be dismissed on the merits or on such grounds as would have the same effect as if it were dismissed on the merits, the opposite party being present. In the present case the suit was dismissed for default at a previous stage and before the opposite party was called upon to reply to the grounds urged by the pauper. It should be mentioned that in deciding the case of *Ali Afzal v. Purna Chandra* (1) the learned Judges relied on the authority of *Ranchod Morar v. Bhanji Edalji* (2). But we find that the Madras High Court, in deciding the case of *Krishna-*

1. *AIR 1924 Cal 1089*—84, I C 708.
2. (1924) 20 Bom 86.

moorthy v. Ramayya (3), held that where an application to sue in forma pauperis is summarily rejected under O. 33, R. 5, (a) Civil P. C., without making any inquiry under R. 6 and a consequent order under R. 7, a second application for the same purpose is not barred under R. 15 of the same order. That was also the opinion of the learned Judges, who decided the case of *Kedar Nath Ray v. Tula Bibi* (4) a decision, which was not referred to by the learned Judges, who decided the case of *Ali Afzal v. Purna Chandra* (1). In the case of *Ma Sein v. Ma Kya Hmyin* (5) the learned Judges also held that, where the first application for leave to sue in forma pauperis was dismissed, as the application was not framed and presented in accordance with the rules and the second application was dismissed for default, neither party appearing, the third application was not barred under O. 33, R. 15, as in the two applications the stage of "refusal" as contemplated under O. 33, R. 15 was not arrived at. In the present case it is only necessary for us to say that we think that the order, not having been passed under R. 7, O. 33, R. 15 had no application and therefore the present application is not barred under that rule.

The portion of the order of the Court below as to costs must however be modified. The costs will be costs in the suit under O. 33, R. 6. With this modification this Rule is discharged. We make no order as to costs in this Rule.

Mitter, J.—I agree with my learned brother that this Rule should be discharged. I rest my decision on the ground that the order in the case rejecting the previous application to sue in forma pauperis has not reached the stage of O. 33, R. 7, Civil P. C., and therefore such an order cannot be regarded as an order refusing to allow the applicant to sue as a pauper within the meaning of O. 33, R. 15 of the Code, so as to entitle the petitioner in the present Rule to contend that the previous order operates as a bar to any subsequent application of the like nature. In support of this Rule Mr. Manmathanath Ray has relied on a decision of this Court, which my learned brother has

already referred to, viz. the case *Ali Afzal v. Purna Chandra* (1). At the first blush that case seems to support his contention. On a close examination of the case, however, it will appear that the learned Judges rested their decision on the ground that there the order was made under O. 33, R. 7, Civil P. C. The order was made after notices had been served on the learned Government Pleader and on the opposite party under O. 33, R. 6. The opposite party was present on the date fixed for inquiry into pauperism and it appears from the record of the case, which we sent for, that the applicant, who prayed to be allowed to sue as a pauper, was absent and his application was dismissed. No costs were allowed to the opposite party. There can be no doubt, therefore that the learned Judges, while referring to the provisions of O. 33, R. 7 of the Code, were of opinion that the previous application operated as a bar, because the previous order was one refusing to allow the applicant to sue as a pauper although his application was dismissed as no evidence was adduced on behalf of the alleged pauper on the date fixed for hearing. It is true that in some portions of the judgment language has been used, which would seem to suggest that a second application would be barred if the previous application was either rejected or refused. In support of that contention the learned Judges were relying on the decision in the case of *Ranchod Morar v. Bezanji Edulji* (2). An examination of this case will show that there also the order, which was said to be a bar to a subsequent application to be allowed to sue as a pauper, was one, which was made under O. 33, R. 7, of the Code, which corresponds to S. 409, Civil P. C. of 1882.

That that is so appears also from a remark made by the learned Judges of the Madras High. Court in the case of *Krishnamoorthy v. Ramayya* (3), where Phillips, J., pointed out that in the case of *Ranchod Morar v. Bezanji Edulji* (2) there had been an inquiry under R. 6, although the Court purported to pass an order under R. 5. From the facts of the present case, which have already been stated by my learned brother, it will appear clear that, although the Court in the first instance made an order fixing 12th of July as the date

3. AIR 1926 Mad 875=96 IC 952=50 Mad 63.

4. (1906) 10 C W N 104n.

5. AIR 1926 Rang 200=93 IC 26=4 Rang. 245.

of the hearing of the pauper application under R. 7, it afterwards modified that order and, as a matter of fact, the stage of R. 7 could not be reached, because no process fees were paid by the applicant to be declared a pauper, who is the opposite party before us. Another case, to which reference has been made, is that of *Atul Chandra Sen v. Peary Mohan Mookerjee* (6), where the learned Judges held that there is no distinction between orders of rejection passed under R. 5 and orders of refusal under R. 7. No authorities were cited by the learned Judges in support of this contention and we do not find that the subsequent authorities on this question would justify this broad proposition laid down by them in that case. For these reasons I agree that the Rule should be discharged.

R.K.

Rule discharged.

6. (1916) 33 I C 812.

A. I. R. 1933 Calcutta 551

PANCKRIDGE AND PATTERSON, JJ.

Jiban Molla—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 179 of 1933, Decided on 12th May 1933.

Criminal P. C. (1898), S. 423—Order for trial of accused by Special Magistrate under Ordinance 1931, S. 30—Retrial ordered under S. 423—Magistrate has jurisdiction until he finishes retrial—Bengal Emergency Powers Ordinance (1931), S. 30.

Having regard to the scheme and purpose of the Bengal Emergency Powers Ordinance 1931, an order for the trial of any person by a Special Magistrate made under S. 30, clothes such Magistrate with jurisdiction to retry the case where an appellate Court directs before the expiration of the Ordinance a retrial by him under Section 423 (1) (f), Criminal P. C., and that the trial cannot be said to be completed until the Magistrate has carried out the directions of the appellate Court and finally disposed of the case.

[P 552 C 1, 2]

Sudhansu Sekhor Mukherjee—for Petitioner.

Khondkar—for the Crown.

Panckridge, J.—The petitioner in this case was arrested in consequence of a search held on 23rd August 1931, in the course of which various explosive substances were discovered. On 4th January 1932, the Local Government by an order in writing made under S. 30, Bengal Emergency Powers Ordinance 1931, directed that he should be tried on charges under the Explosive Substances

Act 1908, by *Manul Abdul Magistrate of the First Class* with the powers of a Special Magistrate under S. 29 of that Ordinance. The Magistrate convicted the petitioner under S. 5, Explosive Substances Act, and sentenced him to undergo rigorous imprisonment for three years. On 30th May 1932, the Sessions Judge set aside the conviction and sentence and directed the retrial of the petitioner. The Magistrate retried the case and on 1st October 1932 again convicted the petitioner under S. 5 and imposed a sentence of two years and six months' rigorous imprisonment. The petitioner again appealed to the Sessions Judge who dismissed his appeal on 15th December 1932. On 20th February 1933, the petitioner obtained this Rule to show cause why his conviction and sentence should not be set aside on the ground that

"after the order of retrial the Magistrate had no jurisdiction to try your petitioner as a Special Magistrate under the Bengal Emergency Powers Ordinances of 1931 and 1932."

It is pointed out that the 1931 Ordinance having been made and promulgated on 1st December 1931, automatically lapsed on 31st May 1932; that is to say, on the day immediately succeeding the day on which the Sessions Judge directed a retrial. To meet this objection to the legality of the subsequent proceedings the Crown relies on S. 4 (1), Bengal Emergency Powers Ordinance 1932, which provides that where before the expiration of the Bengal Emergency Powers Ordinance 1931 an order has been made thereunder for the trial of any person by a Special Magistrate but the trial has not begun, or when at such expiration the trial of any person is proceeding before a Special Magistrate but has not been completed, the offence may be tried or the trial may be completed as the case may be by such Special Magistrate, and such Special Magistrate shall continue to have and to exercise for the purpose of such trial all the powers with which he was invested under the said Ordinance.

The petitioner argues that the provisions of S. 4 (1) cannot apply to the circumstances of this case as they existed at the time of the expiration of the 1931 Ordinance. It cannot be said that the trial had not begun, nor can it be said that though begun it had not been com-

pleted. On the contrary the trial had been begun and had been completed when the Special Magistrate convicted the petitioner for the first time. The petitioner's argument, as we think his counsel was disposed to admit, involves the proposition that the trial and the retrial are distinct and separate proceedings and that the latter can from no point of view be treated as a continuation of the former. If this is correct the expiration of the 1931 Ordinance after the first conviction is not a matter of great importance because the effect of the order of 4th January 1932 was exhausted when the petitioner's trial terminated on his first conviction. Even if the 1931 Ordinance had not expired a fresh order under S. 30 would have been necessary if it was thought desirable that the retrial should be before a Special Magistrate. Counsel for the petitioner rightly points out that where a surety gives a bond that an accused person shall appear for his trial before a Court of Session, there is no obligation to produce him before the Court for his retrial should a retrial be directed. In our opinion however "try" and "trial" have no fixed or universal meaning, but they are words which must be construed with regard to the particular context in which they are used and with regard to the scheme and purpose of the measure concerned.

Thus, though generally speaking a trial and an appeal are different proceedings, a Sessions Judge hearing an appeal against a conviction under S. 210, I. P. C., was held to be "trying" the appellant within the meaning of S. 487, Criminal P. O. : *Madhab Chandra v. Novoodep Chandra* (1). In *Emperor v. Nirmul Kanta Roy* (2), Stephen, J., held that where an accused was tried by a second jury under S. 306, Criminal P. O., he was not "tried again" within the meaning of S. 403, Criminal P. O. Having regard to the scheme and purpose of the Bengal Emergency Powers Ordinance 1931 we consider that an order for the trial of any person by a Special Magistrate made under S. 30 clothes such Magistrate with jurisdiction to retry the case where an appellate Court directs a retrial by him under S. 423 (1) (f), Cri-

minal P. O., and that the trial cannot be said to be completed until the Magistrate has carried out the directions of the appellate Court and finally disposed of the case. This being so we are of opinion that the petitioner's objection to the jurisdiction of the Special Magistrate fails and we discharge the Rule.

Patterson, J.—I agree.

V.S.

Rule discharged.

A. I. R. 1933 Calcutta 552

M. C. GHOSE, J.

Makhan Lal Pal — Accused — Petitioner.

v.

Sakhi—Complainant—Opposite Party.
Criminal Revn. No. 977 of 1932, Decided on 8th December 1932.

(a) Criminal P. C. (1898), S. 200 — Complainant should be examined in full on first day—But Magistrate's negligence to do so is not illegal.

A Magistrate certainly should examine the complainant in full on the first day. But his negligence to do so does not amount to an irregularity which vitiates the trial. And where the Magistrate finding that the previous examination of the complainant under S. 200 is sketchy proceeds again to examine her, the procedure of the Magistrate although open to criticism is not illegal nor is there any illegality in issuing the process against the accused after such examination. [P 553 C 1]

(b) Criminal P. C. (1898), S. 202 — Three accused proceeded against — Two compromising—Process against third can be legally issued.

Where out of the three accused two compromise the case under S. 345, but the third chooses to stand trial, there is nothing illegal nor is it ultra vires of the Magistrate if he issues process against the third: *A I R 1926 Cal 795, Dist.*

[P 553 C 2]

Surajit Chandra Lahiri — for Petitioner.

Sudhangsu Shekhar Mukerji—for Opposite Party.

Judgment. — In this case one Khuki Sundari Dasya made a written petition of complaint against three persons: (1) Jaladhar Pal, (2) Profulla Mohan Pal and (3) Sailendra Mohan Pal alias Makhan Lal Pal, stating that she was a widow with two infant children and that accused 1 and 2 were father and son and they were under the influence of accused 3; that the three men for some time had been conspiring to deprive her of her property and to turn her out of her house and that in pursuance of that conspiracy on 7th August the accused men entered into her house and turned her out. The Magistrate

1. (1933) 18 Cal 121.

2. AIR 1914 Cal 901=24 I C 340=15 Cr L J

480=41 Cal 1072.

who received the complaint examined the complainant under S. 200, Criminal P. C., on the same day; but apparently the oral examination was sketchy. Afterwards on 1st October 1931 he again examined the complainant further with reference to her written allegations against Makhan Lal. The first two accused men compromised the case with the complainant and they thereupon were acquitted by the Magistrate under S. 345, Criminal P. C. But the Magistrate proceeded to try accused 3, Makhan Lal, who has been convicted under S. 447, I. P. C., and sentenced to pay a fine of Rs. 100. This Rule was issued on two grounds, namely: (1) that the whole trial has been vitiated by reason of the fact that the order of issuing process against the petitioner is illegal and ultra vires and (2) that in view of the fact that a piecemeal examination of the complainant is not contemplated by S. 200, Criminal P. C., or by any other provisions of the law, the trying Magistrate acted without jurisdiction in proceeding to examine the complainant afresh on 1st October 1931 and in issuing processes against the petitioner on the basis of that examination.

Upon hearing the learned advocates and upon a perusal of the record it appears to me that there is no force in either of the two grounds. The written petition of the complainant was complete in itself. It was the fault of the Magistrate that he did not on the first date completely examine her orally. The examination was sketchy. But on a later date when the Magistrate found the defect in the oral examination he examined her once again. For this no blame can be attached to the complainant. It is not that she made out a new case on the latter date. She had made out the case in her written petition of complaint. The Magistrate certainly should have examined the complainant in full on the first day. But his negligence to do so does not amount to an irregularity which vitiates the trial. I am of opinion that the procedure of the Magistrate although open to criticism was not illegal nor was there any illegality in issuing the process against the present petitioner who was accused 3. The learned advocate has placed before the Court the decision in the

case of *Subal Chandra v. Akadulla* (1). But the facts of that case are entirely different from the present case. There a certain case was made out against two persons. One of them was put upon trial and upon a consideration of the whole evidence he was acquitted. Thereafter a process was issued upon accused 2 against whom there was the same allegation and the same witnesses were brought forward to support the allegation. In these circumstances this Court set aside the order issuing process against accused 2. In the present case the first two accused men were not put on trial at all, they having compromised the matter with the complainant presumably upon paying her adequate compensation. Apparently accused 3 did not think it fit to compromise the case but chose to stand the trial. He thus takes the consequence.

The fine of Rs. 100 would appear to be excessive, but the learned advocate for the opposite party points out that the petitioner is a person of influence and his conduct towards the widow was cowardly. In the circumstances the fine does not appear to be excessive. The Rule is accordingly discharged.

V.S. *Rule discharged.*

1. A I R 1926 Cal 795=95 I O 888 = 27 Cr L J 788=53 Cal 606.

A. I. R. 1933 Calcutta 553

M. C. GHOSE, J.

Kanai Das Mohanta—Accused—Petitioner.

v.

Narayanganj Municipality—Complainant—Opposite Party.

Criminal Revn. No. 840 of 1932, Decided on 13th December 1932.

Bengal Municipal Act (3 of 1884), S. 6, Cl. 11—Mahant is entitled to benefit of section.

A Mahant is in fact a manager on behalf of the idol and as such he is entitled to the benefit of the provisions of S. 6, Cl. 11. The Mahant's capacity to carry out the orders of the Municipality is limited by the funds obtained by him from the properties of the Akhra. If the said funds be not sufficient, it would not be just or proper to sentence the Mahant to a fine.

[P 554 O 1, 2]

Surajit Chandra Lahiri and *Suresh Chandra Talukdar*—for Petitioner.

B. M. Sen and *Phani Bhuyan Chakrabarty*—for the Crown.

Order.—In this case Kanai Das Mahanta who is a Mahant of Banku Behari Akhra

within Narayanganj Municipality was called upon under S. 200, Bengal Municipal Act, to fill up or cleanse an insanitary tank belonging to the Akhra. On receipt of the requisition he filed a representation to the Municipality asking for six months' time to carry out the requisition. Thereupon the present prosecution was instituted. The trial Magistrate sentenced him to a fine of Rs. 100. On appeal the Additional District Magistrate has reduced the fine to Rs. 30 and in addition sentenced him to a daily fine of Rs. 2 until the requisition of the Municipal Chairman is complied with. The Rule was issued on three grounds. The first ground is that in view of the provisions of S. 6, Cl. 11, Bengal Municipal Act, which lay down that in the absence of sufficient funds in the hands of the Manager, agent or trustee, as contemplated in the said section, no fine could be imposed upon him for his omission to comply with any requisition of the Municipality the prosecution cannot be maintained. The learned counsel appearing for the Crown has urged that the Mahanta is in effect the owner of the Akhra lands. On the other side it is strenuously urged that the Mahanta of the Akhra cannot be considered to be a full owner of the lands belonging to the Akhra. It is said that he may not come exactly under the definition of a manager, agent or a trustee, but he is certainly less than an owner. He is in fact a manager on behalf of the idol and as such he is entitled to the benefit of the provisions of S. 6, Cl. 11. It appears that the Mahant is entitled to the benefits of the provisions of that section.

The second ground taken is that the learned Court of appeal below was wrong in assuming that the filing of the petition for time to re-excavate amounted to an admission of ownership in respect of the tank and also that of existence of funds by the petitioner. As to this the finding of the Court of appeal below is clear that the petitioner is the Mahant of the Akhra and that the insanitary tank is a part of the Akhra lands. The learned appellate Court below found that the Mahant must have had the requisite funds. It is urged that the grounds on which the finding was based are rather weak. The third ground taken is that the imposition of a daily fine is clearly

an enhancement of the sentence which the appellate Court was not entitled to direct. The learned counsel for the Crown has urged that the intention is that the daily fine should be imposed for a period of 30 days and as such the total fine would be than less the fine imposed by the trial Court. But on reading the judgment of the lower appellate Court it does not appear that the said Court has limited the fine to a period of one month. In the circumstances of the case it is inequitable to impose a daily fine. It is apparent that the Mahant's capacity to carry out the orders of the Municipality is limited by the funds obtained by him from the properties of the Akhra. If the said funds be not sufficient to fill up the tank it would not be just or proper to sentence the Mahant to a fine. On the other hand although the petitioner pleaded poverty he did not show that he took the urgent steps necessary to cleanse the tank so as to remove the insanitary condition. In this view the fine of Rs. 30 appears to be appropriate. The daily fine imposed by the lower appellate Court is set aside. With this modification the Rule is discharged.

K.S.

*Order modified.***A. I. R. 1933 Calcutta 554**

MUKERJI AND MALLIK, JJ.

Kalidas Das—Defendant—Appellant.

v.

Satyesh Chandra Sarkar and others—Plaintiffs—Respondents.

Appeal No. 167 of 1931, Decided on 27th April 1933, against original decree of Sub-Judge, Birbhum, D/- 26-4-1930.

(a) Bengal Land Revenue Sales Act (11 of 1859), S. 37—Estate sold for arrears of revenue recorded in separate number—Mere fact of portion of estate being joint with other estates does not alter its character as entire estate.

When an estate sold for arrears of revenue is recorded in a separate number in the Collector's rent-roll with a separate revenue assessed upon it, and the specification in the sale-certificate granted under S. 28 in the form prescribed by the Act shows that the estate sold is an entire estate the mere fact of a portion of the lands of the estate being joint with those of certain other estates cannot stand in the way of its being an entire estate within the meaning of S. 37: 2 C. W. N. 229 and 27 Cal. 290, Ref. [P 557 C 2]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 3—Sale held on failure to pay arrears within date specified in S. 3 is proper. A sale held for failure to pay arrears of revenue by the sunset of the date specified in S. 3 is not

without jurisdiction and hence is valid: *A. I. R.* 1931 P. C. 57; *A. I. R.* 1932 P. C. 61 and *A. I. R.* 1932 Cal. 153, *Ref.* [P 557 C 2; P 558 C 1]

(c) *Mesne Profits* — Plaintiff precluded from obtaining khas possession—Decree for mesne profits can be allowed—Civil P. C. (1908), O. 20, R. 12.

Though ordinarily a decree for mesne profits can only follow a decree for possession and when the plaintiff fails to obtain a decree for possession, a claim for mesne profits should not be allowed; still when the plaintiff is precluded from obtaining khas possession, he cannot be deprived of his right to mesne profits till the date to which he is entitled to possession. [P 558 C 1]

(d) *Mesne Profits*—Claim for mesne profits against trespassers—Nature of decree to be passed indicated—Civil P. C. (1908), O. 20, R. 12.

In the case of a claim for mesne profits two courses are left open to the Court: A decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution; or, the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed against the respective trespassers in plaintiff's favour.

[P 558 C 2]

Amarendra Nath Bose, Bijan Kumar Mukerji and Hari Prasanna Mukherjee—for Appellants.

S. C. Basak, Rupendra Coomar Mitter, Gopendra Nath Das and Bhutnath Chatterjee—for Respondents.

Judgment.—This appeal has arisen out of a suit which was instituted by the plaintiffs for recovery of possession of a patni taluq on a declaration of the plaintiff's title thereto and after annulment of the encumbrances, if any, claimed by the defendants, and also for mesne profits. A decree having been passed in plaintiff's favour defendant 2 has preferred this appeal.

The facts, according to the plaintiffs, are the following: Touzi No. 148 of the Birbhum Collectorate which comprises lot Gomai was sold for arrears of revenue on 27th March 1924, and was purchased by defendant 17 in the benami of defendant 16. On 7th December 1924, defendant 16 took possession of the mehal through the Collectorate. Thereafter, on 5th January 1926, defendant 16 executed a deed of release in favour of the defendant 17. On 30th January 1926 (=17th Magh 1331) defendant 17 settled the mehal in patni with the plaintiffs with power to annul encumbrances, if any. The zamindari originally belonged to the deity Radha-

raman Jieu Thakur and there was a patni under it of which the holder at the time of the sale was defendant 1. Defendants 2 to 12 are darpatnidars of several interests under defendant 1. Of these defendant 2, who is the appellant, has 13 as odd darpatni interest in five of the villages, and eight annas darpatni interest in the sixth one—lot Gomai consisting of six villages in all. Defendants 13 to 15 are mortgagees from some of the darpatnidars. The contesting defendants were defendants 1 and 2, who took various defences. Of these such as are of any importance now will be referred to hereafter. The suit was instituted on 27th January 1926. During the pendency of the suit the patni of the plaintiffs defaulted in the payment of its rents and in consequence thereof it was sold under the Patni Regulation on 1st Jaistha 1335 and purchased by defendant 17.

The Subordinate Judge declared the plaintiff's title to the patni up to 1st Jaistha 1335, the date on which it was sold as aforesaid, and annulled the incumbrances of defendants 2 to 12. He held that defendant 1 is only a benamidar for defendant 3. He held further that the plaintiffs were not entitled to get possession as they had no subsisting interest at the date of the decision, the patni having been sold up as aforesaid on 1st Jaistha 1335. He held however that the plaintiffs were entitled to mesne profits from defendant 3, in respect of the period of one year from 30th January 1925 (=17th Magh 1331, date of the creation of the plaintiff's patni) up to 27th January 1926 (date of this suit), such mesne profits to be the amount which defendant 3 as patnidar had to pay to the zamindar; and that for a period of two years and three months, i. e., from the date of suit up to 1st Jaistha 1335 (date of the sale of the plaintiff's patni) the plaintiffs would get mesne profits against defendants 2 to 12, jointly, on the footing of their being trespassers, such mesne profits being what the defendants themselves could have realized from the tenants of the mehal.

The appellant's first contention is that the purchase which defendant 16 made was not on behalf of defendant 17, but was a purchase made for the benefit of the defaulting proprietors. It appears,

that the appeals which defendant 1 and defendant 2 respectively filed before the Commissioner for setting aside the revenue-sale, defendant 1 alleged that the sale had been brought about by the proprietors in collusion with the darpatnidars, and on the other hand the allegation made by defendant 2 was that the patnidar who according to the terms of his lease was liable to pay the Government revenue wilfully defaulted and managed to bring about the sale in collusion with the proprietors (vide Ex. Z). It appears that about the time of the default defendant 2 himself was in heavy arrears, not having paid the rents of the darpatni for the years 1926 to 1929 B. S. and a suit for the said rents amounting to over Rs. 5,000 was pending against him (vide Ex. M). It also appears that defendant 1, about the said time, had not paid the patni rent for the three quarters ending with December 1923 or January 1924 (vide Ex. 6). There is no indication of any collusion between the proprietors either with the patnidar or with the darpatnidars in the matter of the bringing about of the sale, and the sale does not appear to be anything else than an ordinary incident brought about by the failure on the part of the patnidar, who had undertaken the liability to put in the revenue and omitted to do so, and such omission again having been due to the heavy arrears for which some of the darpatnidars, including defendant 2 himself, were responsible and for which a decree was subsequently passed against him. The oral evidence which the contesting defendants have adduced for the purpose of establishing that defendant 16 was the benamidar of the proprietors and not of defendant 17 consists of the testimony of the son of defendant 2.

Defendant 2 has not examined himself, though he was present in Court at the time of the trial. His son, who is a pleader, has said that defendant 16 was bidding at the sale at the dictation of the proprietors, Dharanidhar Banerji and others and that Dharani paid the consideration money to his Ammukhtear Sarat Chandra Mookerji who put it in. He also deposed that defendant 16 was the Head Master of a School which belonged to the said proprietors, and of which Dharani was the Secretary. We have examined the evidence of this wit-

ness with care, but we regret we cannot come to any other conclusion as regards his evidence than what the Subordinate Judge has done. The learned Judge has given very good reasons for his view that this evidence is not reliable.

An attempt has also been made on behalf of the contesting defendants to establish that it was with the money belonging to the proprietors that the purchase was made by defendant 16, by showing that on 27th March 1924, the date of the sale, the proprietors borrowed a sum of Rs. 6,001, from the father of defendant 17 upon a handnote (Ex. 1), it being said that from out of this money the consideration money as well as the revenue for the next instalment that had already fallen due were subsequently paid. This circumstance has also been sought to be reinforced by the fact that in 1927 the father of defendant 17 instituted a suit (Ex. D) upon this handnote but eventually allowed the plaint to be rejected for default of payment of deficit court-fees. What inference the appellant exactly desires to draw from this last mentioned fact is not very clear, so long as it is not the case that the loan was fictitious. But it is said that this fact shows that some sort of an arrangement must have been come to between the parties, because it is not reasonable to suppose that a lender of such a large sum of money would allow the plaint to be rejected, unless he received satisfaction in some way or other. Now, on an examination of the materials on the record it seems to us clear that there has been no real attempt made by the appellant to establish that the money was borrowed by the proprietors for the purpose of purchasing this property at the sale or that any part of the money went for that purpose. The proprietors appear to have borrowed large sums of money from the father of defendant 17 on other bonds and hand-notes and stood indebted to him for those loans: vide para. 7 of the plaint Ex. D. The fact that defendant 16 is a teacher in the school belonging to the proprietors does not go very far. Nor is anything improbable in the explanation that Sarat Chandra Mookerjee, who happens to be Ammukhtear of the proprietors was engaged by defendant 16 to do the work of putting in the money on his

behalf. Defendant 17 examined himself as a witness and very clearly stated in his evidence that he was the real purchaser and that defendant 16 was his benamidar. The time for making all these suggestions was when he was in the witness box, but it is noteworthy that not one of these facts and circumstances was put to him in his cross-examination. The conclusion we have formed is that the appellant was apprehensive that the facts and circumstances upon which he now relies would have been satisfactorily explained if they were put straight to defendant 17 and so he did not venture to ask him anything about them. The brother of defendant 16, who is joint with the latter, was also examined as a witness on behalf of defendant 17. He has said that he and defendant 16 are debtors of defendant 17, a fact which would make it probable that defendant 16 would be used by defendant 17 as a benamidar. To him also nothing was suggested in cross-examination. The subsequent conduct of the respective parties to which the Subordinate Judge has referred in detail, namely, the taking of possession by defendant 16, the execution of the deed of release by him in favour of defendant 17, the registration of the name of defendant 17, and the payment of revenue by defendant 17 since then without any attempt being made by the proprietors for getting possession of the property or for payment of revenue, also support the conclusion that defendant 16 was the benamidar for defendant 17 and not for the proprietors.

The next contention urged on behalf of the appellant is that the towzi which was sole, though it bore a separate number and a separate amount of Government revenue, was not an entire estate within the meaning of S. 37, Act 11 of 1859. It has been urged that the portion of an estate for which a separate account is opened under Ss. 10 and 11 Act 11 of 1859 and the portion from which it is separated are equally "shares" within the meaning of S. 10 of the Act and are both liable to all the incidents of a "share" and neither can be considered an entire estate: *Monohur Mukerji v. Huro Mohun Mukerji* (1). By reference to the documents bearing on the point (Ex. U and Ex. L series) the

previous history of the lands has been placed before us, and from certain other documentary evidence (Ex. J series, Ex. S series and Ex. Q) and also oral evidence it has been shown that there has been no partition of the lands under the Estates Partition Act. And upon this it has been argued that unless there has been a partition of the lands themselves under the provisions of that Act, and so long as the lands themselves remain joint, the creation of separate towzis with separate revenues does not make the towzis entire estates but only shares of estate. As authority for this contention reference has been made to the case of *Koowar Singh v. Gour Sundar* (2). The case referred to, in our opinion, lays down no such proposition; it only states what the effect of a partition by the Collector made under that Act is. The Estates Partition Act came into existence in 1876, while the estate now represented by towzi No. 148 originated so far back as in 1799. It has been held that when an estate sold for arrears of revenue is recorded in a separate number in the Collector's rent-roll with a separate revenue assessed upon it, and the specification in the sale certificate granted under S. 28, Act 11 of 1859 in the form prescribed by the Act shows that the estate sold was an entire estate the mere fact of a portion of the lands of the estate being joint with those of certain other estates cannot stand in the way of its being an entire estate within the meaning of S. 37 of the Act: *Kamal Kumari v. Kiran Chandra* (3) and *Preo Nath Mitter v. Kiran Chandra Roy* (4). The sale certificate (Ex. C) in this case and the Register Ex. 2 (2) sufficiently show that the towzi is an entire estate. It also appears that the Collector treated the estate as an entire estate and sold it as such: vide *Robukari*: Ex. Y.

It was next argued on the authority of the decision of the Judicial Committee in the case of *Mt. Saraswati v. Surja Narain* (5) that the sale held was without jurisdiction. The contention, in our opinion, is not tenable, for the simple reason that in this case it is

2. (1897) 24 Cal 387.

3. (1898) 2 C W N 229.

4. (1900) 27 Cal 290.

5. A I R 1931 P C 57 = 130 I C 378 = 10 Pat 496 (P O).

abundantly clear that 12th January 1924, failure to put in the arrears by the sunset of which date brought about the sale, was the date specified in S. 3 and not S. 2 of the Act. This decision of the Judicial Committee has been explained by a later decision of their Lordships in *Krishna Chandra v. Pabna Dhanabandar Co.* (6) and also by the decision of this Court in the case of *Radha Gobinda Deb v. Girija Prasanna Mookerji* (7).

The next contention of the appellant relates to the question of the plaintiffs' right to annul the under-tenure. We think the words of the plaintiffs' patni lease leave no room for this contention. It is quite true that by reason of the fact that the plaintiffs' patni was sold up subsequently to the institution of the suit, the plaintiffs at the date of the decision of the Court below were not entitled to obtain khas possession. But defendant 17 has not said anything against the plaintiff's right to annul the under-tenures and such right was exercised by the plaintiffs at a time when they were fully competent to do so.

The last contention relates to the question of mesne profits. As regards this matter, it has been argued in the first instance that a decree for mesne profits can only follow a decree for possession, and that when the plaintiffs have failed to obtain a decree for possession their claim for mesne profits should not have been allowed. The proposition, which the appellant has thus propounded and which under ordinary circumstances is perfectly sound, cannot be regarded to be applicable to the present case in its special circumstances. It is only because of the sale that took place during the pendency of the suit that the plaintiffs are precluded from obtaining khas possession. This cannot deprive the plaintiffs of their right to mesne profits up to the date up to which they were entitled to possession. So far as the principles as regards calculation of mesne profits are concerned, it seems to us that the learned Judge was right in making defendant 3 alone liable for the period up to the date of

suit on the footing of his being the patnidar. As regards the period subsequent to the institution of the suit he has made defendants 2 to 12 liable jointly on the footing that they were trespassers since that date. As has been pointed out in the case of *Basanta Kumar v. Ram Sundar* (8) in the case of a claim for mesne profits two courses are left open to the Court. A decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution; or, the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed against the respective trespassers in plaintiffs' favour.

This, in our opinion, was a case in which the latter course should, if possible, have been adopted. It appears however that the appellant never asked the Court below to proceed on such lines, and indeed furnished no materials nor adduced any evidence to enable the learned Judge to apportion the mesne profits amongst defendants 2 to 12 inter se. The learned Judge seems to have been perfectly willing to help the appellant in that way, as would appear from the following observations of his in his judgment:

"The liability of the other defendants cannot be apportioned in this suit as the defendants did not adduce any evidence to show whatsum each of them realized after institution of the suit till 1st Jaistha 1356 B. S."

On 19th April 1927 defendant 1 instituted a suit, being R. S. No. 11 of 1927, for the rents of the derputni for the years 1330 to 1333 against defendant 2, that is to say the appellant, and his co-sharer. The suit was decreed on 24th July 1928, and it appears that the decretal dues were realised on 1st August 1929. The result of this realisation has been that defendant 1 has received from the appellant and his co-sharer a portion of the amount for which defendants 2 to 12 stand liable on account of mesne profits under the decree which the Subordinate Judge has made in this case, namely mesne profits for the period

C. A. 1 R 1922 P C 61 = 136 I O 410 = 59 I A 68 = 59 Cal 1094 (P O).

T. A. 1 R 1922 Cal 158 = 136 I C 129 = 59 Cal 196.

S. A. 1 R 1922 Cal 600 = 136 I O 692 = 59 Cal 859.

commencing from the date of institution of this suit, (i. e. 27th January 1926) up to the end of Chaitra 1333. We appreciate that there is some amount of hardship on the appellant for what has happened, but for this we do not see that he is entitled to any relief as against the plaintiffs. It was for the appellant, if he wanted to have any relief, to take suitable steps in the present suit by applying for apportionment and placing proper materials before the Court for that purpose.

The result is that, in our judgment, this appeal fails and should be dismissed with costs to the plaintiff-respondents hearing-fee being assessed at 10 gold mohurs.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 559**

GUHA AND M. C. GHOSE, JJ.

Debendra Narain Roy—Petitioner.

v.

Jogendra Narain Deb and others — Opposite Party.

Civil Revn. Nos. 141 and 142 of 1932, Decided on 12th July 1932, against order of Sub-Judge, 1st Court, Alipore, D/-30th January 1932.

(a) Civil P. C. (1908), O. 14, R. 2 and O. 15, R. 3 — Application made after date fixed for first hearing for trial of some of issues as issues of law without taking evidence—O. 14, R. 2 or O. 15, R. 3 has no application.

Order 14, R. 2, refers to the stage of settlement of issue, and O. 15, R. 3 contains provisions similar to those contained in O. 14, R. 2 for disposal of a suit, at the first hearing. Hence these provisions have no application to a case, where an application is made after the date fixed for first hearing, for the trial of some of the issues raised in a suit as issues of law, without taking evidence. The question arising for consideration must therefore be dealt with quite irrespective of the provisions of the Code of Civil Procedure. [P 560 C 1]

(b) Practice—Piecemeal trial of suit.

Though the trial of suit piecemeal has been condemned on the ground of inconvenience and costs involved in such procedure, it is impossible to lay down a general rule in this behalf: it depends on the facts and circumstances of each particular case. [P 560 C 1]

(c) Civil P. C. (1908), S. 115—High Court has power to pass such order as would meet the ends of justice in cases before it.

The High Court can in exercise of the revisional jurisdiction and in the exercise of the power of superintendence vested in it, pass such order as is called for by the peculiar facts and circumstances of the case in order to meet the ends of justice. [P 560 C 2]

Pugh and Ambica Pada Choudhury — for Petitioner.

N. N. Sircar, Rabindra Nath Choudhury, Basak, Kanai Dhan Dutt, Bijan Bihari Das Gupta, Panchanan Ghosal, Pran Dhan Das and Parash Chandra Sen — for Opposite Parties.

Guha, J. — These rules are directed against an order passed by the Subordinate Judge, First Court, 24-Parganas, on 30th January, 1932, in Title Suit Nos. 84 and 164 of 1930, holding that the additional issues 14 to 20 raised in suit No. 84, and the additional issue raised in Suit No. 164 which is in the same terms as issue 15 in Suit No. 84, described as "issues of law" may be tried first, and also that the suits "may be disposed of on the issues of law only."

The history of the litigation has been set out in very great detail in the application to this Court on which these rules were granted, as also in the affidavits filed by the parties in this Court. The suits out of which these rules have arisen relate to the title of the petitioner as claimed by him to the Bijni Raj in Assam, and to a certain item of property belonging to the Raj which is in Bengal. In view of the passing of an enactment known as the Bijni Succession Act, 1931, (Assam Act 2 of 1931), which received the assent of the Governor of Assam on 27th March 1931, and of the Governor-General of India, on 9th May 1931; and was published in the Assam Gazette on 20th May 1931, additional written statements were filed in the suits and additional issues to which reference has been made above were raised, at the instance of the parties concerned. The Court was then asked to take up these issues for decision as preliminary issues, and the application in this behalf was opposed by the petitioner in this Court, as also by Purendra Narain Deb and Surendra Narain Deb, plaintiffs 1 and 2 in Suit No. 164 of 1930. The objection raised in this behalf has been overruled primarily on the ground that R. 2, O. 14, and R. 3, of O. 15, Civil P. C., gave power to the trial Court to hold piecemeal trial, and that power should be exercised in this case. It has to be noticed that O. 14, R. 2 refers to the stage of settlement of issue, and O. 15, R. 3 contains provisions similar to those contained in O. 14, R. 2 for disposal of a suit at the first hearing.

These provisions appear to have no application to a case like the one before us, where there was the application made after the date fixed for first hearing, for the trial of some of the issues raised in a suit as issues of law, without taking evidence. The question arising for consideration must therefore be dealt with quite irrespective of the provisions of the Code of Civil Procedure to which reference has been made above.

The trial of a suit piecemeal has sometimes been condemned by their Lordships of the Judicial Committee of the Privy Council, on the ground of inconvenience and costs involved in such procedure, on the facts and circumstances of the particular cases before them; but it is impossible to lay down a general rule in this behalf. In the case before us regard being had to the history of the litigation and in view of the line of defence taken after the Bijni Succession Act came into operation, it could not be successfully contended that the trial Court was not to be permitted to exercise its discretion in the matter of procedure to be followed in the trial of issues raised by the parties. It seems to us however that it would not be right for the trial Court to treat the additional issues raised in the suits as issues of law in the sense that they are pure questions of law, as distinguished from mixed questions of fact and law; nor was the Court below right in observing that the suits "may be disposed of" on the issues of law only if the observation indicate that the other issues raised in the suit could be treated as non-existent.

In our judgment, the order of the Court below should be varied; and we direct the Subordinate Judge to take up the additional issues 14 to 20 in Suit No. 84 and the additional issues raised in Suit No. 164, for trial. The parties are to be called upon to adduce evidence bearing upon those issues, if the Subordinate Judge considers that evidence is necessary for the determination of those issues. In the event of these issues being decided against the plaintiffs, the suit will be dismissed; on the other hand on their being decided in favour of the plaintiffs in the suit, the trial Court will take up the issues raised in the suits before the additional issues were framed, and proceed to deal with them and dispose of the suits in accordance

with law. We make this order in the exercise of our revisional jurisdiction and in the exercise of the power of superintendence vested in this Court, as we entertain no doubt that such an order is called for, in order to meet the ends of justice in the cases before this Court. We make no order as to costs in these rules. Let the records be sent down as soon as possible.

M. C. Ghose, J.—I agree.

K.S.

Order varied.

A. I. R. 1933 Calcutta 560

C. C. GHOSE, AG. C. J. AND

S. K. GHOSE, J.

Asiruddin Mondal—Appellant.

v.

Latifannessa Bibi and others—Respondents.

Appeal No. 394 of 1931, Decided on 19th May 1933, from original order of First Court Sub-Judge, Pabna, D/- 4th July 1931.

Civil P. C. (1908), O. 20, R. 12 — Final decree for delivery of possession in partition suit—Subsequent decree for mesne profits in same suit—Execution of decree for possession—Fresh notice for execution of decree for mesne profits within a week after disposal of execution of decree for possession is not necessary—Civil P. C. (1908), O. 21, R. 22 (2).

In a suit for partition a final decree for delivery of possession of property was passed and there was further direction for inquiry into the mesne profits. These were enquired into and finally there was a decree for mesne profits. The decree for possession was put into execution and within a week after its disposal, execution of the decree for mesne profits was started:

Held: that both the decrees were passed in the same suit having regard to the provisions of O. 20, R. 12 and that no fresh notice was necessary.

Held further: that by sub-R. 2, R. 22, of O. 21 the Court is not bound to issue notice if it considers that the issue of such notice would cause unreasonable delay. [P 560 C 1]

Dhirendra Lal Kastgir and Sudhir K. Kastgir—for Appellant.

Radhabinod Pal and Jitendra Mohan Banerji—for Respondents.

Judgment.—This is an appeal by the judgment-debtor in an execution proceeding. The only point is whether the execution should fail for want of notice under O. 21, R. 22, Civil P. C. It appears that there was a suit for partition in which a final decree for delivery of possession of property was made on 18th December 1924, and there was a further direction for inquiry into mesne profits. These were enquired into and

finally there was a decree for mesne profits on 31st January 1928. The decree for possession was put into execution in Execution Case No. 55 of 1929. Within a week after the disposal of that execution case the present execution case for mesne profits was started. The point urged in this appeal is that as the decree for possession of the property was separate from the decree for mesne profits there should have been a fresh issue of notice under O. 21, R. 22. We do not think that this point can be sustained.

The decree for delivery of possession of property as also the decree for mesne profits were passed in the same suit having regard to the provisions of O. 20, R. 12, Civil P.C. The first final decree, which was made on 18th December 1924, gave direction for enquiring into the mesne profits and this was necessary because the amount of the decree had to be enquired into for the purpose of calculation. When this inquiry was finished the result was embodied in the decree for mesne profits; but it does not follow that there were two separate decrees for the purpose of notice under R. 22, O. 21. Moreover the point has really no substance in this appeal, because execution was still proceeding and the judgment-debtor had notice and he appeared and urged certain objections as to the merits of the claim and these have been disposed of by the executing Court. Moreover by sub-R. (2), R. 22 the Court is not bound to issue notice, if it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. In the present case the executing Court has held that as the present execution was started within a week after the disposal of Execution Case No. 55 of 1929 no fresh notice was necessary. In these circumstances we think that there is no merit in this appeal. The appeal is therefore dismissed with costs; hearing fee five gold mohurs.

K.S.

Appeal dismissed.

* A I. R. 1933 Calcutta 561

MITTER AND M. C. GHOSE, JJ.

Mahendrakumar Baishya Shaha—Appellant.*Deeneshchandra Ray Chaudhuri*—Respondent.

Appeal No. 167 of 1932, Decided on 4th January 1933, from appellate order of Second Sub-Judge, 24-Parganas, D/27th February 1932.

* Provincial Insolvency Act (1920), S. 52.—Executing Court should not confirm sale if it is apprised of insolvency—Civil P. C. (1908), O. 21, R. 92.

When a Court is apprised of the pendency of an application for insolvency in another Court and of the further fact that such application had been admitted, it should stay its hands so far as the execution of the decree by the creditors of the insolvent is concerned. The executing Court would not therefore be justified in holding the sale or in confirming it, if it is apprised of the pendency of the insolvency application, e. g. by an application by an Interim Receiver in Insolvency: *A I R 1925 Lah 168, Diss. from; A I R 1932 Mad 95; A I R 1928 Bom 177 and 84 I C 829, Rel. on.* [P 662 C 1, P 668 C 1]

Gunendrakrishna Ghosh—for Appellant.*Pyarilal Chatterji and Krishnalal Banerji*—for Respondent.

Mitter, J.—This is an appeal against an order of the Subordinate Judge, Second Court, of 24 Parganas, and arises out of an application made by the Official Receiver concerning an insolvency proceeding, in which the receiver asked the Munsif of Alipore, who dealt with the matter in the first instance, that a certain auction sale, which was held at the instance of one of the decree-holders should not be confirmed. The Munsif was of opinion that the sale was not illegal and should be confirmed. An appeal was taken to the Court of the Subordinate Judge of 24-Parganas. He set aside the order of the Munsif and he was of opinion that the order of the Munsif directing the sale and confirming it should be set aside. Against this order the present appeal has been brought, and it is contended by the decree-holder, who is himself the purchaser, that the order of the Subordinate Judge is not justified by the provisions of S. 52, Provincial Insolvency Act. The respondent has taken a preliminary objection to the hearing of this appeal, and he contends that no second appeal lies to this Court. It is not necessary however to decide this question, seeing

that we are of opinion that the appeal should fail on the merits. It appears that, in the course of the execution proceedings, a receiver was appointed by the insolvency Court after the application for insolvency at the instance of another creditor had been admitted. The receiver was an ad interim receiver. An information of the fact that an insolvency petition pending before the District Judge had been admitted was conveyed to the Munsif before the sale in execution of the decree took place. It is contended on behalf of the appellants that this sale was a valid sale as there was no application by the Official Receiver asking that if the property had been in the possession of the Court, it was to be delivered to the receiver within the meaning of S. 52. It is contended that the mere fact that the executing Court had notice of the pendency of the insolvency application was not sufficient to justify the executing Court in staying the sale, and great stress has been laid on the words "the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the receiver."

It is admitted in this case that there was no application made by the ad interim receiver. We are of opinion that, even in such a case, looking to the scheme of the provisions of the Insolvency Act, the executing Court would not be justified in holding the sale if it is apprised of the pendency of the insolvency application. Reliance has been placed in support of the contrary view on the decision of the Lahore High Court in the case of *Ralla Ram v. Ram Labhaya Mal* (1). That was a decision of a single Judge. That decision no doubt supports the contention of the appellants. That decision however has been dissented from in the decisions of the other High Courts in India. Reference may be made in this connexion to a decision of the Madras High Court in the case of *Sivasami Odayar v. C. R. Subramania Aiyar* (2), where it has been held that an interim receiver is entitled to apply under S. 52, Provincial Insolvency Act, S. 52, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage,

that is to say, after an insolvency petition has been admitted. The same view has also been taken in the case of *Anantharama Iyer v. Kuttimalu Kovilamma* (3) and also in another case, namely the case of *Mahasukh Jhaverdas v. Valibhai Fatubhai* (4). The Lahore case, on which reliance has been placed by the appellants, has been commented upon by Sir Dinshaw Fardunji Mulla in the Tagore Law Lectures on the "Law of Insolvency in British India." It would be useful to quote his comments in this behalf:

"Two conditions must be satisfied before an order can be made by the Court executing the decree for delivery of the attached property to the Official Assignee or receiver. The first is that notice must be given to the executing Court of the order of adjudication or of the admission of the insolvency petition, as the case may be, and the second is that there must be an application to the executing Court for delivery of the property to the Official Assignee or Receiver. If such notice is given and such application is made, the executing Court is bound to direct the property to be delivered to the Official Assignee or Receiver. It does not however follow that if no such application is made, the Court executing the decree can sell the property even if it had such notice as is mentioned above."

The learned author then refers, in support of his view, to the decision of the Bombay High Court, to which I have already referred, namely to the case of *Mahasukh Jhaverdas v. Valibhai Fatubhai* (4), as also to the Madras case referred to above, namely *Anantharama Iyer v. Kuttimalu Kovilamma* (3). In the latter case it was said that a sale by an executing Court, after notice of the order of adjudication, was void as against the receiver. The Lahore decision proceeds on a decision of an English Court in the case of *Trustee of Woolford's Estate v. Levy* (5). Sir Dinshaw Mulla in his lecture points out the distinction between a case under the English Bankruptcy Act of 1883 and a case under the Indian Provincial Insolvency Act, and he is of opinion that the Lahore decision is erroneous. The learned author points out this:

"In support of its judgment the Court relied upon *Trustee of Woolford's Estate v. Levy* (5), a case under S. 46, Bankruptcy Act of 1883. In that case it was held that a sale by the Sheriff after receiving order in execution of a decree against the debtor, though made with notice of order, was valid as against the trustee in

3. (1916) 34 I C 829.

4. A I R 1929 Bom 177=109 I C 152.

5. (1892) 1 Q B 772=61 L I Q B 646=56 J P 694=40 W R 489=46 L T 512.

1. A I R 1925 Lah 168=80 I C 503.

2. A I R 1922 Mad 95=126 I C 835=55 Mad 816.

bankruptcy appointed after adjudication, if no application was made by the Official Receiver under that section for delivery of the property to him. The distinguishing features of that case are, first, that the sheriff after he came to know of the receiving order communicated with the Official Receiver and the Official Receiver wrote to the Sheriff asking him to realise the goods and to account to him for the sale proceeds; and, secondly, that a receiving order under the English law does not vest the debtor's property in the Official Receiver as an adjudication order vests it in the trustee in bankruptcy. The Lahore decision, it is submitted, is erroneous."

In view of this opinion of the learned Tagore Law Lecturer, which is entitled to very great weight, we are of opinion that the contention of the appellants must fail. It has been argued that if this view is taken, the words, "on application" become superfluous and redundant. There is no force in that contention. The underlying principle of the Provincial Insolvency Act, as can be gathered from the provisions of S. 52, is that when a Court is apprised of the pendency of an application for insolvency in another Court, and of the further fact that such application had been admitted, it should stay its hand so far as the execution of the decree by the creditors of the insolvent is concerned. In this view, we are of opinion that the decision of the learned Subordinate Judge is right and must be affirmed. The appeal is dismissed with costs. The hearing fee is assessed at one gold mohur. It is not necessary to pass any order on the application in the alternative.

M. C. Ghose, J.—I agree.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 563

GUHA AND BARTLEY, JJ.

Mozam Dafadar and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 26 of 1933, Decided on 5th June 1933, from order of Addl. Sess. Judge, Jessore.

(a) Penal Code (1860), Ss. 366 and 368—Accused charged for both kidnapping and abduction—Separate charges are necessary—Criminal P. C. (1898), S. 221.

Where an accused is charged for kidnapping and abduction separate charges are necessary and if the accused is charged only under S. 366, the charge is entirely defective, illegal and prejudicial to the accused: *A I R 1927 Cal 644* and *A I R 1927 Cal 200, Rel on.* [P 568 C 2]

(b) Penal Code (1860), Ss. 366 and 368—Joint trial of accused charged with abduc-

tion alone and accused charged with both abduction and kidnapping is irregular—Criminal P. C. (1898), S. 233.

Joint trial of an accused charged with offences mentioned in S. 366 and accused charged with commission of both abduction and kidnapping is irregular and prejudicial to the accused; consequently conviction based on such trial should be set aside. [P 568 C 1]

Probodh Chandra Chatterji and Birsagar Chatterji—for Appellants.

Panna Lal Chatterji—for the Crown.

Judgment.—The appellants, six in number, have been convicted by the learned Additional Sessions Judge, Jessore, on a verdict of the jury divided in the proportion of three to two. The Appellants 1 to 5 have been convicted under S. 366, I. P. C., and sentenced to seven years' rigorous imprisonment, while appellant 6 has been convicted under S. 368, I. P. C., and sentenced to three years' rigorous imprisonment. The charge on which appellants 1 and 4 were tried was for kidnapping and abduction. The charge against appellant 2 was for abduction only, as mentioned in S. 366, I. P. C. Appellant 6 was jointly tried with the other five, for the offence under S. 368, I. P. C., as mentioned already. The first question that arises for consideration in the case before us is whether the charges as framed and which the first four appellants had to meet were properly and legally framed. The question of framing of charges under S. 366, I. P. C., has received the consideration of this Court on various occasions and the decisions in some of the recent cases: see in this connexion the case of *Mafizaddi v. Emperor* (1) and *Ism Sheikh v. Emperor* (2), clearly indicate how charges under S. 366, I. P. C., in which kidnapping and abduction are both mentioned are required to be framed. In the case before us, there can be no doubt that the charges as framed which four of the accused persons were to answer, were entirely defective in law and were not in accordance with the proposition clearly laid down by this Court in the cases referred to above. The charges against these accused were not legally framed, and they were, in our judgment prejudiced at the trial, on account of that.

1. *A I R 1927 Cal 644=104 I.C. 245=28 Cr L J 805.*

2. *A I R 1927 Cal 200=89 I.C. 987=28 Cr L J 201.*

The question of joint trial of the accused: Trial of appellant 5 charged for abduction as mentioned in S 366, I. P. C, and not for kidnapping and abduction, for the commission of which offence appellants 1 to 4 were charged and the trial of appellant 6 under S. 368 with the other appellants under S. 366 was a procedure which could not be supported. We are decidedly of opinion that the joint trial of this kind could not be supported. We are decidedly of opinion that the joint trial of this kind could not but have, and had in fact prejudiced the appellants in their defence. In the above view of the case before us the conviction of the appellants after a trial which was irregular and not in accordance with law, could not be maintained. It was necessary therefore to consider whether the appellants should be retried after proper charges have been framed against them according to law, a joint trial of all the appellants for separate and distinct offences being avoided in the interests of justice. The evidence in the case placed before the Court which was fairly summed up by the Judge in his charge to the jury, was not such as could lead to a unanimous verdict of the jury; the jurors were divided in the proportion of three to two. The Judge's order, recorded at the time of his passing sentence, indicates some disinclination on his part to accept of the jury, as returned. Taking everything into consideration, and confining ourselves to the evidence placed before the jury, we are not satisfied that the case before us is one in which a re-trial should be directed. In the result therefore the appeal is allowed. The conviction of the accused appellants in this case, and the sentences passed on them are set aside. The appellants are acquitted, and are to be set at liberty, and discharged from their bail bonds.

K.S.

Appeal allowed.

* A. I. R. 1933 Calcutta 564

MITTER AND M. C. GHOSH, JJ.

Kanai Lal Nandy and others—Appellants.

v.

Tinkari De—Respondent.

Appeal No. 428 of 1932, Decided on 8th February 1933.

* (a) Provincial Insolvency Act (1920), S. 9, Cl. (c)—Act of insolvency is committed when petition is filed by debtor and petition by creditor must be filed within three months from such date.

The presentation of the petition by the debtor is in itself an act of insolvency. He does not cease to be so even if the petition is dismissed and any creditor may present an insolvency petition against a debtor founded on this act of insolvency. But it must be done within three months of the date on which the debtor presented his petition and not within three months of the dismissal of such petition: *A I R 1931 Cal 246, Ref.* [P 565 C 1, 2]

* (b) Provincial Insolvency Act (1920), S. 9, Cl. (e)—Act of insolvency under Cl. (e) occurs when property is sold and not when sale is confirmed.

The act of insolvency alleged in S. 9, Cl. (e), occurs when the property is sold and not when the sale is confirmed. Hence a petition by a creditor must be made within three months from the date of sale. [P 566 C 1]

Atul Chandra Gupta and Nani Bhusan Mukherjee—for Appellants.

Kshitish Chandra Chakravarty, Panchanan Ghosal and Nalini Kumar Mukherjee—for Respondent.

Mitter, J.—This is an appeal by one Kanai Lal Nandy and others who have been adjudicated insolvents on the petition of a creditor who is a respondent before us. In this petition of the creditor two acts of insolvency were alleged: (1) the two appellants filed a petition for adjudication as insolvents in the Court of the District Judge of 24-Pargannas on 5th January 1932 and thus committed an act of insolvency which continued from 5th January 1932 to 14th March 1932, the date on which it was dismissed for default; and (2) that some of the properties of the appellants had been sold in execution of the decree of the First Munsif's for payment of money in certain execution cases on 18th January 1932. The present application of the petitioning creditor was made on 9th April 1932. The appellants objected to the said petition on the ground, amongst others, that the petition before insolvency is time-barred inasmuch as the act of insolvency as alleged by the said creditor in para. 8 (a) of the petition took place more than three months before the filing of the petition of insolvency and also on the ground that assuming that the sale in execution of the decree for money was an act of insolvency the sale having taken place more than three months be-

fore the filing of the creditor's petition, the said petition is barred by limitation.

The learned District Judge was of opinion that the petition of the petitioning creditor was not time-barred apparently in the view that the petition of the creditor was filed on 9th April 1932 within three months from the date of the dismissal of the appellants' petition for insolvency for non-prosecution on 14th March 1932. Against this order of adjudication the present appeal has been brought and it is contended by Mr. Gupta, who appears for the appellant that the order of the District Judge is wrong. He argues that under the provisions of S. 9, Cl. (c), Provincial Insolvency Act, the act of insolvency which is based on the application of the appellants to be adjudicated as insolvents has occurred beyond three months before the presentation of the petition and consequently having regard to the provisions of S. 9, Cl. (c) the present application of the petitioning creditor is barred. He argues that as soon as the petition was filed by the debtor the appellants' act of insolvency was committed and the petition of the petitioning creditor should have been filed within three months from that date. In support of this contention he has relied on a passage in the Tagore Law Lectures on Insolvency by the Right Hon'ble Sir Dinshaw Mulla which occurs at p. 95 of the said book. The learned lecturer points out that a debtor commits an act of insolvency if he petitions to be adjudicated insolvent. The presentation of the petition by the debtor is in itself an act of insolvency. He does not cease to be so even if the petition is dismissed and any creditor may present an insolvency petition against a debtor founded on this act of insolvency. But it must be done within three months of the date on which the debtor presented his petition. In support of this view reference is also made to a decision of this Court given with reference to somewhat identical provisions of the Presidency Towns Insolvency Act.

In the case of *Anupama Devi v. Gurusdas Chatterjee* (1), Buckland, J., sitting on the original side of this Court held that the fact of the presentation of the petition for insolvency by the debtor

was an act of insolvency and not the fact that it would remain on the files of the Court for disposal and that time must run from the date of the presentation of the petition. This would appear from the bottom of p. 1274 of the report which states what was held by Buckland, J. An appeal was taken to the High Court on its appellate side and apparently the learned counsel did not think it right to challenge this proposition as laid down by Buckland, J., in that suit. We are of opinion therefore that the view taken by the learned Judge is wrong and that so far as this act of insolvency is concerned the act occurred beyond three months from the date of the presentation of the application of the appellants to be adjudicated insolvents the present petition of the creditor is barred. Mr. Chakravarty who appears for the respondents contends that it was open to the learned District Judge to extend the period of four days from 5th April to 9th April under the provisions of S. 78, Provincial Insolvency Act, which as he points out is a new section and is not to be found in the Presidency Towns Insolvency Act. The difficulty in accepting this contention is that this case was never made in the Court below. It depends on facts and the appellants might rightly say that this ought not to be entertained in the Court of appeal as it is dependent on facts which require to be investigated. We are not therefore prepared to allow this point to be raised as there is no indication of the point either in the petition for insolvency or in the judgment of the learned District Judge.

The second act of insolvency alleged is that some of the properties of the appellants had been sold in execution of a decree and that this petition of the petitioning creditor is within three months of that date and therefore having regard to the provisions of S. 6, Cl. (e), Provincial Insolvency Act, the application of the petitioning creditor should be allowed. It is pointed out however on behalf of the appellants that the sale in execution of the money decree took place on 23rd November 1931 as will appear from the order-sheet which is to be found at the last page of the paper-book. This act of insolvency also was committed beyond the period of three months and is barred under the provi-

sions of S. 9, Cl. (e) of the Act. It is argued however for the respondents that the sale was not confirmed till 18th January 1932 and consequently the act of insolvency alleged in S. 6, Cl. (e), must be taken to have occurred not on the date of the sale, but on the date of the confirmation of the sale and if that view is taken then the petition of the creditor is within time and in support of this contention reference has again been made on behalf of the respondents to a passage in Tagore Lectures of Sir Dinshaw Mulla at p. 93, where the learned author says with reference to an act of insolvency mentioned in Cl. (e) that the act of insolvency not being an act of the debtor runs from the time when it is completed, that is, from the moment after the completion of the sale. The learned author does not state that the word "completion" there is equivalent to "confirmation of the sale." A sale is complete as soon as property is knocked down and purchased by somebody; confirmation comes later. There is no authority for the contention that when S. 6, Cl. (e), says that the act of insolvency occurs when the property is sold, we must read into the language of the statute as if the words were "when the sale was confirmed." The legislature knew the distinction between "sale" and "confirmation of a sale" and it has used language which will go to show that the act of insolvency is committed as soon as the property is sold and undoubtedly the property was sold on 23rd November 1931, that is beyond three months from the presentation of the petition out of which the present appeal arises.

The result is that the order of the learned District Judge must be set aside and the petition of the petitioning creditor must be dismissed. There will be no order as to costs.

M. C. Ghose, J.—I agree.

K.B.

Order set aside.

A. I. R. 1933 Calcutta 566

MUKERJI, J.

Sm. Sakhisona Dasi—Plaintiff — Appellant.

Prankrishna Das and others — Defendants—Respondents.

Appeal No. 1802 of 1930, Decided on 1st December 1932.

(a) Landlord and Tenant—Rent—Doctrine of suspension of rent—Nature explained.

The doctrine of suspension of rent means that the landlord may be penalized for a wilfully wrongful or tortuous act of his own by which he prevents a tenant from being in quiet and peaceful enjoyment of the premises demised to the latter. The doctrine is a relic of feudal times and the reasons for the rule have been variously stated to be that the landlord ought not to be encouraged to injure his tenant whom by the policy of the feudal law he is bound to protect, that he cannot be permitted to apportion his own wrong, and that because by the demise every part of the demise is equally chargeable with the whole rent the lessor cannot by his own act discharge any part of the burden during the continuance of the contract : 86 Cal 866, *Ref.* [P 567 C 2]

(b) Landlord and Tenant—Rent—Doctrine of suspension of rent—Rules regarding scope of doctrine mentioned.

(1) In cases where the tenant has not been put in possession of a part of the subject leased and the rent is a lump rent for the whole land leased treated as an individual subject the doctrine may be applied. But the doctrine has no application to a case where the tenant has not been put in possession of the whole land leased but the stipulated rent is so much per bigha. [P 570 C 2]

(2) Where the lessor has evicted the lessee from a part of the land demised, the entire rent is suspended. But, where the landlord had failed to deliver possession of a part of the demised premises having been dispossessed by a title paramount the lessee cannot claim suspension of the entire rent but is liable only to pay a proportionate rent for the land in his possession. [P 569 C 1]

(3) Where dispossession or eviction by the landlord is found, no consideration whether the rental is a lump rental or a rental at a certain rate per bigha or acre enters into the question. The real test in such cases is : was it one indivisible tenancy and was there interference by the landlord with the due enjoyment of the premises or any part of them? In deciding on this test one may consider whether the tenancy consists of separate mouzahas or parcels of land separately assessed to rent or whether the tenancy is in fact, and not in law only, divisible or indivisible. [P 571 C 1]

(4) Where rent is assessed at a rate per bigha the doctrine will apply if it is a case of dispossession or eviction by the landlord. [P 571 C 1]

(5) *A. I. R. 1925 P. C. 97* should not be interpreted as laying down anything beyond what it actually says : *Case law fully discussed.* [P 570 C 2]

Sarat Chandra Roy Choudhury and Hiraial Ohakrabarti—for Appellant.

Sitaram Banerjee and Debabrata Mitra—for Respondents.

Judgment.—The plaintiff instituted this suit for recovery of rent for the years 1930 to 1933 B. S. for a holding, which, according to her, consisted of 8 bighas 15 cottas of land and bore a rental of Rs. 90-4-0 per year. The

defendant's case was that upwards of 100 years ago their predecessors came to have a holding under the predecessors of the plaintiff which originally consisted of 4 bighas 17 cottas of land with a rental of Rs. 72-12-0; that by a measurement subsequently made it was found to consist of 4 bighas 15 cottas 8 chitaks and its rental was accordingly reduced to Rs. 71-11-0; that by subsequent settlements taken of fresh lands from time to time, it eventually became a jama of 6 bighas 3 cottas of land with a rental of Rs. 147-8-0. Their case was that the plaintiff had forcibly dispossessed them of 2 bighas 8 cottas out of the lands and settled the same with a third party. Their case further was that when they protested, the plaintiff promised to give them 1 bigha 3 cottas mere land and grant them a permanent lease of 5 bighas 1 cotta of land on a rental of Rs. 120, but that the plaintiff never carried out her promise and on the other hand placed all sorts of obstacles in their enjoyment of the rest of the lands and so they are entitled to claim suspension of rent. The plaintiff's allegation on the other hand was that the 2 bighas 8 cottas of land was taken from the defendants with their consent and on their agreeing to pay a reduced rental of Rs. 90-4-0, and she denied having interfered with the defendants' peaceful enjoyment of the rest of the lands. The Courts below have dismissed the suit. The trial Court observed that it was "unable to hold that any relationship of landlord and tenant existed between the parties in respect of a jama of Rs. 90-4-0."

The wording of this finding is not quite happy but what is meant is clear: the Court held that the plaintiff's case that there was consent to the portion being taken out and a rental of Rs. 90-4-0 being agreed upon was not established. The Subordinate Judge also has found that the plaintiff's case that the defendants willingly gave 2 bighas 8 cottas and agreed to pay a rental of Rs. 90-4-0 was not proved. He has come to no definite finding on the defendant's case that after the dispossession there was a promise by the plaintiff to give them 1 bigha 6 cottas more land and to grant them a permanent lease of 5 bighas 1 cotta at a rental of Rs. 120, but has observed thus:

"It seems to me that the clamours of the defendants against such aggression were alleged by

some golden prospects held out for compensation and the plaintiff is powerful enough not only to take away the lands but also to forget her promise of compensation."

He has also recorded another finding, but that, in my opinion, is not a finding on which his decision is based; that the plaintiff has put some obstacles in the way of the defendants' peaceful possession by cutting off water supply for irrigation, and I accordingly do not propose to place any reliance on it. I have very carefully scrutinized the finding and have come to the conclusion that it amounts, on the whole, to a finding of wrongful and forcible dispossession. The question to be considered is whether on this finding a decree suspending the entire rent is justified. The question has been considered in a very large number of cases and it must be conceded that there is a considerable conflict in the views that have from time to time been taken. It is nevertheless, in my opinion, possible to gather from the decisions, certain principles, which may, without difficulty, be held to be sufficient for the disposal of the present case. I propose to refer to only such of the decisions as have a direct bearing on the case before me. The doctrine of suspension of rent, as I understand it, means that the landlord may be penalized for a wilfully wrongful or tortuous act of his own by which he prevents a tenant from being in quiet and peaceful enjoyment of the premises demised to the latter.

The doctrine is a relic of feudal times and the reasons for the rule have been variously stated to be that the landlord ought not be encouraged to injure his tenant whom by the policy of the feudal law he is bound to protect, that he cannot be permitted to apportion his own wrong, and that because by the demise every part of the demise is equally chargeable with the whole rent the lessor cannot by his own act discharge any part from the burden during the continuance of the contract. These reasons have been pointed out by Mookerjee, J., in an elaborate judgment in which he has also shown that the rule has been adopted in England though not without considerable divergence of opinion: see *Rai Charon Sagar Majumdar v. Administrator of Bengal* (1). In a very

early decision of this Court, *Gopanund Jha v. Gobind Pershad* (2) Sir Barnes Peacock, C. J., quoted this doctrine from Bacon but had no occasion to apply it in the case before him because in that case the dispossession was not by the lessor but by a title paramount, and such dispossession justified a decree for apportionment. A number of decisions bearing upon this question are referred to in the judgment of this Court in the case of *Dhanput Singh v. Mahomed Kazim Ispa'ani* (3), in which on a consideration of them and of certain English authorities it was laid down that where the act of landlord is not a mere trespass but something of a graver character interfering substantially with the enjoyment, by the tenant, of the demised property, the tenant is entitled to a suspension of rent even though there may not be actual eviction, and that even if there be such interference committed in respect of a portion of the property there should be no apportionment of rent where the whole rent is equally chargeable upon every part of the land demised, but if the interference be in respect of only a certain portion of the demised property the rent for which is separately assessed there should be apportionment.

In *Harro Kumari v. Purna Chandra* (4) suspension was allowed in a case in which the dispossession was in respect of a part of a tenure the rent of which was reserved at a certain rate per bigha; and the reservation laid down in *Dhanput Singh's* case (3) was explained on the ground that in that case, though the *patni* was granted as a single tenure, it was composed of several villages the rent of each village being separately assessed. This last mentioned decision was followed in *Surendra Nath Guha v. Kali Kanta* (5) and *Chandra Kanta Das v. Ramanath Burman* (6) in both of which cases the rental was at a rate per bigha. In the meantime in the case of *Annada Prasad v. Mathuranath* (7) one of the learned Judges observed that it might be questioned how far the technicalities of English law should be allowed to affect the relations of landlord and tenant in this country, but held on the

facts that the rule of suspension was inapplicable to the case before them because:

"all that could be said was that the plaintiff did not give the defendant possession of a quantity of lands."

In the case of *Purna Chandra v. Rasik Chandra* (8), suspension of rent was ordered, it being said that the principle was supported by a long series of decisions which had been recognized as good law for 40 years and that the rule was based upon weighty reasons and was defensible on principle. In *Sarif Jan Bibi v. Aftabuddin Meah* (9), the doctrine was applied in the case of a tenancy consisting of 16 parcels of land, from three out of which the tenant has been dispossessed, and it was observed that the reservation in *Dhanput's* case (3) that where the dispossession was in respect of only a certain portion the rent for which was separately assessed there should be apportionment was not founded on principle. In *Ashutosh Dhar v. Joy Lal Sardar* (10), it was applied to a tenancy where rent had been settled at a certain rate per bigha, it being said that the rule as to suspension of rent as a punishment for the dispossession by a landlord of a tenant should not be made nugatory by giving the landlord a decree for rent for the portion of the tenancy still in the occupation of the tenant. In the case of *Dwijendra v. Aftabuddin* (11) two clear pronouncements were made first:

"The result is precisely the same whether he (the tenant) is expelled by violence or is obliged from the exigencies of the situation, to submit to the highhanded act of a powerful landlord;" and second,

"The true position is that the eviction of the tenant, whether from part of the demised premises or from the whole, entails a suspension of the entire rent while the eviction lasts, whether the tenant remains in possession of the residue or not; the tenancy however is not terminated nor is the tenant discharged from the performance of his covenants other than payment of rent such as a covenant to repair."

Side by side with the cases referred to above there was another line of cases in which the tenant had not been dispossessed or evicted by the landlord but had not been put in possession by him of the whole of the lands demised. The case of *Annada Prasad v. Mathura Nath* (7)

2. (1899) 12 W R 109.

3. (1897) 24 Cal 296.

4. (1901) 28 Cal 188.

5. (1912) 14 C W N 227.

6. (1910) 6 I C 478.

7. (1908) 2 I C 123.

8. (1911) 9 I C 568.

9. (1911) 8 I C 30.

10. (1918) 18 I C 821.

11. (1917) 39 I C 203.

to which reference has been made above, may be regarded as a case of this character. *Saroda Prasad v. Manmatha Nath Mitter* (12) is another case of this nature in which it was held, following *Annada Prasad v. Mathura Nath* (7), that where a tenant had not been put in possession of a portion of the demised land but nevertheless went on paying the full rent agreed to in the lease, the tenant could not claim an entire suspension of the rent but only an abatement of it. In *Manindra Chandra Nandi v. Narendra Chandra Lahiri* (13) however, which was a case in which the landlord having let out a portion of the land to an earlier lessee, let it out again with other lands to a subsequent lessee and failed to deliver to the latter possession of the entire land leased to him, it was held that the entire rent should be suspended, the reason given being that "the landlord having failed to perform the duty he had undertaken the rent ought to be suspended."

In the case of *Narendra Chandra Lahiri v. Manindra Chandra Mandi* (14), N. R. Chatterjee, J., pointed out very clearly the distinction between the two classes of cases and observed that

"there is no doubt that where the lessor has evicted the lessee from a part of the land demised, the entire rent is suspended,"

but that

"where the landlord had failed to deliver possession of a part of the demised premises having been dispossessed by a title paramount the lessee cannot claim suspension of the entire rent but is liable only to pay a proportionate rent for the land in his possession."

While this was the state of the law in this Court a case came up before it, the case of *Katyayani Debi v. Uday Kumar Das* (15), where, upon the findings, it appeared that the landlord had omitted from a bona fide mistake to put the tenant in possession of a portion of the lands leased, the lands being largely jungle, and therefore little known, and this Court held that the tenant was not entitled to a suspension of rent. This case then went up to the Judicial Committee and their Lordships: see *Katyayani Debi v. Uday Kumar Das* (16), observed:

"The doctrine of suspension of rent, where the tenant has not been put in possession of part of the subject leased has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha."

These observations of their Lordships have been understood differently by different learned Judges in this Court: and I shall now refer to some of the cases which have been decided by this Court since *Katyayani's* case (15). *Sushil Kumar v. Rajani Kanta* (17) was a case in which the defendants had purchased the lands at an auction-sale in execution of a rent decree obtained by the landlords plaintiffs against the original tenants who held them at a rent at a certain amount per bigha, and it was found that the landlords, that is to say the plaintiffs, had leased them out to a third party since the date of the lease of the said original tenants. It was held that *Katyayani's* case (16) supported a decision that the rule of suspension of rent has no application in cases where the stipulated rent is so much per bigha and that the rule had been applied in cases where the rent reserved is a lump sum for the whole land, but that there was no authority for the proposition that in every such case there would be entire suspension and no abatement of the rent. *Suresh Chandra v. Mathuranath* (18) was a case in which it was found that the tenant was not put in possession of the whole of the demised premises by reason of circumstances over which the landlord had no control, and the rule was not applied.

In *Tarap Sheikh v. Kunja Behari Roy* (19) the finding was that it was possible that the third party who was in possession had been in possession from before the lease in favour of the defendants and suspension of rent was not allowed. The Court referred to and relied on *Katyayani's* case (16), in support of the proposition that the doctrine of suspension of rent has been applied where the rent was fixed in a lump for the whole land leased, treated as an indivisible subject, and it cannot be applied where the rent is to be fixed according to the area in possession of the defendant, and that the principle

12. (1915) 28 I C 372.

13. AIR 1919 Cal 379=32 I C 13=46 Cal 956.

14. AIR 1922 Cal 158=67 I C 800=49 Cal 1019.

15. AIR 1923 Cal 848=69 I C 117=49 Cal 257.

16. AIR 1925 P C 97=68 I C 110=52 I A 180=

52 Cal 417.

17. AIR 1927 Cal 787=104 I C 775.

18. AIR 1925 Cal 1187=90 I C 47.

19. AIR 1926 Cal 1226=98 I C 215.

of suspension of rent is inapplicable where the tenant is liable to pay according to the stipulation at so much per bigha per year. The doctrine was applied in the case of *Dhirendra Nath Roy v. Bhabatarini Debi* (20) to a tenancy which bore a lump rental. In that case it was said

"where there is a tenancy and that tenancy is an indivisible one in which a lump sum for rent is to be paid in respect of the whole of the demised premises, if the landlord interferes with the due enjoyment of the premises or any part of them. . . . It is not possible for the landlord to assert that any portion of the rent is payable in respect of any portion of the premises for in law in such circumstances every piece of the rent is payable out of every portion of the premises demised. There is a doctrine for which authority can be found however that " " where it can be proved that certain portions of the rent are specifically assessed and appropriated to certain parcels of the demised land and in respect of a distinct parcel of which the rent is specified there is an eviction by the landlord, the landlord is entitled to receive, notwithstanding the eviction, his rent in respect of the other portions of the land which are separately and specifically assessed for rent."

As I understand these observations they do not purport to lay any weight on the factor of lump rental or rate of rent per bigha but on the question whether the tenancy is in fact divisible into separate parcels separately and specifically assessed to rent. This is exactly what was said in *Harro Kumari v. Purna Chandra* (4) to which reference has already been made. And this, in my opinion, is the correct view to take of the matter. In *Mahim Chandra v. Karam Ali* (21) and *Abhoy Charan Sen v. Hem Chandra Pal* (22), the observations of the Judicial Committee in *Katyayani's* case (16) have been taken to mean that where there is a lump rental and the tenant has been dispossessed by the landlord from a part of the holding, the entire rent may or must be suspended. In *Sajjad Ahmad v. Troilakhya Nath* (23), which was a very special case, the Settlement Officer having found a tenancy in respect of the land in actual occupation of the tenant with a rental which was fixed by him as fair, the doctrine of suspension of rent was not applied, Rankin, C. J., observing:

"The doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised. . . . It ap-

pears to me that unless we are to set aside the Settlement Officer's decision and give no effect to it at all it must be held that in respect of the 21 bighas it has been found that the fair and equitable rent is Rs. 18; in other words, the entirety of the original rent is inconsistent with and has been destroyed by the finding of the Settlement Officer."

In *Ebadali v. Fatema Bibi* (24) which was a case of dispossession by the landlord, but the stipulated rent was a certain rate per bigha it was held that the doctrine was not applicable. In *Kali Kumar v. Ananda Chandra* (25) the distinction between the two class of cases was again pointed out, it being observed that neither *Katyayani's* case (16) nor the case of *Rajani Kanta Biswas* (17) were cases in which there was dispossession but were cases in which the tenants never obtained possession.

I have carefully considered all the decisions referred to above. My own view is that *Katyayani's* case (16) should not be interpreted as laying down anything beyond what it actually says. It says that in cases where the tenant has not been put in possession of a part of the subject leased and the rent is a lump rent for the whole land leased treated as an individual subject the doctrine has been applied. As their Lordships did not express any disapproval of this application it may be assumed that in such cases it may with propriety be applied. It says then that the doctrine has no application to a case where the stipulated rent is so much per bigha. This passage in my opinion should not be read as detached from the passage which precedes it: the result, in my opinion being that what was meant was that the doctrine has no application to a case where the tenant has not been put in possession of the whole land leased but the stipulated rent is so much per bigha. I am clearly of opinion that their Lordships never intended to say anything in approval or disapproval of the applicability of the doctrine in cases of dispossession or eviction by the landlord.

Next, I think there is a clear distinction between the two classes of cases to which I have already referred and which was very clearly pointed out by N. R. Chatterjea, J., in the case of *Narendra Chandra Lahiri v. Manindra Chandra Nandi* (14), and that distinction should

20. AIR 1929 Cal 395=119 I O 997.

21. AIR 1929 Cal 516=119 I O 133.

22. AIR 1929 Cal. 563=123 I O 653=57 Cal 137.

23. AIR 1928 Cal 479=118 I O 875.

24. AIR 1927 Cal 351=106 I O 501.

25. (1928) 106 I O 359.

be borne in mind in applying the decision in *Katyayani's* case (16) to any particular case. Thirdly, I am of opinion that where dispossession or eviction by the landlord is found, no consideration whether the rental is a lump rental or a rental at a certain rate per bigha or acre enters into the question. The real test in such cases is what was laid down by Page, J., in the case of *Dhirendra Nath Roy v. Bhabatarini Debi* (20): Was it one indivisible tenancy and was there interference by the landlord with the due enjoyment of the premises or any part of them? I think however that in deciding on this test one may consider whether the tenancy consists of separate mauzahs or parcels of land separately assessed to rent or whether the tenancy is in fact, and not in law only, divisible or indivisible. In other words, my view is that the mere fact that the tenancy is governed by one lease and so in law may be regarded as one tenure is not enough; what has to be seen is whether in fact, the parcels are such that deprivation from one necessarily interferes with the due enjoyment of the others. This is a distinction which was clearly explained by Maclean, C. J. and Banerji, J., in *Harro Kumari v. Purna Chandra* (4). As Rankin, C. J., has pointed out

"the doctrine of suspension of rent solely depends upon this that the rent due is an entire sum in respect of the land demised."

Is it to be said that the rent fixed for a particular tenancy is not an entire sum in respect of the land demised, simply for the reason that in assessing it a rate per bigha or acre is taken as the basis of the calculation and that rate is mentioned in the lease? As observed by Page, J.:

"It is not possible for the landlords to assert that any portion of the rent is payable in respect of any portion of the premises for in law every pie of the rent is payable out of every portion of the premises demised."

Fourthly, I am of opinion that if it is to be held that where rent is assessed at a rate per bigha the doctrine will not apply though it be a case of dispossession or eviction by the landlord, the doctrine will fail to achieve its object in a vast majority of cases and will offend against the elementary rule that a party cannot be permitted to apportion his own wrong. The doctrine has been applied in this country for well over 60 years now, and should not be rendered

nugatory by imposing on it a restriction of this character. In my judgment therefore even though this were a case in which a rate per bigha or acre was the basis of calculation, the Subordinate Judge, upon the findings as I read them, was entirely justified in ordering a suspension of rent. I am prepared however to treat the rental as a lump rental, as has been found by the Courts below. The result is that in my judgment this appeal should be dismissed with costs. Leave has been asked for for preferring an appeal under the Letters Patent and I grant it.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 571**

C. O. GHOSE AND S. K. GHOSE, JJ.

Sudhir Chandra Pal and another—Appellants.

v.

Uttara Sundari Pal and others—Respondents.

Appeal No. 45 of 1930, Decided on 17th November 1932, against original decree of Dist. Judge, Sylhet, D/- 7th January 1930.

(a) Succession Act (1925), Ss. 232 and 233—Probate Court cannot decide question of title.

The probate Court cannot go beyond the terms of a will and decide a question of title, or see whether the petitioners could come in as residuary legatees or their representative or determine if the gift over in will was valid or not. The function of the probate division is to determine what documents are testamentary, and who is entitled to be constituted the personal representative of the deceased. [P 572 C 1,2]

(b) Succession Act (1925), S. 61—Burden of proof.

Where a will is propounded by a chief beneficiary under it, who has taken a leading part in giving instructions for its preparation, etc., it is necessary that evidence should clearly prove that the testator approved the will: A I R 1930 P C 24, *Foll.* [P 574 C 1]

Hemendra Kumar Das and Charu Chandra Chowdhuri—for Appellants.

Gunada Charan Sen and Paresh Lal Shome—for Respondents.

S. K. Ghose, J.—The appellants Sudhir Chandra Pal and Manorath Chandra Pal applied for the probate of a will said to have been executed by Jugalram Pal or in the alternative, for Letters of Administration with a copy of the will annexed. The will in question is dated 3rd Pous 1814 corresponding to 19th September 1907. Jugalram died on 5th Pous following and it is said that he was then in a boat on his way to get the will

registered. By the will the testator bequeathed his properties to his son Surjya Kumar Pal and he further provided that in the case of Surjya dying without male issue his nephews Ram Mohan Pal and Dhanram Pal would get the properties and he also appointed these two persons executors to the will. Surjya died on 16th March 1924 and he left no issue. Dhanram died on 3rd January 1925. Ram Mohan died on 18th December 1927. The petitioners claim that according to the provisions of the will they have become entitled to the properties of the testator and accordingly they make the application as above. The objectors are Uttara Sundari Pal, the widow of Surjya Kumar, and Sashi Bhusan Pal, the son of his sister. Their case is that the will was not executed by Jugalram Pal who was ill and unconscious for 8 or 10 days before his death and that he had no testamentary capacity and they further allege that after the death of Jugalram and during the lifetime of Surjya Kumar the properties used to be managed by Ram Mohan Pal. He colluded with the sons of Dhanram who tried forcibly to make Uttara Sundari affix her thumb impression on a blank stamp paper with a view to having a document written in respect of the properties left by Surjya Kumar. This led to criminal cases and ultimately Uttara instituted two civil suits against the petitioner Manarath and others claiming certain sums of money. During the pendency of the suits the present application for probate was filed. The learned Judge held that the will was genuine. But he further held that the gift over in favour of Dhanram and Ram Mohan was inoperative and in that view he found that the petitioners had no locus standi to make the application. Accordingly he dismissed the application. Hence this appeal.

As regards the question of locus standi the learned Judge no doubt refers to ss. 232 and 233, Succession Act. He was entitled to read the will in order to see whether in the circumstances the petitioners could come in as residuary legatees or their representatives. But he has gone further than that. He has construed the will in order to see whether the gift over in the will was a valid one or not and he has held that it was invalid. This is a question which

is beyond the scope of the Probate Court:

"The function of the Probate Division is to determine what documents are testamentary, and who is entitled to be constituted the personal representative of the deceased." (Tristram and Coote's Probate Practice, Edn. 17, p. 6.)

The learned Judge was therefore clearly wrong in going beyond the terms of the will and in deciding a question of title which ought to be gone into in another Court. The real question therefore is whether the learned Judge is right in holding the will genuine. On this point the learned Judge has accepted the direct evidence as to execution which was adduced on behalf of the petitioners. Mr. Gunada Charan Sen, for the respondents has pointed out that there are certain circumstances which go to show that this direct evidence is open to suspicion. Surjya Kumar died on 16th March 1924. The present application was filed on 13th December 1928. During this period Ram Mohan, Dhanram, and their sons entered into transactions treating Uttara Sundari as heir to the properties left by Surjya Kumar. Ex. O, is copy of the plaint in a suit of 1924 in which Uttara was a co-plaintiff with Ram Mohan and Dhanram and subsequently Sudhir was substituted in place of Dhanram deceased. It is pointed out that in the plaint it was definitely stated that Surjya Kumar had died leaving his widow, plaintiff 4, as his heir to the properties left by him.

On the other hand the suit had reference to properties which were purchased after the death of Jugalram. Ex. P is copy of the plaint in another suit of 1924 in which Sudhir was one of the co-plaintiffs and Uttara one of the pro forma defendants was similarly described as heir to Surjya Kumar. It was however a simple money suit. The plaint recited that certain dues had been partitioned amongst plaintiff and pro forma defendants, but Uttara herself in her deposition stated that there was no partition of the ancestral properties. Moreover these are cases of litigation with third parties and it does not seem essential that a reference should have been made to the will.

Then there is Kobala Ex. F of 1928 which was executed after the death of Ram Mohan by Sudhir and his brother. It is pointed out that the above men-

tioned therein would be correct on the supposition that Uttarpara was the heir of Surjya Kumar. This however is not strong evidence and Mr. Sen has conceded that in so far as the question of the genuineness of the will is concerned this does not carry the matter any further. Mr. Sen however has drawn our attention to certain Jamabandi papers, Ex. R series and Ex. U series in which the name of Uttara Sundari was mutated in place of her deceased husband. This only goes to show that so far as the Collectorate proceedings were concerned the parties continued to treat Uttara as one of the family and in fact the name not only of Uttara but also of her mother-in-law Brahma Mayee was substituted in place of Surjya. The learned Judge does not expressly refer to these documents, but he points out that so long as there was no dispute in the family Ram Mohan and his brother might not have thought it necessary to go to the expense and trouble of obtaining probate of the will. I think this is quite a reasonable supposition. There is however evidence that towards the end of Ram Mohan's life trouble arose in the family. Uttara brought a criminal case against Sudhir, his brother Bepin, and others making charges under Ss. 355 and 352, I. P. C. The case ended on 26th June 1928, the accused being convicted and fined. Uttara says that this case was brought during the lifetime of Ram Mohan who died while it was pending. Brahma Mayee the step-mother-in-law also brought a cross-criminal case which was dismissed on 1st November 1928.

On 5th September 1928 Uttara filed these two civil suits referred to above against Sudhir and others. According to the petitioners Monorath found the will and the draft of it amongst his father's old papers in an almirah about a month after his death. Mr. Sen has contended that it is significant, having regard to the circumstances, that the application for probate was filed on 13th December 1928. This no doubt is a matter which has to be carefully considered. It is quite clear upon the evidence that for a long time after the death of the testator the parties lived in amity. Surjya Kumar lived until 1924 and until his death at least Ram Mohan or his brother did not feel any necessity to apply for probate. Dhanram died in

1925, but the evidence is that Ram Mohan managed the properties. It is no doubt a curious circumstance that Ram Mohan did not divulge the existence of the will to his son and the latter found it by accident at a time when it was most opportune. But on the other hand the dispute as evidenced by the criminal cases did not arise until towards the end of Ram Mohan's life. For a very long time he had treated Uttara as one of the family without raising any troublesome question as to her right to the properties. Whether advisedly or not he had not been acting on the will and in the circumstances it is not improbable that he did not speak about the will at all to his young son.

On the other hand the petitioners have produced a body of direct evidence in support of their case of the execution of the will. The document was witnessed by four persons of whom one had since died and another was ill. Two were examined before the Court and they were believed by the learned Judge. As regards Brindaban Chandra Pal, P. W. 4, Mr. Sen has contended that he made certain false statements with regard to another document Ex. C and therefore to that extent he was disbelieved by the learned Judge. But really the statements do not seem to have been made deliberately falsely. The witness was not quite literate and he corrected himself almost immediately. There is also no reason why the other witness, P. W. 2, should be disbelieved and the same applies to the evidence of Dwarka. The argument that these witnesses are relations has really no force. There is a draft, Ex. 2, which is said to have been written by one Gopal Gobinda. This man could not be produced and the evidence is that he is the uncle of Sashi Bhusan De who is looking after the case for Uttara. This will appear from the evidence of the pleader, petitioners' witness 8. Gopal was cited as witness by the petitioners, but he did not appear and notice was ordered to be served by special messenger. Even then he did not appear and warrant was applied for. These proceedings are on the record and it is certainly a circumstance which makes the story of fabrication of the draft improbable.

Then looking at the document itself I am unable to hold that it could have

been fabricated at the time as alleged by the objectors. It is a document of three pages and each page was signed by all the witnesses. The recitals and terms of the will clearly indicate that it came into existence at a time when Surjya Kumar was not married and was also not in good health and Ram Mohan and Dhanram were the only two other near relations in whose welfare the testator must have been closely interested. There is a curious recital in the very last passage of the will and it refers to certain corrections made in the body of the document. These and the various detailed provisions made to meet future contingencies in case Surjya Kumar should die unmarried or should die without a son and so forth, to my mind make the story of fabrication improbable. The petitioners have also examined the Doctor, P. W. 3, and his evidence is inconsistent with the objectors' case that Jugalram was ill and unconscious for days together, while the boatman, P. W. 6 corroborates the petitioners' case that Jugalram died on the boat on the way to the registration office. Mr. Sen has referred to the case of *Vellaswami Servai v. Sivaraman Servai* (1), in which it is held that where a will is propounded by the chief beneficiary under it, who has taken leading part in giving instructions for its preparation, etc., it is necessary that the evidence should clearly prove that the testator approved the will. Applying this standard of proof to the circumstances of the present case I cannot differ from the learned Judge and hold that the direct evidence in support of the execution of the will ought to be disbelieved. I agree with him in holding that the will was duly executed by Jugalram as alleged on 3rd Pous 1314. The petitioners are therefore entitled to Letters of Administration with a copy of the will annexed.

The appeal is accordingly allowed with costs in both Courts. We assess the hearing-fee at Rs. 300. The cross-objection is dismissed with costs two gold mohurs.

O. C. Ghose, J.—I agree.

V.B./R.K.

Order accordingly.

1 A I R 1930 P C 24=121 I C 280=57 I A 96=
8 Rang 179 (P.C.).

A. I. R. 1933 Calcutta 574

MUKERJI AND MITTER, JJ.

Nabagopal Sarkar Bahadur — Defendant—Appellant.

v.

Mrs. Sarala Bala Mitter—Plaintiff — Respondent.

Appeal No. 252 of 1927, Decided on 3rd July 1930, against original decree of Addl. Dist. Judge, 24-Parganas, D/- 13th June 1927.

(a) Will — Mental weakness to constitute testamentary incapacity must be qua will in question.

To be such mental weakness as would be sufficient to constitute testamentary incapacity, such incapacity must be qua the will in question.

[1 576 C 2]

(b) Will — Fraud — Testatrix not having satisfactory health at time of execution of will—False misrepresentation of testatrix's pecuniary indebtedness to executrix legatee—Will is vitiated by fraudulent misrepresentation.

The health of the testatrix was far from satisfactory due to mental and physical weakness for a long time. The executrix legatee under the will who had considerable influence over the testatrix falsely misrepresented to the testatrix and made her believe that she was heavily indebted pecuniarily to her and got execution of the will in consideration of such pecuniary indebtedness and help rendered to the testatrix:

Held: that the will was procured by fraudulent misrepresentation which vitally affected the judgment of the testatrix and that probate should not be granted.

[1 576 C 2]

(c) Will—Testatrix being intelligent lady—Onus of proving fraud or undue influence is on caveator.

Where the testatrix is an intelligent lady, the onus of proving that the will is brought about by fraud or undue influence is on the caveator: *Tyrrrell v. Panton*, (1894) P D 151.

[P 576 C 2; P 577 C 1]

(d) Will—Will made in favour of person of active confidence with testatrix — Court should scan evidence of independent volition.

Where a will is made in favour of a person who is in a position of active confidence with the testatrix, it is the duty of the Court to scan the evidence of independent volition closely in order to be sure that there had been a thorough understanding of the consequences by her.

[P 577 C 1]

(e) Will—Fraud—If fraud has been purposely practiced, probate may be refused even though testator knew and approved of contents of will.

Although the testatrix did know and approve of the contents of the will the paper may be refused probate if it be found that fraud has been purposely practised on the testatrix in obtaining the execution thereof: *Guardhouse v. Blackburn*, (1856) 1 P 109 and *Fullon v. Andrew*, (1875) 7 H L 448, *Rej.*

[P 577 C 2]

(f) Will—Undue influence.

It is not enough to show that the testatrix's will was dominated by the propounder; but it must be shown further that the influence was

exercised on the particular occasion and the will was the result of that influence: *Wingrove v. Wingrove*, 11 P D 81, *Bandains v. Richardson*, (1906) A C 169 and *Craig v. Lamoureux*, (1920) A C 349, Ref. [P 577 O 2]

Braja Lal Chakravarti, Pyari Mohan Chatterji and Krishna Lal Banerji—for Appellant.

N. N. Sircar, Panchanan Ghose, Jagat Chandra Bose, Durgadas Roy and Gundendra K. Ghose—for Respondent.

Mukerji, J.—This appeal has been preferred from the decision of the Additional District Judge, 24-Parganas, granting probate of the will of one Mrs. Bipin Bala Sarkar. She is alleged to have executed a will on 5th July 1922 and got it registered on 17th September 1923. She died on 6th March 1925. Mrs. Sarala Bala Mitter, the executrix named in the will and to whom the entire bequest was made, applied for probate. Notices were issued on the testatrix's husband Rai Bahadur Nobi Gopal Sircar, her brother Dr. S. K. Bose, and her sister Mrs. Kiran Bala Chaudhury. The husband and the sister contested the proceedings, and in this appeal the former alone is the appellant. To deal with the questions which have arisen in this appeal a short history of the life of the testatrix will not be out of place. (After giving a long detailed account of her life and describing as to how she came in contact and lived with the executrix, the judgment proceeded). As regards the execution and attestation of the will there is hardly any dispute. It is a registered will of which the whole of the contents were written by the testatrix with her own hand and its execution was admitted by her before the Registrar. The two attesting witnesses Dr. Bejoy Krishna Chaudhury and Mrs. Suniti Laura Ghose have given evidence. In our opinion execution and attestation have been duly proved, and indeed they have not been challenged on behalf of the appellants.

It has then been argued that the testatrix since her bereavements and in consequence of her illness was not in a fit state of mind to understand what she was doing, that she was wanting in rationality and that she was not intelligent enough or had no sufficient mental capacity to grasp the contents of the will. (After discussing the evidence, His Lordship proceeded). To sum up then, there was in her a defect, a weak-

ness of the mind; but however much it may be regarded as a disorder of the mind it was in no sense an intellectual disorder and in no degree reflected on her intellectual capacities. To be such mental weakness as would be sufficient to constitute testamentary incapacity, such incapacity, it is well settled, must be qua the will in question. Mrs. Mitter was the only lady who from 1913 or a short time before down to the date of the will was regularly looking after her, taking proper care of her, keeping her company in plains as well as in the hills and providing for her diversions; and it is only natural that all her feelings, her affections and her wishes would be centred round her; so the will was not at all an unlikely production. The will is a very short document which a lady of the calibre of the testatrix who had some little education in her childhood, had travelled to England, and had borne the company of Anglo-Indian ladies for a series of years and had lived with Mrs. Mitter for nearly 10 years or so would find no difficulty in comprehending. In these circumstances it must be held that the appellants' contention in this respect fails. (After rejecting the argument regarding the date of the execution of the will, the judgment proceeded). It has been contended in the next place on behalf of the appellant that the will was the result of undue influence exercised by Mrs. Mitter on the mind of the testatrix. Leaving the question of fraud apart as distinct from undue influence the matter stands thus: From 1910 or at all events from 1912 or 1913, Mrs. Mitter exercised considerable and weighty influence over the mind of the testatrix. This influence, no doubt, in so far as it was beneficial, was duly recognized by the husband; she made her happy while she was miserable before. It may also be that Mrs. Mitter to a certain extent dominated the will of the testatrix and had latterly, as the letters referred to above in detail suggest, succeeded in having ascendancy over her mind in such a way that the testatrix regarded her counsel as supreme.

It is also not an unreasonable inference to make from the said letters that Mrs. Mitter, although she in the beginning had been acting with the best of motives, latterly conceived the idea of getting from Mrs. Sarkar little by little

all that her husband had in order that ultimately all that would come to her under the will. It is also not unlikely that in her offer to provide for a house of her own for Mrs. Sarkar Mrs. Mitter was really arranging to have her own house made, as the change of mind from time to time on the part of Mrs. Sarkar as disclosed by the letters suggest. Certain statements in Mrs. Sarkar's letters, the truth of which has been denied by Mrs. Mitter but which it is impossible to regard as really untruth proceeding from Mrs. Sarkar, clearly demonstrate that Mrs. Mitter was making false representations to her to serve her own purposes in the matter of raising loans for the erection of the houses and so on. But then all this would not amount, in law, to such undue influence as would be sufficient to vitiate a will: see *Wingrove v. Wingrove* (1), *Bandains v. Richardson* (2) and *Craig v. Lamourca* (3). Mrs. Mitter may have acquired an ascendancy over the will of the testatrix but the testatrix was a person of competent understanding and in doing what she did the testatrix could not have said: "This is not my wish but I must do it." The will however brought about either by good offices truly rendered to the testatrix or by show of false affection or concern for the good and welfare of the testatrix or by using the testatrix as a means for securing a purely selfish end, must, in our judgment, be regarded as the expression of the testatrix's own wishes. We reject with confidence the evidence that has been adduced to show that the testatrix was ever ill treated or unkindly treated by Mrs. Mitter or that the testatrix had during her last illness spoken to her husband about the will having been extorted from her.

There remains then the case of fraud to be considered. (After discussing the evidence regarding this, the judgment proceeded.) It is clear therefore that her health at the time when she executed the will as well as when she had it registered was far from satisfactory, and the mental and physical weakness that she must have been suffering from at the periods concerned may also have

contributed to a readiness in believing in the picture as to her pecuniary indebtedness that was falsely presented before her by Mrs. Mitter. Key, L. J., observed in the case of *Hampson v. Guy* (4):

"The amount of evidence which would induce a person of strong mind and in good health to make a will according to the wishes of the persons who were inducing such a testator must be very much greater than the amount of inducement which would improperly influence the mind of a person who was weak partly from mental infirmity and partly from ill-health."

It is true that there was no question of fraud in that case, but it cannot be said in the case of inducement by fraudulent misrepresentation the position is anything different. We are of opinion that it was by means of fraudulent misrepresentation which vitally affected the judgment of the testatrix that the will was procured. We accordingly allow the appeal and reversing the decision appealed from order that the application for probate be dismissed with costs in both the Courts.

Mitter, J.—I have come to the same conclusion as my learned brother; and I would add nothing were we not differing from the Judge of the Court below on a question of fact where he had seen and heard the witnesses. I have no doubt that the will of which probate has been applied for was executed by the testatrix Mrs. Bepinbala Sarkar on 5th July 1922 with full knowledge of its contents and that she got it subsequently registered. The propounder of the will has proved affirmatively that the testatrix knew and approved of the contents of the will. There is much force in the contention of the learned Advocate-General that on this part of the case the appellant's arguments as to her testamentary incapacity are based on suspicions and suggestions and not on evidence. The evidence leads me to think that the testatrix was an intelligent lady, but at the same time impressionable, for Bimalabala, witness 13 for the defendant, tells us that she was a resolute lady in the sense that, being influenced by her friends, she did many things irrespective of consequences. The onus is therefore thrown on the caveator, now appellant, to prove either fraud or

1. (1886) 11 P D 81=55 L J P 7=84 W R 260=50 J P 56.

2. (1906) A C 169.

3. (1920) A C 849=89 L J P C 22=121 L T 208=36 T L R 26.

4. (1891) 84 L T 778.

undue influence in obtaining the will : see *Tyrrell v. Painton* (5).

The will, to my mind, is however an inefficient will and ignores the claims of the husband to the bounty of his wife in respect of property which she alleges she obtained by gift from him and the bequest is made solely in favour of the propounder with whom the testatrix was in terms of the greatest intimacy for a very long time. The circumstances under which this intimacy grew up have been detailed with great minuteness in the judgment of my learned brother and I do not propose to recapitulate them. The will may not be an unnatural one in the circumstances, but one is tempted to enquire what are the overriding considerations which made the testatrix disregard the claims of her husband to her bounty. The real matter for consideration is whether it has been established that the will has been obtained by fraud or undue influence. (After examining the evidence, His Lordship proceeded.) Indeed it is impossible to escape the conclusion that it was under this impression that the testatrix thought it her duty to make the will and thus to repay the debt of the respondent which however did not exist in reality. Her evidence makes it clear that it was she who induced this belief on a mind which was easily subject to the importunities and influences of friends. The testatrix was a person of sufficient capacity. The propounder described her nature in one of the letters as not really normal. She was a spell-bound lady and was so much led by others that she had nothing to call her name. The false belief was induced in her by one who, if she did not dominate the will of the testatrix, was in a position of active confidence with her and where a will is made in favour of such a person it is duty of the Court to scan the evidence of independent volition closely in order to be sure that there had been a thorough understanding of the consequences by her. This deceit practised on a mind easily led away by impressions is sufficient to annul her testament.

The Judge below thought that it was not within the scope of the present suit to see whether the loan of Rs. 15,000

5. (1934) P D 151 = 6 B 540 = 70 L J 435 = 43 W R 242.

was partly or wholly unfounded, missed its bearing on the question as to what induced the testatrix to make the will. Fraud is no less detestable in law than open force. Where therefore as in the present case the testatrix is circumvented by fraud the testament is of no more force than if she were constrained by fear. It may be taken to be fairly established that although the testatrix did know and approve of the contents of the will the paper may be refused probate if it be found that fraud has been purposely practised on the testatrix in obtaining the execution thereof : *Guardhouse v. Blackburn* (6) not disapproved in *Fulton v. Andrew* (7). It is difficult to define the different grades or shades of fraud. But here, for the reasons given, I am clearly of opinion that the will was the result of the deception practised on her by the false representation that Rs. 15,000 was due from the propounder of the will to the testatrix, a representation which on the evidence appears to be wholly devoid of truth. It remains to notice an argument regarding undue influence put forward by the appellant. It is not enough to show, as the appellant contends, that the testatrix's will was dominated by the propounder but it must be shown further that the influence was exercised on the particular occasion and the will was the result of that influence : see *Wingrove v. Wingrove* (1), *Bandains v. Richardson* (2) and *Craig v. Lamoureux* (3). We have no evidence in this case of undue influence in the sense that she was coerced to make the will. But I have already stated that the will was the result of the false representation that a large debt was owing by the testatrix to Mrs. Mitter and cannot stand.

It remains to notice another argument of the learned Advocate-General that this ground of fraud is not indicated in the objection of the defendant and reference is made to para. 14 of the objection, p. 27, where misrepresentations of a different kind are alluded to. But I think in paras. 19 to 21 of the objections the fraud based on misrepresentation in Ex. P is raised. In para. 21 it is distinctly stated that the statements in

6. (1936) 1 P 109 = 35 L J P 113 = 12 Jur (n s) 278 = 14 L T 69 = 14 W R 235.

7. (1975) 7 H L 442 = 44 L J P 17 = 32 L T 205 = 25 W R 266.

the Bengali writing were not true and correct and the caveator believed that "it was procured and induced by the fraud of the proponent" (referring to Ex P).

K.S.

*Appeal allowed.***A. I. R. 1933 Calcutta 578**

MUKERJI, J.

Sheikh Wafiz — Defendant — Appellant.

v.

Md. Nannoo and others — Plaintiffs — Respondents.

Appeal No. 1796 of 1930, Decided on 15th November 1932, against appellate decree of First Addl. Sub Judge, Mymensingh, D/- 6th March 1930.

Easements Act (1882), S. 18—Suit by person on his own behalf and on behalf of villagers for declaration of right of way claimed as customary right—Evidence let in as to use of pathway for over 20 years from time immemorial—What is proved is customary right and not mere easement.

A suit was filed by a person on his own behalf and on behalf of all the villagers of his village for a declaration of a right of way which was claimed as a customary right or in the alternative as an easement of necessity. The evidence let in proved that the pathway was used for more than 20 years. On this the lower appellate Court Judge held that the pathway was used for over 20 years as an easement and as of right:

Held: on appeal that it was a case of customary right and not one of mere easement: *AIR 1935 Cal 200, Rel on.* [P 579 C 2]

Birendra Kumar De—for Appellant.

Satindra Chandra Khasnavis — for Respondents.

Judgment.—Defendant 1, in a suit which was instituted by the plaintiffs for declaration of a right of way over an alleged 'gopat', is the appellant in this appeal. The suit was dismissed by the trial Court but had been decreed by the Subordinate Judge on appeal in a modified form. The 'gopat' which forms the subject matter of the suit will appear from the Commissioner's map which is to be found on the record and the portion of it which has a direct bearing on the case is marked in that map as lying between stations 1 and 16. Although I am not prepared to interfere with the decision which is complained of in this appeal, I must say that I am unable to disagree with the learned advocate for the appellant in his submission that the Subordinate Judge has fallen into an error in dealing with the case in so far as it is a question of the exact nature of

the right which had to be determined. The suit was instituted by the plaintiffs on their own behalf and also on behalf of all the inhabitants of certain villages. The averments in the plaint were that the 'gopat' in question was a village pathway through which the aforesaid villagers of the several villages had a customary right to pass and curiously enough it was also stated that they "had been using the same for a period of upwards of 20 years, that is to say, since time immemorial."

In the alternative there was an averment as regards the 'gopat' being one in which the said villagers had a right of way as of necessity. The trial Court, as already observed, dismissed the suit. Its findings were that to the extent of the pathway that lay between stations 1 and 6 such a 'gopat' did exist but that it was only a private path used by the neighbours of defendant 1 and that the villagers in general had actually no right of user in respect of it and as regards the portion lying between stations 6 to 16, that portion was of much lesser width and was actually in the nature of an *ail* in respect of which also the plaintiffs had no right of user at all. The trial Court appears to have disbelieved the oral evidence that was adduced in respect of the plaintiffs' case as regards the customary right and right of user as of necessity. The Subordinate Judge in the opening paragraph of his judgment set out the plaintiffs' case quite correctly saying that the pathway was claimed by the plaintiffs on their own behalf as well as on behalf of the other villagers of the middle para of village Jaipasha and that their case was that they had been using it from time immemorial and also that they claimed the pathway as an easement of necessity. When discussing the evidence in his judgment he referred to the evidence of a number of witnesses examined on behalf of the plaintiffs and observed that it was clear from their evidence that the plaintiffs and the people of Maijpara had been using the pathway for over 20 years as an easement and as of right. He then proceeded to consider the nature of the user and after having dealt with it in certain subsequent paragraphs of his judgment he came to the conclusion that the contention that was urged on behalf of the defendant to the effect that such user on

the part of the plaintiffs as there was in respect of the 'gopat' was of a permissive character and disposed of that contention as being untenable and he also found that the plaintiffs had only the right to pass over the disputed pathway with or without loads and to use it to bring their womenfolk in palanquins. The learned Judge thus negated a material part of the plaintiffs' case which was to the effect that they could take plough cattle over the 'gopat' and indiscriminately use the gopat for taking conveyances and things of that kind over it. The Subordinate Judge also found that there could be no question of any easement by way of necessity there being other paths through which the plaintiffs could reach the fields to go to which they have been asking for this gopat. In the light of findings thus arrived at the learned Subordinate Judge made a modified decree in favour of the plaintiffs.

The appellant has not been slow to take advantage of the error into which the Subordinate Judge has fallen by referring to an "easement" which in his opinion had been established by evidence adduced in view of the statements which they had made and which according to him showed that there had been user as of right, etc., for a period of over 20 years. 20 years have got very little to do with the question of the right that was claimed by the plaintiffs in the case. It was clearly a customary right in respect of a village pathway which, as has been clearly pointed out in the case of *Ali Mohammad v. Katu* (1), must be established by proving

"a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to use the land not belonging to or occupied by them, and to do acts in respect thereof which if there was no such custom would be acts of trespass."

It has been also pointed out in that case that

"such custom must be proved by reliable evidence of such repeated acts openly done which have been assented and submitted to as lead to the conclusion that originally by agreement or otherwise the usage had become the customary law of the locality."

The reference of 20 years therefore is certainly unhappy and perhaps also misleading. In view of the argument which has thus been advanced on behalf of the appellant and with which I entirely

agree it becomes necessary for me to look into the evidence. Mr. De has referred me to the evidence of five witnesses for the plaintiffs upon which the learned Subordinate Judge appears to have relied in his judgment and which evidence he seems to have entirely believed. Mr. De's contention is that it is not so very clear from the judgment of the learned Subordinate Judge that he is prepared to believe the evidence of those witnesses in so far as it seeks to establish user for a period of over 20 years and that it is not an unreasonable inference to make, having regard to the fact that the evidence of those witnesses in respect of user by the taking of conveyances and cattle has not been accepted by the Subordinate Judge, to hold that he accepted the evidence of those witnesses only to the extent that it went to establish that the user was for a period of 23 years or so. Having read that evidence I have come to the conclusion that such a contention is not possible. The whole object of the plaintiffs in leading evidence in the case appears to have been to establish that the right was being exercised from time immemorial. There is evidence of the plaintiffs to the effect that the pathway had been used by these villagers for about 200 years. The witnesses have strenuously stated the user to have been for 50 years or periods of a like character. Having regard to this evidence which the Subordinate Judge seems to have accepted in its entirety in so far as the length of the user is concerned, his finding as regards the right of the plaintiffs may, in my opinion, be justly read as amounting to this: that that evidence points to a customary right having its origin in some sort of an agreement which gave rise to that right.

On the whole therefore I think it would not be right for me to interfere with the decision of the learned Subordinate Judge though technically speaking it is open to the criticism which has been levelled against it by the learned advocate who had appeared on behalf of the appellant. The result, in my opinion, is that the appeal must be dismissed, but having regard to what I have already said I shall make no order as to costs in favour of the respondents.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 580

PATTERSON, J.

Abdur Rahim Molla and others—Plaintiffs—Petitioners.

v.

Tamijaddin Molla—Defendant—Opposite Party.

Civil Rule No. 1035 of 1932, Decided on 5th January 1933, from decision of Second Court Munsif, Gopalgang, D/- 13th August 1932.

Specific Relief Act (1877), S. 35— Decree for specific performance conditional on payment of amount in Court within certain time—Court has jurisdiction to extend time for payment of such amount for adequate reasons.

In a decree for specific performance it was provided that if the plaintiff deposited a certain amount in Court within a certain date from the date of the decree, the opposite party should execute and register a kobala in their favour. The plaintiff alleging that his pleader's letter came late to him prayed for extension of time to pay the amount in Court:

Held: that the decree was in the nature of a preliminary decree and that the Court had the jurisdiction to extend the time if it was satisfied that there were adequate reasons for the same: *AIR 1923 Mad 284, Rel on.* [P 580 C 2]

Monmotha Nath Roy (Junior)—for Petitioners.

Abdul Ali—for Opposite Party.

Order.—The petitioners in this case have obtained a decree for specific performance against the opposite party. By that decree it was in effect ordered that on the petitioners depositing a sum of Rs. 235 in Court within 15 days of the date of the decree the opposite party should execute and register a kobala in their favour in respect of the land in suit and that in the event of the opposite party failing to do so the petitioners would be entitled to have a kobala executed and registered through the Court. The petitioners having failed to deposit the entire amount within the time allowed by the Court applied to the Court for an extension of time to enable them to put in the balance, at the same time stating in explanation of the delay that the pleader's letter informing them of the result of the suit had reached them too late and that they had therefore not been able to procure the whole amount in time. The learned Munsif however rejected the application, holding that he had no jurisdiction to grant an extension of time inasmuch as the time had been fixed by the decree of the Court and any enlargement of time would therefore have the effect of varying the decree.

The present rule is directed against the order refusing to grant time in so far as that order is based on the finding that the Court had no jurisdiction to grant time.

It appears that the contract in question has been held to have been a valid and a binding contract, and that it is still subsisting, no provision having been made in the decree to the effect that in the event of the decree-holder failing to deposit the balance of the consideration money within the time allowed by the Court the contract would be rescinded. In these circumstances, the decree in question may be regarded as being in the nature of a preliminary decree, and if it be so regarded, the decision of the Madras High Court in the case of *Abdul Saker Sahib v. Abdul Rahman Sahib* (1) would appear to be applicable. That decision supports the view urged before me on behalf of the petitioners, namely, that the Court below had jurisdiction to grant time for the deposit of the balance of the consideration money in the event of that Court being satisfied after due inquiry that there had been some adequate reason for the petitioners' failure to deposit the amount within the time fixed. The learned advocate for the opposite party does not seriously contend that the Munsif had no jurisdiction to grant time, and he has not been able to refer me to any decision of this Court in which a different view of the law has been taken from that taken in the Madras decision referred to above.

This being the position, I think the proper course will be to make the Rule absolute in this sense: that the learned Munsif must be held to have jurisdiction to grant time in the exercise of his discretion. An order rejecting the petitioners' prayer for time is accordingly set aside and the Munsif is directed to consider the application afresh in the presence of both sides and to dispose of it on its merits, either by rejecting it or by granting time on suitable terms. The Rule is accordingly made absolute in the manner indicated above. The costs in this Court will abide the final result, the hearing fee being assessed at one gold mohur.

K.S.

Order accordingly.

1. AIR 1928 Mad 284=72 I O 888=45 Mad 148.

A. I. R. 1933 Calcutta 581

JACK AND MITTER, JJ.

Ali Bakhtear and others—Petitioners.

v.

Khandkar Altaf Hossain and others—

*Opposite Parties.

Civil Rule No. 1149 of 1932, Decided on 25th January 1933, against order of Dist. Judge, Murshidabad, D/- 20th July 1932.

Mussalman Wakf Act (42 of 1923), S. 3 — Wakf in which whole of ultimate benefit is not reserved for poor or for other religious purpose comes under Act of 1923 and not under Act of 1913 — Mussalman Wakf Validating Act (6 of 1913), S. 3.

Act 6 of 1913 only applies to a wakf in which the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

[P 581 C 2]

Some of the terms of a wakf were as follows :

(1) As long as the founders live they shall appropriate one-third of the proceeds of the wakf properties themselves and apply two-thirds to other charities ; (2) after their death two-thirds of the proceeds of the wakf properties shall be enjoyed by their children and the remaining one-third should go to meet the charities ; and (3) in the event of non-existence of any child begotten by the founders, such a person from among their relatives as may be most nearly related to them shall be appointed mutwalli and shall get Rs. 10 a month as a salary, shall live in their dwelling house and shall appropriate the balance of the proceeds of the tanks and gardens left after defraying the expenses of persons attached to the Madrasa and Khankah :

Held : that the wakf was not in the nature of wakf described in S. 3, Act 6 of 1913, but came under the definition of wakf in Act of 1923 as the whole of ultimate benefit was not reserved for the poor or for any other purpose recognized by the Mussalman law as religious, pious or charitable of a permanent character.

[P 581 C 2]

Nasim Ali and Farhat Ali—for Petitioners.

Rupendra Kumar Mitter and A. S. M. Akram—for Opposite Parties.

Jack, J.—This rule was issued on the opposite party to show cause why this Court should not set aside the dismissal on a preliminary point of the petitioner's application for an order on the opposite party to file accounts under S. 3, Mussalman Wakf Act 42 of 1923. The preliminary point raised was that Act 42 of 1923 is not applicable to this wakf inasmuch as it is a wakf of the nature described in S. 3, Wakf Validating Act 6 of 1913, and is thus excluded from the operation of Act 42 of 1923 by S. 2 (e) of the Act. Some of the terms of the wakf are as follows : (1) as long as the

founders live they shall appropriate one-third of the proceeds of the wakf properties themselves and apply two-thirds to other charities ; (2) after their death two-thirds of the proceeds of the wakf properties shall be enjoyed by their children and the remaining one-third should go to meet the charities ; and (3) in the event of non-existence of any child begotten by the founders, such a person from among their relatives as may be most nearly related to them shall be appointed mutwalli and shall get Rs. 10 a month as a salary, shall live in their dwelling house and shall appropriate the balance of the proceeds of the tanks and gardens left after defraying the expenses of persons attached to the Madrasa and Khankah.

The question then is whether this is a wakf coming under Act 6 of 1913 or under Act 42 of 1923. Act 6 of 1913 only applies to a wakf in which the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character : vide S. 3 (b) of the Act. It is quite clear therefore that in the present case Act 6 of 1913 has no application because the ultimate benefit is not reserved for the poor or for other charitable purposes. The ultimate benefit goes to the relative of the founders who will be appointed mutwalli. In addition to Rs. 10 as his salary, he is to live in the dwelling house and to appropriate the balance of the proceeds of the tanks and gardens left after defraying the expenses of persons attached to the Madrasa and Khankah. It is clear from this that certainly the whole of the ultimate benefit is not reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable of a permanent character.

The learned Judge therefore in holding that the wakf is in the nature of a wakf described in S. 3, Act 6 of 1913, is not correct. On the other hand the wakf clearly comes under the definition of wakf contained in Act 42 of 1923. Therefore the learned Judge was not right in dismissing the application on this preliminary point. The rule is made absolute and the case sent back to the District Judge for disposal in accordance with law on the other questions which

arise. We make no order as to costs of this rule.

Mitter, J.—This question raised by this rule turns on the construction of certain provisions of the Mussalman Wakf Act (Act 42 of 1923). It appears that the petitioners and opposite parties 2 and 3, who are the Mussulman inhabitants of village Sahapur in the District of Murshidabad and are interested in the wakf created by one Hossain Ally and his wife on 19th July 1863 by a deed of wakfnama which concerned properties situate in Calcutta and in the districts of Murshidabad, Burdwan and Birbhum, applied before the District Judge, Murshidabad, for an order on the opposite party 1 to file a statement under S. 3 of the Act. They alleged in the said application that opposite party 1 was not managing the wakf estate according to the terms of the wakfnama but was misappropriating the wakf fund. The learned District Judge has thrown out the said application on the ground that the wakf is of a nature described in S. 3 of the Wakf Validating Act 6 of 1913 and as such the wakf clearly comes within the purview of the excepted part of S. 2, Cl. (a), Act 42 of 1923, and the Act does not apply to the present case. We have read the wakfnama and it appears to us that one-third of the income of the wakf properties is devoted to the personal expenses of the founders of the wakf and the remaining two-thirds in paying the expenses of the students and teachers, in providing food to the travellers in the month of Ramzan and spending certain sums in the mosques in different places. Provision is also made for the succession of the mutwalliship the first mutwallis being the founder and his wife. Having regard to paras. 1 and 3 of the wakfnama it appears to us that the wakf is partly a public wakf that is devoted entirely to religious purposes and partly a private wakf. The wakf is really a mixed wakf and to such a wakf the provisions of the Mussalman Wakf Act are clearly applicable.

This was the view taken by Wazir Hussain, C. J., of the Oudh Chief Court in the Full Bench decision of *Shabbir Hossein v. Ashiq Hossein* (1). The learned Judge is clearly in error in holding that the wakf in the present case is a wakf

described in S. 3, Mussalman Wakf Validating Act of 1913, and therefore comes within the exception of S. 2 (a) of the Act of 1923. We are of opinion that S. 3, Mussalman Wakf Validating Act, applies to wakf which are in the nature of family settlements, pure and simple, where the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious pious or a charitable purpose of a permanent character. We are supported in this view by an unreported decision of this Court in Civil Rules Nos. 872 and 873 of 1931. The result is that the order of the learned District Judge must be set aside and he is directed to re-hear the application which he has thrown out on the preliminary ground. For the reasons given above I agree that this rule must be made absolute.

K.S.

Rule made absolute.

A. I. R. 1933 Calcutta 582

LORT-WILLIAMS AND MCNAIR, JJ.

Bhupendra Nath Sinha—Appellant.

v.

Giridharilal Nagar—Respondent.

Criminal Appeal No. 754 of 1932 Decided on 5th June 1933.

(a) Penal Code (1860), S. 405—S. 405 does not apply to partners

Section 405 is not intended to apply to partners as the essential element which forms the gist of the offence under S. 405 is the allegation of entrustment, and as it is very difficult to show how or in what circumstances a partner can be said to have been entrusted with partnership property. Further a partner who receives money belonging to the partnership on account of himself and his copartners does not do so in a fiduciary capacity: 9 W. R. Cr. 37; 13 Beng. L. R. 807; *Piddocke v. Burt*, (1894) 1 Ch. 341, *Rel.*

[P 586 C 1]

(b) Criminal P. C. (1898), S. 350 (3)—Transfer of case to another Magistrate after hearing principal prosecution witnesses—Accused not claiming de novo trial—Conviction of accused by new Magistrate—Conduct of trial is not satisfactory—Criminal P. C. (1898), S. 526.

Where a case is transferred to another Magistrate on the application of complainant after most of the principal prosecution witnesses have been heard and on the accused not claiming a de novo trial the new Magistrate convicts the accused without hearing the principal witnesses for the prosecution, the trial is unsatisfactory. This state of affairs follows from the iniquitous S. 526. [P 587 C 2]

Remedy for this is suggested by confining S. 526 to transfers made before commencement of trial. [P 587 C 2]

A. K. Basu, Satindra Nath Mukherjee and Narendra Nath Banerjee—for Appellant.

Gammel and Sures Chandra Talukdar—for Respondent.

D. N. Bhattacharjee—for the Crown.

Lort-Williams, J.—The appellant was convicted by the Chief Presidency Magistrate of offences under S. 406, I. P. C., and sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 1 000. The case for the prosecution was as follows: the joint family firm of Baldeoram Behari Lal, now consisting of Murari, Giridharilal and three minors, have carried on business for many years as Bankers and Banias at 49 Strand Road. In 1929 they started another business in hessians and gunnies under the name of Giridharilal & Co. at 135 Canning Street. The accused Sinha was a partner in a firm called Ram Sarup Mamchand, who were sole guaranteed brokers, for hessians and gunnies of David Sassoon & Co. Early in 1930 Giridharilal proposed to Sinha that he should leave Ram Sarup Mamchand, join Giridharilal and Murari as a partner in their firm of Giridharilal & Co. and induce Sassoon & Co. to give them the appointment of sole guaranteed bazar gunny brokers.

Sinha consented, and it was agreed that he should have a seven annas share, and that they would provide a sum of Rs. 3 lacs, which would be required to be deposited as security with Sassoon & Co. Sinha thereupon obtained the appointment, the deposit being reduced subsequently to Rs. 1½ lacs.

Business commenced, and Sinha used to do all the work of Giridharilal & Co. while Giridharilal and Murari devoted their attention to the business of Baldeoram Behari Lal. But Sinha had no authority to draw or sign cheques nor, according to Giridharilal had he any right to receive money on behalf of Giridharilal & Co., without the permission of his partners. There was no written partnership agreement, and Sinha denies that there was any restriction upon his receiving money. On the face of it, such a restriction does not sound very plausible, and seems to be in the nature of an afterthought invented to meet subsequent developments. Sassoon's Manager was a man named Abraham, and Sinha suggested to Giridharilal

that it would be good policy to offer him a bribe, not only to secure the continuance of the present appointment, but in order to induce him to put other business in the hands of Giridharilal & Co. Sinha says that this was Giridharilal's and Murari's suggestion and that he was afraid that such a bald offer might offend so refined a gentleman, but that his finer susceptibilities would not perhaps be outraged, if share speculation was transacted on his behalf to the extent of Rs. 1½ lacs. Whoever made the suggestion first, all three agreed to it, though Giridharilal alleges that Abraham was to bear losses, if any. Abraham's name, for obvious reasons, did not appear in the firm's books in connexion with these transactions, and no agreement was made with him by Giridharilal & Co. Giridharilal admits that subsequently they got a great deal of extra business in jute, rape, linseed and other goods from Sassoon & Co. by favour of Abraham.

In addition to their business as brokers, Giridharilal & Co. did a considerable trade as dealers in gunny and hessian, and by October 1930 they had very heavy stocks on their hands and the firm was working at a loss. Sinha offered to obtain money from Sassoon & Co., Giridharilal and Murari agreed, and Sinha opened a loan account on behalf of Giridharilal & Co. with Sassoon & Co. for Rs. 1½ lacs. There was no written agreement; neither Giridharilal nor Murari had any communication with Sassoon & Co. nor gave any direction about what authority, if any, was to be required, before money was allowed to be withdrawn from the loan account. By this means Sinha obtained for Giridharilal & Co. in October 1930 Rs. 50,000, which was repaid almost immediately and Rs. 75,000, which was adjusted some months later. There was a loss in 1930 on Abraham's share speculations of Rs. 31,000 odd, and this was debited to Sinha. Giridharilal explains this by alleging that when asked to get the money from Abraham, Sinha confessed that his story about Abraham was a lie, and that he meant to take the profits (if any) for himself. Sinha denies this and says that Giridharilal & Co. never intended to charge Abraham with any losses, and they were debited to Sinha benami, because some entry had to be

made in order to adjust the books. Sinha was not debited in the balance sheet with any interest on the amount advanced, for share speculation, but in the journal for 1931 an entry appears for the first time three months later. Sinha says this is a fabrication.

About this time Giridharilal alleges that he discovered a cash entry of Rs. 2,751, made by Sinha on account of differences in hessians, which had not been entered in the sawda (or contract) book and that he complained to Sinha who begged pardon for it. This refers to what are called fatka transactions, that is to say speculations in differences, in the price of goods. The case for the prosecution is that Giridharilal & Co. never dealt in fatka, and had no knowledge that Sinha was doing anything of the kind.

In cross-examination, however, a large number of documents, books and entries were put to Giridharilal who was forced to admit that a considerable amount of business in fatka had been done, not only for Sassoon & Co., but on Giridharilal & Co.'s own account. Sassoon & Co. liked them to be called Bhitari Bazar transactions, because the word fatka is applied to gambling deals exclusively, but for all practical purposes they mean the same thing. Whether the transaction amounts to gambling or not depends on the form of the contract and the intention of the parties, and turns largely upon the question whether delivery is intended or not. Further it is clear from Giridharilal's admissions, that the entry of Rs. 2,751 was the balance owing on account of a number of these transactions some of the bills for which bore the signature of Giridharilal. None of them appear in the sawda book, and this bears out Sinha's contention that fatka transactions never appeared in the books, except in the form of a balance.

In 1930 the firm incurred a loss of more than Rupees 4 lakhs, Sinha's share being more than Rs. 2 lakhs. This was due almost entirely to losses as dealers in gunnies and hessians. According to Giridharilal there was a profit of Rupees 1½ lakhs on their legitimate business of brokerage for Sassoon & Co. There was a dissension between the partners in which Giridharilal and Murari told Sinha that they would not do such

business in future and Sinha gave an undertaking in his own writing (Ex. 12) in which he promised to enter all transactions in the sawda book daily, such entries to be examined and initiated by his partners. He further agreed to be personally liable and responsible for all transactions not so entered, examined and initialled. The document continues:

"Further I add here that henceforth I shall do no speculative business of any sort in the name of our said partnership business, and if I am hereafter detected to have done so, I shall alone in my personal capacity be liable . . . If any business is done by Giridharilal without my consent I shall not be responsible."

Sinha's contention is that this did not refer to speculation to be done on behalf of Abraham and that it was agreed henceforth to speculate only in differences on his behalf, because this did not involve tying up the large capital sums required for speculative dealings in shares. As Sinha could not pay his share of the firm's losses, he gave his promissory note as security and three promissory notes executed in favour of his wife. Each party accuses the other of forgery of the latter. His wife's endorsement was not obtained, nor was any inquiry made from the persons who had executed the notes. During the latter part of 1931 Giridharilal was often away at Benares and about the middle of December he went there again, and returned with Murari about the middle of January 1932, when they heard that Sinha had been speculating heavily in fatka. They enquired from Sassoon & Co. and found that he had withdrawn from the loan account Rupees 25,000 on 18th December 1931, Rupees 75,000 on 29th December 1931, and Rs. 15,000 on 18th January 1932, and had repaid Rs. 25,000 on 12th January 1932. They examined the cash-book on 25th and 27th January and found no such entries, but on the 29th when they looked again, entries had been made in the handwriting of Sinha. They referred the matter to one Benoy, who had introduced Sinha to Giridharilal, and he says that Sinha confessed that he had done wrong, asked Benoy to save him, and gave him his pass-book. From the pass-book they discovered that Sinha had paid the three sums mentioned into his private account and on the 27th they accused him of gambling in fatka, and of committing theft, and

showed him the entries in his pass-book. He admitted that he had done wrong and asked for forgiveness. Thereupon this prosecution was launched, charging Sinha with misappropriation of these three sums. In the meantime several firms had made claims on Giridharilal & Co. for considerable sums arising out of fatka transactions and litigation is pending.

The case for the defence is that from first to last all the partners knew and agreed to speculate for the benefit of Abraham as a bribe to induce him to give business to the firm. It was never intended to charge him with any loss. Though the Rs. 31,000 odd was debited to Sinha for the purpose of adjusting the books, no interest was charged, and the shares unsold were credited to the firm and not to him. Throughout 1930 and 1931 the firm did fatka business both for Sassoon & Co. and for themselves, and in 1931 for Abraham, and in jute and hessian as well as linseed. These were never shown in the sawda book, but they appear in the linseed fatka book (Ex. A), and the rest appear in the jute and hessian fatka book which the prosecution have suppressed. A private telephone connexion was maintained with the firm of Gopiram Murarka for fatka business. The payment of Rs. 2,751 was made in cash to Gopiram, an open cheque for the money was signed by Giridharilal, and the payment was debited to the firm. In 1931 all the partners agreed that share speculation tied up too much money, and that jute and hessian fatka instead would be done for Abraham's benefit in future. Otherwise none but solid business would be done, such as brokerage. Only the balance on fatka transactions was shown in the cash-book at the end of the year. The loss in 1931 was really more than Rs. 90,000, but this figure was entered in order to correspond with the entry of Rs. 90,000 withdrawn from Sassoon's loan account, as in 1930 the debit was made against Sinha's name. When Giridharilal and Murari were both away from Calcutta, and Sinha could not draw on the firm's account, it was agreed that he should draw money from the loan account in case of emergency. For obvious reasons it would be useless to pay these sums into the firm's account at the Bank. When Giridharilal and

Murari went to Benares in December 1931, there were fatka losses to be met, and his partners were aware that Sinha intended to draw on the loan account.

On 12th January he returned to this account Rs. 25,000 in cash, out of fatka profits, and paid Abraham Rs. 11,000 odd on 12th December for which a pencil receipt signed, and in his writing, was put in evidence before the Additional Chief Presidency Magistrate. As Abraham was not called and no witness produced this document, the Chief Presidency Magistrate disregarded it. Sinha says that such pencil receipts were always taken from Abraham, and kept for accounting purposes, but they have been suppressed by the prosecution. Out of the Rs. 90,000 drawn from Sassoon and Company, Rs. 78,000 odd was paid out for fatka on the 22nd and 30th December and the 19th January, in addition to the Rs. 11,000 odd paid to Abraham. Counsel on behalf of Sinha desired to give evidence to show how all sums were dealt with by his client, but the Magistrate refused to allow him to do so, on the ground that the case did not, and could not, turn on a question of account. Nevertheless the Magistrate has based his judgment finally on an incomplete account and is convinced that Sinha is guilty, because he failed to account for the whole of the sums withdrawn from the loan account. According to Sinha the partners met on the 25th January to settle the account for 1931, and the entry of Rs. 90,000 was made, representing the debit balance on fatka transactions for the year. With regard to further claims pending on account of fatka by Kishenlal, Gopiram and other firms, Giridharilal and Murari suggested repudiation, and reliance on the defence that they were gambling transactions. Sinha refused, and in order to bolster up this dishonest plea he has been repudiated and prosecuted by his partners. The prosecution admit that he was not turned out of the office until four days after his alleged confession. This trial was unsatisfactory for several reasons. In the first place the charge itself was seriously defective. The essential element, which forms the gist of the offence under S. 405, was omitted, namely, the allegation of entrustment. It is true that such an omission is not fatal if it had

not occasioned a failure of justice (S. 225 and other sections of the Criminal P. C.) It is difficult however to say this with any certainty. The omission was not due simply to error. The prosecution were not able, even up to the end of the hearing on appeal, to state with certainty or particularity what was the nature of the entrustment which they sought to charge nor by whom, nor when, such entrustment was made.

The difficulty arises owing to the admitted fact of partnership. In *In re Lalchand Roy* (1) the Court held that in a case of partnership the gist of the offence of criminal breach of trust, viz., dishonest misappropriation, is wholly wanting, the accused being a part owner of the property. But it was decided by a Full Bench in *Queen v. Okhoy Coomar Shaw* (2) that the words of S. 405 are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with dominion over it, and has dishonestly misappropriated it, or converted it to his own use, and this decision has been followed, without further discussion, in some other cases. We have no doubt that it is correct so far as it goes, but no indication is given in the judgment, to show how, or in what circumstances, a partner can be said to have been entrusted with partnership property, or with dominion over it, or to have misappropriated or converted it, and it is difficult to conceive how such a situation could arise. The learned Judges did not decide that such a situation had arisen in that case, but only that if it did arise on appropriate facts, then the section was wide enough to cover it. A partner who receives money belonging to the partnership on account of himself and his co-partners, does not do so in a fiduciary capacity: *Piddock v. Burt* (3). No criminal prosecution is sustainable by one partner against another for stealing, or embezzling or obtaining by false pretences, or misappropriating the property of the firm: *Lindley on Partnership*, Edn. 9, p. 559, and the cases referred to in note (a), especially *R. v.*

Loose (4) (stealing): *R. v. Evans* (5), (false pretences); and *R. v. Bren* (6), (embezzlement). This disability has been removed in England by 31 and 32 Vic. C 116, now replaced by S. 40 (4), Larceny Act 1916, but no similar legislation has been enacted in India.

Partners are joint-owners or co-owners of the partnership property, that is to say of the common stock: S. 253 (1), Contract Act. Each partner is co-owner of the whole of this common stock, though he receives or pays a share only in profits and losses arising therefrom, and though his share in the partnership property is only the value of his original contribution, increased or diminished by his share of profit or loss. It is difficult therefore to conceive how he can be entrusted with, or with dominion over, his own property, or how he can dishonestly misappropriate it or convert it to his own use. In *Emperor v. Jagannath Raghunath Das* (7), Sir John Beaumont, C. J., seems to have realized these difficulties, but held that a partner might be entrusted with dominion over the partnership property. We are unable to appreciate the distinction which he drew. The English cases were not cited to the Court, nor were the incidents arising from the law of partnership discussed in the judgment. Moreover the decision is marred by the fact that the learned Judge's mind seems to have been much affected because the accused himself did not give evidence to rebut the charge, or to show that this intention was honest. It must have escaped the learned Judge's attention that our procedure does not provide the accused with any such opportunity, and to require him to defend himself offends against the fundamental presumption which underlies the administration of the criminal law both here and in England.

In the present case, clearly, there was no entrustment of dominion, because the prosecution case is that Sinha acted without authority. The learned counsel who has appeared for the prosecution has invited us to avoid the difficulty of

1. (1888) 9 W R Cr 27.

2. (1874) 13 Beng L R 307=21 W R Cr 59 (FB).

3. (1894) 1 Ch 248=83 L J Ch 246=42 W R 248=70 L T 553=8 Bang 104.

4. (1860) 29 L J M C 132=6 Jur (ns) 513=2 L T 254=8 W R 422=8 Cox C C 802.

5. 9 Jur (ns) 184.

6. (1861) 9 Cox C C 398=12 W R 107=9 L T 452=83 L J M C 59.

7. AIR 1932 Bom 57=1932 Cr C 81=136 IC 493=38 Cr L J 317.

entrustment by convicting the accused under S. 403. This however would not remove the difficulty arising from the necessary element of dishonest misappropriation or conversion. Even if it were possible dishonestly to misappropriate or convert one's own property, it is clear that in the present case the fatka contracts were made in the name of the firm Giridharilal and Murari held Sinha out as having authority to make such contracts, and prima facie the firm was liable upon them. It is equally clear that Sinha used the money drawn from the loan account to meet these liabilities. There is no sufficient evidence on the record to enable us to say that these were gambling transactions and void as such. That would depend upon the form of each contract, and the intention of the parties about delivery. Prima facie the contracts were valid and enforceable. In Ss. 403 to 409, I. P. C., which deal with criminal misappropriation and criminal breach of trust, many classes of persons are specifically mentioned, but no reference is made to partners, either in the sections or in the numerous illustrations thereto. The latter refer to persons entrusted absolutely with property of another, and not to property which belongs either partly or wholly to the accused. This alone affords striking confirmation of the view, that the sections are not intended to apply to partners.

Another unsatisfactory aspect of this trial was, that the principal witnesses for the prosecution were not heard by the Chief Presidency Magistrate who convicted the accused. The trial commenced before the Additional Chief Presidency Magistrate on 25th February 1932. After the whole of the witnesses for the prosecution had been examined-in-chief, charges framed, cross examination practically concluded, and the trial, after numerous adjournments, had extended to 1st June 1932, the complainant Giridharilal was absent on account of illness. At the previous hearing he had been severely pressed in cross-examination, and had been compelled to make admissions, which largely discounted, if they did not destroy entirely, his reliability as a witness of truth. The trial was adjourned for a week, when the complainant filed a petition under

S. 526, Criminal P. C., asking for adjournment to enable him to apply for transfer. No reasons were given, or even suggested, for this sudden desire to have the case tried by another Magistrate. Meanwhile the Magistrate heard something about the complainant, which made him unwilling to try the case further, and he requested the Chief Presidency Magistrate to transfer it to his file. Thereafter the Chief Presidency Magistrate asked the accused whether he claimed a trial de novo. His counsel was thus placed in a dilemma. Either he had to pursue the futile task of cross-examining all the witnesses over again, well primed as they would be after their previous experiences, or he had to let the Magistrate decide the case without hearing the principal witnesses for the prosecution. Such was the Gilbertian situation created, and such is the embarrassment which the complainant is able to inflict upon the accused by means of this iniquitous section, which still disfigures the Code, though some of its worst features have been removed recently by amendment.

Such a trial cannot be satisfactory, nor for similar reasons can a new trial repair the damage. We are not unmindful that similar results follow from necessary transfers of Judges and Magistrates. The remedy is to reduce their number to those which deal alone renders unavoidable, provided that in every other case the Judge or Magistrate shall complete all pending trials before his transfer, and confine S. 526 to transfers made before the commencement of a trial. Another unsatisfactory feature of the case was the omission to call Abraham as a witness. He was in Calcutta and available throughout the trial. His evidence would have disposed of the case one way or the other and would have cleared up much that has been left obscure. If both the prosecution and the defence were unwilling to call him, the Magistrate ought to have examined him.

In conclusion we observe that neither party came to Court with clean hands. Both were quite ready to corrupt Abraham in order dishonestly to obtain favours from his firm. The onus lies upon the prosecution and the proof in this case depends mainly upon the evidence of Giridharilal. We cannot rely

upon his evidence and in our opinion the onus has not been discharged. Consequently and for all these reasons, this conviction cannot stand, and we set it aside and acquit the accused.

McNair, J.—I agree.

K.S.

Accused acquitted.

*** A. I. R. 1933 Calcutta 588**

MUKERJI, J.

Pranballav Saha and another—Plaintiffs—Appellants.

v.

Bhagaban Chandra Seal and others—Defendants—Respondents.

Appeal No. 2938 of 1930. Decided on 6th January 1933, against appellate decree of First Addl. Sub-Judge, Dacca, D/- 16th August 1930.

* (a) Registration Act (1908), S. 17, sub-S. 2, Cl. (1)—Some of properties mortgaged released by mortgagee by taking some amount—Endorsement on back of mortgage to that effect does not require registration.

The expression "where the receipt does not purport to extinguish the mortgage" should be read as they are and no words such as "in whole or in part" or "in respect of some or all of the mortgaged properties in their entirety" can be read as qualifying that expression. Hence where a mortgagee releases some of the mortgaged properties by taking some money and makes an endorsement on the back of the mortgage to that effect, the mortgage itself is not extinguished and so the endorsement falls within sub-S. 2, Cl. (1), S. 17 and requires no registration.

[P 589 C 1]

* (b) Transfer of Property Act (1882), S. 60—Purchaser of some of mortgaged property—Subsequent release of some other of mortgaged property by mortgagee—Purchaser is entitled to partial redemption of property purchased by him.

Where a person purchases some of the mortgaged property and subsequent to the purchase, the mortgagee releases some other of the mortgaged property other than the one purchased, the purchaser is entitled to redeem partially the property purchased by him. Only where he purchases with knowledge of a prior release by the mortgagee that he can be insisted to redeem the whole mortgage.

[P 589 C 1; P 590 C 2]

D. N. Bagchi, Mohini Mohan Bhattacharjee and Harakrishna Pramanik—for Appellants.

Kalpada Chakravarti—for Respondents.

Judgment.—In 1923, the predecessors of defendants 1 to 4 executed a mortgage in plaintiffs' favour in respect of certain properties on taking a loan of Rs. 895. In 1924 the plaintiffs released some of the properties on receiving Rs. 1,000 from the mortgagors and made an endorsement to that effect on the back of

the mortgage bond. Defendant 8 had in the meantime purchased one of the properties, not one amongst the properties subsequently released. The plaintiffs instituted the suit for enforcing the mortgage security for the principal and interest due after deducting the amount received by them and against all the mortgaged properties. In the plaint however he averred that he had released some of the properties as aforesaid. The suit was contested by defendant 8 alone who was impleaded on the allegation that the plaintiffs had come to know of his purchase only a few months before the suit. The Munsif made a decree for sale in respect of all the mortgaged properties on the basis of the mortgage as it originally was. It is obvious that such a decree in respect of all the mortgaged properties was wrong because the mortgagee himself had previously released some of the properties on receipt of Rs. 1,000. From the decree made as above defendant 8 preferred an appeal. Before the Subordinate Judge the plaintiffs conceded that the decree for sale of all the properties could not stand and prayed for an amendment of the plaint by asking for a sale of the properties not released. The Subordinate Judge allowed the prayer.

In dealing with the contentions of defendant 8, the appellant in the appeal before him, the Subordinate Judge held that the endorsement by which the release was made required registration and not having been registered was not admissible in evidence. He held that therefore the release was to be treated as made on the date on which the plaint which contained the admission about the release was filed. He held also that as the plaintiff admittedly had knowledge of the purchase of defendant 8 on the date of the suit, and so before the date of the release as he found it, the case attracted the principle that if a mortgagee releases one or more of the mortgaged properties with the knowledge that there has been change of ownership as to some or all of the properties, then the properties which remain liable are only liable for such part of the mortgage debt as is proportionate to their value at the date of the mortgage. He held therefore that defendant 8 would be entitled to redeem his own property only and on payment of the proportion-

ate mortgage debt. On this basis the Subordinate Judge has made a decree for sale of the properties which are unreleased. The plaintiff has then preferred this second appeal. A number of decisions of the different Courts, not wholly consistent with each other, have been cited before me on behalf of the appellant on the meaning of S. 17, sub-S. (2), Cl. (11), Registration Act. I do not propose to discuss them here as none of them has directly decided a case in which the receipt of the money which is the subject-matter of the endorsement purported to extinguish a mortgage entirely in respect of a part of the mortgaged properties. But giving the question the best consideration I could I have come to the conclusion that the expression "when the receipt does not purport to extinguish the mortgage" should be read as it is and that no words such as "in whole or in part" or "in respect of some or all of the mortgaged properties in their entirety" can be read as qualifying that expression. I am inclined to take the view that as only some of the mortgaged properties purported to have been released by the endorsement, the mortgage itself was not extinguished and so the endorsement falls within sub-S. (2), Cl. (11), S. 17 and required no registration.

In the view that I have taken as above the position has been simplified and the only question that I have to consider is whether the defendant is entitled to redeem his property only, when subsequent to his purchase the plaintiffs granted the release in respect of some other of the mortgaged properties. It has been strenuously contended that it is only when the mortgagee grants a partial release with knowledge of the change of ownership of a part of the whole of the mortgaged properties that a partial redemption is to be allowed, and that where he does so without any such knowledge the transferee has no equities in his favour on which he can rely for claiming such partial redemption. I have not been able to discover any authority directly bearing on this question. Of course there is abundant authority for the proposition that where the mortgagee has granted the release with such knowledge the release should have the same effect as a purchase of the release properties by the mortgagee him-

self and so a partial redemption must be allowed. In my opinion, the argument that where knowledge is not proved, the transferee must redeem the mortgage in its entirety as it stands after the release, cannot be accepted as sound on principle. Redemption of the whole, in my opinion, can only be insisted on where the transferee acquires his interest with knowledge of the release: when he has such knowledge or at all events when he ought to have had such knowledge, he can have no higher rights than what his vendor, the mortgagor, himself has. But in cases where the transferee could never have knowledge of the release as in the present case where the release took place after the transfer, he is in a different position. A mortgage is not to be regarded as a prohibition against transfer. An innocent transferee of a part of the equity of redemption too has his rights protected on equitable considerations.

In my judgment, such a transferee is entitled to urge on equitable grounds that when he took the transfer there was one indivisible mortgage, and when after he acquired an interest in the equity of redemption, the integrity of the mortgage was broken by the mortgagee and the mortgagor behind his back he is entitled to a claim a partial redemption, the mortgagee himself being no longer competent to rely on the integrity of the mortgage. It should not be overlooked that the mortgage security, as a whole, is no longer enforceable by reason of the release itself, and it is only a deformity of it that is being sought to be enforced as a whole by the mortgagee. The mortgagee having by his own act in granting the release, made it impossible for the transferee to redeem the original mortgage as a whole on the basis of which the equity of redemption which he purchased has to be judged, he is, in my judgment, entitled to claim a partial redemption. On all these considerations, I am of opinion that the decision of the learned Judge as to partial redemption is right. I accordingly dismiss this appeal with costs. Leave to prefer an appeal under the Letters Patent is granted.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 590

GUHA AND BARTLEY, JJ.

Shyam Sunder Das—Plaintiff—Appellant.

v.

L. Ivans and others—Defendants—Respondents.

Appeal No. 1443 of 1931, Decided on 23rd May 1933, against decree of 1st Court Sub-Judge, Sylhet, D/- 20th December 1930.

(a) Assam Land and Revenue Regulation (1 of 1886), S. 71—Purchaser at revenue sale is entitled to avoid interest created by adverse possession.

The incumbrance which may be set aside under S. 71 of the Assam Land and Revenue Regulation, includes not merely an incumbrance actively created by the previous holder but also an incumbrance created by the acquiescence or laches either wilful, or arising from negligence, and a purchaser at a revenue sale is entitled to avoid an interest acquired by anyone by adverse possession: 8 C W N 108, *Ref.* [P 591 C 2]

(b) Landlord and Tenant—Occupancy holding—Land over which right of occupancy can be acquired by tenant should be land used for agricultural or horticultural purpose.

Land in respect of which right of occupancy could be acquired by a tenant must be land used or to be used for agricultural or horticultural purpose, and for that purpose land occupied for purpose subsidiary to or promoting agricultural or horticultural becomes subject to right of occupancy. Hence where lands have been given to the tenant for grazing of cattle required for agricultural purpose, right of occupancy can be acquired by the tenants in occupation of such land. [P 592 C 1]

(c) Assam Land and Revenue Regulation (1 of 1886), S. 80—Possession of person with co-sharers—Surrender by co-sharers—Continuous possession of such person for 12 years is possession under one and same right and occupancy right acquired therefore is protected from eviction in sale for arrears of revenue after 12 years.

Defendant was a co-sharer along with others in possession of a tenancy for grazing cattle for agricultural purposes. The other co-sharers surrendered their interest and the whole right devolved upon the defendant who was in continuous possession for more than 12 years. Subsequently the land was sold for arrears of revenue.

Held: that the defendant's possession was continuous under one and the same right, that he had acquired a right of occupancy at the date of the sale and that he was entitled to protection from eviction: 22 W R 51, *Foll*; 8 Beng L R 838, *Ref.* [P 593 C 1, 2]

(d) Assam Land Revenue Regulation (1 of 1886), Ss. 85 and 88—Sale for arrears of revenue—Title to property vests in purchaser only when sale becomes final—Continuous possession for 12 years or more when sale becomes final gives protection

even though revenue sale takes place before 12 years—*Obiter*

Obiter.—An estate does not become free from encumbrance by the mere sale, if the purchaser does not avoid them; but the purchaser is allowed this option of avoiding the encumbrance only when the title to the property vests in him i.e. when the sale becomes final. Hence the purchaser is not entitled to evict a person who has been in continuous possession for more than 12 years when the sale becomes final but less than 12 years when the sale is held as by the time the title vests in the purchaser, the person has acquired right of occupancy: 2 C W N 689, *Diss from.* [P 5-8 C 2]

Brojolah Chakravarti and Birendra Kumar De—for Appellant.

Sarat Chandra Basak, Priya Nath Dutta, Jitendra Mohon Banerji and Hemendra Kumar Das—for Respondents.

Judgment.—The plaintiff in the suit giving rise to this appeal claimed to have his title declared as the patnidar under defendants 13 and 14, the purchasers of Taluk Syed Natir, sold for arrears of revenue, on 11th January 1919 free from all incumbrances, and to have a decree passed in his favour for khas possession of an eight annas share of the lands in suit. According to the plaintiff, defendants 1 to 12 had no right to be in possession of those lands. In view of amicable settlement between parties concerned effected from time to time it is only necessary to take notice of the defence of defendants 3 to 5 and defendant 11 against whom this appeal is now directed. Defendants 3 to 5 claimed to be in possession as darpatnidar under defendant 2, who was a patnidar by virtue of a series of transfers in respect of 2 karsas 2 pawas 3 jastis of land out of the area described in the plaint created by defendant 1. Defendant 11 asserted that he was in possession of 1 kara and 1 pawa of land in the north-west part of plot 1 and some portion of plot No. 2 described in the plaint, as a tenant with right of occupancy. The defence therefore of these defendants in the suit was that the interest claimed by them were protected from the effect of revenue sale and the plaintiff could not get khas possession of the lands in suit in their possession. The Courts below having given effect to the defence raised by the contesting defendants 3 to 5 and 11 and the plaintiff's prayer for khas possession having been dismissed, the plaintiff appealed to this Court. In view of

the nature of the defence set up, the case of defendants 3 to 5 has to be considered separately from the case of the other defendant, namely defendant 11.

The estate to which the lands in suit appertain, Taluk No. 54720/1 Syed Natir was sold for arrears of revenue free from all incumbrances previously created thereon by any person other than the purchaser and under the provisions contained in S. 71 Assam Land and Revenue Regulation, 1886, a tenure created bona fide, and at a rent no less than the full amount of the revenue fairly payable in respect of the land could not be avoided by the purchaser. It was necessary therefore for defendants 3 to 5 seeking protection from eviction to establish that the patni and the darpatni under which they claimed to be in possession, were bona fide settlements and that the rent reserved was not less than the full amount of the revenue payable for the lands settled. So far as the rent of the tenure is concerned, it has not been contended before us in this appeal, that the rent of the tenure in regard to which protection was claimed created by the patni patta Ex 2 was less than the proportionate share of the revenue payable for the lands covered by that patta. The question whether the settlement evidenced by the document Ex 2 was a bona fide one, was elaborately discussed before the Courts below. On the findings arrived at by those Courts it is impossible for us to come to any conclusion other than the one arrived at by the Court of appeal below that the tenure in question was created bona fide so as to make the provision contained in S. 71, Assam Land and Revenue Regulation applicable to it, in the matter of its protection. On the finding that the person by whom patni was created, Hara Kumar Pal, had acquired title to the lands comprised in the patni by adverse possession, and that he had opened a separate account of estate No. 1050 and in view of the argument that the patni, as created by a trespasser was not entitled to protection after revenue sale, the question for consideration was whether the party claiming as patnidar was bona fide in possession by collecting rent and could the darpatnidars claiming under the

patnidar claim to be in the same position. It is no doubt correct to say that the incumbrance which may be set aside under S. 71, Assam Land and Revenue Regulation includes not merely an incumbrance actively created by the previous holder but also an incumbrance created by the acquiescence or laches either wilful, or arising from negligence and a purchaser at a revenue sale is entitled to avoid an interest acquired by anyone by adverse possession: see *Mohamed Nashim v. Kashi Nath* (1); but the question before us is not avoidance of an interest created by adverse possession; the question being whether the persons claiming to be in possession were persons bona fide settlement holders under the patni and the darpatni created from time to time. The patni in the case before us was created in the year 1299 B. S. and on the findings arrived at by the Courts below we are unable to hold that there was any want of bona fides on the part of the settlement holders in the position of defendant 3 to 5 which could disentitle them from the protection from eviction, afforded by the statute. The argument in support of the appeal so far as they relate to the defence of defendants 3 to 5 in the suit, cannot in the above view of the case, be accepted as sound. The defence of defendant 11 in the suit rested on the basis of his being a tenant who has acquired a right of occupancy in the lands in suit in his possession. The estate to which the lands appertained was sold for arrears of revenue on 11th January 1919; the sale was confirmed on 27th November 1919. The potta in favour of defendant 11, Ex. D in the case, is dated 24th March 1907; and 12 years from the date of the potta was completed a few months after the date of sale but before the confirmation of sale. The settlement as evidenced by the potta was for grazing purposes. It has been found by the Court below that the potta "was created in confirmation of defendant 11's jote. As his co-sharers surrendered, he executed kabuliya for himself only."

The Court below has further stated that there was no evidence that defendant 11 held the lands comprised in the potta "for avocation totally unconnected with agricultural purpose, and that evidence on the re-

cord went to show that defendant 11 converted a portion of the lands into paddy land."

The learned Subordinate Judge on the finding arrived at by him that the defendant had acquired right of occupancy before the auction-purchasers acquired title to the lands in suit by their purchase at the sale for arrears of revenue came to the conclusion that the defendant's right of occupancy will hold good against the plaintiff, a patnidar under the auction-purchasers. The first question that arises for consideration on this part of the case, is the one relating to the nature of the tenancy evidenced by the potta, Ex. D. It is to be noticed that land in respect of which right of occupancy could be acquired by a tenant must be land used or to be used for agricultural or horticultural purpose, and for that purpose land occupied for purpose subsidiary to or promoting agricultural or horticultural becomes subject to right of occupancy. In the case before us on the findings on evidence arrived at by the Court below to which reference has already been made, and upon a plain reading of the potta Ex. D, it is right to hold that the tenancy in favour of defendant 11 was for grazing of cattle required for agricultural pursuits, and in this connexion the fact that a portion of the lands comprised in the tenancy originally created for grazing purpose was converted into paddy land, as found by the Court below, assumes importance. In our judgment the lands in occupation of the defendants were lands in respect of which right of occupancy could be acquired.

The question that comes up for consideration next, is whether right of occupancy had been acquired by defendant 11 at the date on which the estate in which the lands in question were comprised was sold for arrears of revenue on 11th January 1919. There is no dispute that the period of 12 years had elapsed so far as the occupation of the defendant was concerned on the date of the confirmation of the sale on 27th November 1919. It is necessary to determine whether the defendant could get the benefit of his previous possession of the lands along with his cosharers, before the execution of a kabuliya by himself in the year 1907. The Court below has referred to the evidence on the side of the plaintiff showing that defendant 11

was in possession for nearly 30 years at the time when one of the witnesses for the plaintiff was giving evidence in Court in 1928, and it has been found by that Court that Ex. D executed in the year 1907, was a confirmatory potta in favour of defendant 11 in confirmation of his jote, after his cosharers had surrendered their interest in the tenancy in question. It was argued in support of the appeal on the authority of the decision of this Court in the case of *Mahomed Chaman v. Ram Pershad* (2), that upon defendant 11's own case, that he had other persons co-tenant as, that upon their surrendering their rights, he took a settlement of the entire tenancy, the incidents of the old tenancy were extinguished, and that a new tenancy with new rights having come into existence from 24th March 1907, the defendant could not have acquired a right of occupancy on the date of the sale for arrears of revenue.

It has no doubt been held in the case referred to above that the right of occupancy acquired under S. 6, Act 8 of 1869 must be an occupancy of one and the same kind, that is to say, it must be occupancy by the person pleading it, or by his father, or some other person from whom he inherits. It is worthy of notice that *Mahomed Chaman's* case (2) mentioned above, was considered by this Court in a subsequent case: *Forbes v. Ram Lal Biswas* (3), in which it was held that the continuous possession for 12 years, which is the subject of S. 6, Act 8 of 1869 must be possession under one and the same right. This right might have been, in its inception, joint with other persons, and by the death of cosharers, ultimately become a sole right, without its continuous nature being affected. The real issue, as pointed by the learned Judges in *Forbes's* case (3) mentioned above, was whether possession was under one and the same right; and the case before us is stronger than that case in view of the position that there was surrender by the cosharers of defendant 11 of their interest, and the potta in favour of the defendants which has been found by the Court below to be confirmatory in its nature. As observed by the learned Judges deciding the case of *Forbes v. Ram Lal Biswas* (3)

2. (1874) 8 Beng L R 388—22 W R 52n.

3. (1874) 22 W R 51.

the right might be joint in its inception with other persons, but it might be continuous throughout in its nature.

In the case before us the right continuous in its nature by its surrender by co-sharers devolved exclusively on defendant 11. In our judgment the correct view of the law applicable to the case before us, is the one laid down in *Forbes* case (3), and we have no hesitation in expressing our agreement with the same, and in holding that defendant 11 had acquired a right of occupancy at the date of the sale for arrears of revenue on 11th January 1919, and was entitled to protection from eviction. The conclusion arrived at above completely disposes of the appeal against defendant 11.

In the above view of the right of defendant 11 as against the plaintiff, so far as the claim to protection from eviction is concerned, it is unnecessary to go into the other questions raised in support of the appeal against defendant 11. Regard being however had to the elaborate argument addressed so us relating to the matters indicated below, we propose to deal briefly with the points raised. It was urged that the tenant must complete 12 years' possession before the date of the revenue sale and not before the date of the confirmation of the sale. With reference to this question the further questions emerge for consideration as to what was sold at the revenue sale and when were the rights of the purchaser under the sale exercisable under the law. There cannot in our opinion be any doubt as regards the position that what is sold at the sale for arrears of revenue is the estate in arrears, and the estate is sold free of incumbrances; protection is afforded to a tenant having a right of occupancy under the rent law. It does not follow from that that the tenant who had acquired the right of occupancy by 12 years' occupation at the date of the confirmation of the sale which is an event that might take place a long time after the date on which the sale of the estate was held could be evicted. The tenant in occupation could in our opinion have the benefit of his continuous possession from the date of sale to the date of confirmation of sale. It is further to be noticed that it is well settled now that the interest of the

incumbrancer does not cease to exist without any act done by the purchaser; an estate does not become free from incumbrances by the mere sale, if the purchaser does not avoid them.

The incumbrancers are not *ipso facto* avoided by the sale of the estate for arrears of revenue, and are only liable to be avoided at the option of the purchaser at such sale; such option may be exercised by the institution of a suit within the time allowed by law. The question then arises when did the title vest in the purchaser under the law. So far as the Assam Land and Revenue Regulation goes there is the clear provision that the title to the property sold vests in the purchaser from the date of the sale certificate, and not before; and the sale certificate shall bear the date on which the sale became final: see Ss. 80 and 85 as also R. 146 and Form 39, Assam Land and Revenue Regulation. In the face of the statutory provision applicable to the case before us, we are not prepared to give effect to the arguments on behalf of the plaintiff-appellant, that the title vested in the purchaser at the date of the revenue sale, and that such a title entitled the plaintiff claiming through the purchaser to avoid a tenancy in respect of which there was a continuous possession by the tenant for more than 12 years when the sale became final. There was right in the purchaser to avoid the tenancy, and that right could be exercised only when the title had vested in him; before the vesting of the title in the purchaser, if there was the acquisition of the right of occupancy and there is nothing contained in the statutory provisions applicable to the case before us and in the general law which could bar the acquisition of such right, the right so acquired could not be avoided at the time when the title to the estate sold for arrears of revenue vested in the purchaser. Any view contrary to the above would, in our judgment, militate against the clear provisions of the law applicable to the Province of Assam; and we are unable to accept any proposition to the contrary if that has been laid down by this Court in the case of *Adhur Chandra Banerji v. Aghore Nath* (4), dealing with the provision of S. 816, Civil P. C., 1882, the decision in which

4. (1926) 2 C W N 589.

case was relied upon by the learned advocate for the appellant in his arguments before us.

As indicated already in view of our definite decision that defendant 11 had acquired the right of occupancy before the date of the sale for arrears of revenue on 11th January 1919, the opinion expressed by us on the question of the date of vesting of title under the revenue sale and on the further question of the plaintiff's right to avoid the tenancy of defendant 11, if the occupancy right of that defendant was acquired before the date of confirmation of the sale, counting the period of 12 years possession from the time when defendant 11 came to be in exclusive possession in 1907 after his cosharers had surrendered their interest, it is not necessary for the purpose of the case before us. In our judgment defendant 11 acquired the right of occupancy in the tenancy held by him at the time when the sale was held on 11th January 1919, and the tenancy held by him could not be avoided under the law.

In the result this appeal is dismissed with costs, the decisions of the Courts below being affirmed. Defendant 5, respondent, and defendant 11 are entitled to separate sets of costs in the appeal. The plaintiff-appellant and defendant 1, respondent in this appeal, have settled the matters in controversy as between themselves out of Court, and a petition of compromise has been filed in this Court by those parties. The decree prepared in this Court will be in accordance with the terms of compromise, so far as the plaintiff appellant and defendant 2, respondent are concerned the petition of compromise filed in Court forming part of the decree. It is necessary to mention that the terms of compromise settled as between the plaintiff and some of the defendants in the suit at different stages of the litigation, will be operative as between the parties concerned, so far as they are consistent with our decision as to the rights of parties as contained in this judgment.

K.S.

Appeal dismissed.

A: I. R. 1933 Calcutta 594

RANKIN, O. J. AND COSTELLO, J.

Dharani Kanta Chakrabarty and others
—Appellants.

v.

Emperor—Opposite Party.

Criminal Admitted Appeals Nos. 252, 253 and 254 of 1932, Decided on 7th December 1932, against decision of Addl. Dist. Magistrate and Special Magistrate, Mymensingh, D/- 14th March 1932.

(a) Ordinance (11 of 1931), S. 34—Charge sheet framed on 24th November 1931 and Magistrate directing trial to begin on 9th December 1931—Accused cannot be deemed to be on trial on 1st December at time of promulgation of Ordinance.

On 24th November 1931 a charge sheet was sent in and the Magistrate had directed the trial to begin on 9th December 1931. The prosecution was not ready on 9th December and various adjournments were taken until on 2nd February 1932. It was directed that the case would be taken up by the Additional District Magistrate as a special Magistrate under Ordinance 11 of 1931 which was promulgated on 1st December. It was contended that the Special Magistrate had no jurisdiction under S. 34 of the Ordinance :

Held : that the accused were not being tried before any Court on 1st December 1931 and that the trial before the Special Magistrate did not offend against S. 34. [P 596 C 1]

(b) Criminal P.C. (1898), S. 342—Recalling of one of prosecution witnesses after arguments had commenced in presence of accused's pleader — Accused's pleader not insisting on right to question accused or let in further evidence—Trial is not vitiated.

Where arguments had commenced, one of the prosecution witnesses was recalled and some questions were put to him. Even though the pleader of the accused was also present at this time, he did not ask for calling further evidence:

Held : that the fact that the formalities were not gone through in not asking the accused some questions under S. 342 did not vitiate the trial.

[P 596 C 2]

(c) Penal Code (1860), S. 411—Accused found in possession of stolen revolver long after theft—Conviction under S. 411 is not proper.

Accused who were engaged in collecting arms and explosive substances were found in possession of a stolen revolver. The theft of the revolver was not at all recent :

Held : that the mere fact of possession was not sufficient for a conviction under S. 411 as the accused were not very much concerned whether the revolver had been smuggled or stolen.

[P 597 C 1]

(d) Arms Act (1878), Ss. 19 (f) and 20—Person cannot be convicted under both sections in respect of same revolver.

A person cannot be convicted both under S. 20 and S. 19 (f), Arms Act, in respect of the same revolver.

[P 597 C 2]

Sures Chandra Talukdar, Ramendra Chandra Roy and Kumud Bandhu Bagchi—for Appellants.

Khundkar and Anil Ch. Roy Chowdhury—for the Crown.

Rankin, C. J.—In these three appeals, seven accused persons are before us who were tried by a Special Magistrate under Ordinance 11 of 1931 in the District of Mymensingh. They were charged with various offences under S. 411, I. P. C., under Ss. 19 (f) and 20, Arms Act, and under S. 5, Explosive Substances Act, and there was also a charge of conspiracy against them all having reference to the offences indicated by these sections. The appellant Dharani Kanta Chakravarty has been sentenced to 7 years' rigorous imprisonment, appellant Sailaja Ranjan Bhattacharjya to 4½ years, appellant Nikhil Bhusan Chaudhuri to 4½ years, appellant Sudhir Chandra Bhattacharjya to 6 years, appellant Jagat Bandhu Basu to 6 years, appellant Profulla Kumar Majumdar to 7 years and the appellant Manindra Chandra Deb-nath to 5 years' rigorous imprisonment.

The case for the prosecution is that on the night of 22nd-23rd September 1931 the police, upon information received, carried out a search of the premises occupied by Dharani, that they went to his place with a considerable force, that they surrounded the house, different officers being posted at different places, and that all the accused persons together with Dharani's mother and a younger woman, a widowed relation of Dharani, were found in the main hut which appears to be a commodious hut with a verandah and so forth or a corrugated iron house. When they got to the house, they took up their position and waited for about half an hour before anything happened. In the meantime, efforts were made to obtain search witnesses locally; but before these witnesses were procured, Dharani came out of the hut suddenly with a revolver covered over by the end of his dhoti. He attempted to move to the west and finally threw the revolver into a tank after proceeding some little distance. He was seen doing this and was apprehended and the revolver was immediately recovered. It is also said that while this was going on certain of the persons inside the hut were seen to throw away various articles towards the north-east where there is a

verandah at least partially closed up with wooden planks. When the search witnesses arrived and the hut was entered into, all the accused persons together with the two women are said to have been found in that hut. In the presence of the search witnesses, the hut was searched and the place where the articles were thrown away was searched and in the result there were recovered in addition to the revolver already mentioned a postcard with a circular portion cut out in the middle, a white paper containing some chemical formulae for the preparation of bombs and two metallic bombshells formed out of ordinary brass pots with the necks cut clean off. It appears that the revolver was one which was stolen from medical officer in December of the previous year 1930.

The witnesses who speak to the search are the following police men: first of all, the Sub-Inspector Abu Mahammad who is now the police officer in charge of the thana in question at Nandail, the Sub-Inspector Basanta Kumar Mukherji P. W. 7, Dafadar Debendra Chandra De, Assistant Sub-Inspector, Chintaharan Mukhoti and two constables of the names of Ashraf Ali and Raghunandan Singh. In these circumstances the Special Magistrate convicted all the accused on all the charges. He held that the revolver was in the possession of them all; he held that all of them knew that the revolver had been stolen; he held that they were all engaged in possessing and preparing dangerous explosive substances contrary to the provisions of S. 5, Explosive Substances Act, and they all entered into a conspiracy to offend against S. 411, I. P. C., Arms Act, and the Explosive Substances Act. At the hearing of these appeals, Mr. Talukdar, who appears for accused 1, 2 and 7, that is, the appellants in Appeal No. 252 supported by his learned friend who appears for accused 8, that is the appellant in Appeal No. 253, has taken certain objections: first of all, he says that the Special Magistrate had no jurisdiction because by virtue of S. 34 of the Ordinance these accused were not liable to be tried by a Special Magistrate. S. 34 of Ordinance No. 11 of 1931 is to the effect that no direction shall be made for the trial of any person by a Special Magistrate for an offence for which he was

being tried at the promulgation of this Ordinance before any Court. We have examined the order sheet of the Sub-Divisional Magistrate to see whether or not the accused on 30th November or on 1st December 1931 were being tried within the meaning of that section.

It appears to me to be reasonably clear what the position was. The accused had been arrested and they were being detained in hajat and it appears that orders had been made allowing them bail, if they could find bail. They had not, in fact, it appears, been released on bail. On 11th November, the Assistant Magistrate not the Subdivisional Officer complained that no materials had yet been placed before him to enable him to see whether cognizance could be taken and he directed the case to be put up on the 14th; nothing had been done and the Subdivisional Officer ordered the police to make a report. On the 24th, for the first time, a charge sheet was received against all the seven accused. It appears that it charged them under the Arms Act. The charge sheet being received the order simply was "put up tomorrow." On the 25th there was an order about bail "the accused may all be released on bail of Rs. 1,000 each to appear on 9th December 1931, police to send witnesses in batches." As a matter of fact, on 9th December, the prosecution was not ready and various adjournments were taken until on 2nd February 1932 it was directed that the case would be taken up by the Additional District Magistrate as Special Magistrate. The date of the Local Government's direction to that effect is actually 6th January 1932. We have to see therefore whether on 1st December 1931 these people were, in the words of S. 34 of the Ordinance, being tried before any Court. In my opinion it is reasonably clear that they were not. The charge sheet had been sent in and the Magistrate had directed the trial to begin on 9th December 1931. No amount of metaphysical disputation about cognizance will, in my judgment, avail for this argument. At the time the Magistrate on 25th November 1931 made his order, it does not appear that he had any complaint before him or any complaint ready to be examined and he had not a single prosecution witness before him. He took no steps such as are parts of the trial. He merely ar-

ranged that the trial should begin on 9th December. The purpose of S. 34 is quite intelligible for all practical purposes and I think that, in the present case, it is clear enough that the order for trial before the Special Magistrate did not offend against that section. This objection therefore to jurisdiction must be overruled.

Another technical point upon which it was contended that the trial itself was bad is this: It is said that P. W. 18 after arguments had commenced was recalled on 10th March and some questions were put to him about a plan and Mr. Talukdar contends that being so all the accused should have been questioned again under S. 342, Criminal P. C. All these people were being defended and this took place at a time when arguments were going on by their pleaders. It is clear enough that, if they wanted to call further evidence, the pleaders for the defence would have had a right to have it if they had asked for it. It is equally clear that no such suggestion was made at the time. In these circumstances, I am not going to hold that the fact that the formalities were not gone through asking these accused persons some questions under S. 342, Criminal P. C., vitiates the trial.

Upon the questions on the merits it is necessary, first of all, to consider whether the police evidence of the search and the articles found in the search is to be believed. (After discussing this evidence and holding that the police evidence is to be relied on, the judgment proceeded.) It being taken therefore that the police evidence is to be relied on, we have then to see whether there is any answer to the prosecution case that these people collected at this spot and all in this hut in the middle of the night or very early in the morning for some purpose connected with the possession and manufacture of arms and explosive substances. In my judgment, there is no resisting the conclusion that the presence of these people in that hut is connected with the articles to which I have referred. In my judgment, *prima facie* all these persons are confronted with a strong *prima facie* case and have been taken red-handed as conspirators offending against the Explosive Substances Act. It is necessary however to examine the evidence against each of

these accused separately and to see whether upon the whole of the evidence affecting him his conviction can be maintained. I may say at once that in my judgment it is not possible to agree with the Special Magistrate in convicting any of these persons under S. 411, Penal Code. The theft of this revolver was not at all recent and it does not seem to me that the mere fact of possession even if the possession of the revolver was brought home to them all would be enough to show that they knew that the revolver had been stolen. After all, people who are engaged in collecting arms and explosive substances are not very much concerned whether the revolver had been smuggled or stolen. I do not think myself that the conviction under S. 411, Penal Code, is good on this evidence against anybody. If the question were only as to the revolver and there was no other question, there too, while the case of Dharani would be clear not only under S. 19 (f), but also under S. 20, Arms Act, there might be a good deal to say as against the other accused. Assuming that Dharani had collected a number of people to manufacture bombs, he might still have a revolver in his own house with which the other people had nothing to do. I am not therefore satisfied that as regards the appellants other than Dharani possession of the revolver or conspiracy to possess it has properly and sufficiently been brought home to them. In the case of Dharani however the offence is clear and plain that he was possessing it and that he was concealing it from the police is also clear.

We have therefore to consider the evidence from the point of view of each accused to see whether there is a sufficient case of conspiracy in connexion with the preparation of bombs and, if there is, there is to my mind, no reasonable difficulty or question about the sentences that have been passed by the learned Magistrate. Collection of people for manufacturing bombs deserves the sentence which the Special Magistrate has awarded. The same is true with regard to the other conspirators for they were actively participating in the conspiracy and caught red-handed. In the case of Dharani, I do not think that there is any defence whatsoever. He is the person whose hut it was; he is the

person who was responsible for these people using his premises for the purpose; he was found with a revolver in his hand and trying to conceal it at the same time when the other persons were trying to get rid of the other articles. So far as his case is concerned, the Magistrate has given him seven years under S. 20, Arms Act, and that conviction and sentence must stand. The conviction under S. 411, Penal Code, on him must be set aside. I do not understand how a person can be convicted both under Ss. 20 and 19 (f), Arms Act, in respect of the same revolver. So, separate convictions under S. 19 (f) may be eliminated. He has been given five years under S. 5, Explosive Substances Act, and he has been given seven years on the conspiracy charge. Save as already mentioned these convictions and sentences must stand and his appeal must be dismissed.

The next person is Sailaja Ranjana Bhattacharjya, one of the appellants in Appeal No. 251. He has been found guilty and given two years' rigorous imprisonment under S. 411, Penal Code. That must be set aside. He has also been given two years under S. 19 (f), Arms Act. That may also be set aside. He has further been given four years under S. 5, Explosive Substances Act, and 4½ years on the conspiracy charge. In this case, we have to examine whether the evidence is good and sufficient against him to show that he committed an offence under the Explosive Substances Act, and took any part in the conspiracy. (After discussing the evidence on this and holding it as not being proved beyond doubt, the judgment proceeded). I think that his conviction ought to be set aside and that he should be acquitted. (After considering the case of the other accused, the judgment concluded.) In the result therefore the appeals of Sailaja and Manindra are allowed and the appeals of the other appellants are dismissed as indicated above.

Costello, J.—I agree.

K.S.

* Order accordingly.

A. I. R. 1933 Calcutta 598

C. O. GHOSE, AG. O. J. AND MALLIK, J.
Davis Hewlet and Co.—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 247 of 1933, Decided on 7th June 1933.

Calcutta Municipal Act (3 of 1923), Ss. 406, 407 and 488 — Potassium nitrate supplied by accused firm for sodium citrate—Accused held guilty under S. 406 read with S. 488.

The accused firm of Chemists and Druggists sold potassium nitrate instead of sodium citrate when sodium citrate was wanted:

Held: that the accused was guilty under S. 406 read with S. 488, that the offence was of a serious nature and that a fine of Rs. 450 was not at all excessive: *A. I. R. 1928 Cal. 820, not foll.* [P 598 C 1, P 599 C 2].

Jitendra Chandra Banerjee — for Appellants.

Satindra Nath Mukerjee — for the Crown.

Judgment.—This appeal arises out of a conviction under S. 406 read with S. 488, Calcutta Municipal Act. There is some question as to whether the conviction was under S. 407, read with S. 488; but it is not necessary at this moment to refer to that question because it will be dealt with later.

The facts giving rise to this prosecution, shortly stated, are as follows: The accused firm carry on business as Chemists and Druggists. An employee of the Corporation of Calcutta went on 2nd November 1932 to the shop of the accused firm and asked to be supplied with a certain quantity of sodium citrate. Instead of sodium citrate being supplied to the Corporation employee potassium nitrate in which there was some sodium chloride was supplied. The article sold was found on analysis to contain potassium nitrate and also a little of sodium chloride. It is common knowledge that potassium nitrate with Sodium chloride thrown is something very different from sodium citrate. Sodium citrate is an inoffensive article and is often prescribed by medical practitioners. The sale took place on 2nd November 1932, and it appears that on 1st January 1933, the approval of the Chief Executive Officer to the institution of a case for the sale of potassium nitrate in the place of sodium citrate was asked for. The Chief Executive Officer having sanctioned the prosecution as appears from his facsimile signature on the application for summons,

the necessary application for summons was made before an Honorary Magistrate in the Cossipore-Chitpore area within whose jurisdiction apparently the shop of the accused firm was situate. That the application for summons was made on 17th January 1933, has been found to be correct by us after an examination on the application for summons with the original register of summonses which has been produced before us. The numbers mentioned on the application for summons, namely, F. 1272 and L. Register No. 8381, are mentioned in the register of summonses and there cannot by any doubt whatsoever that that is so. We are making a reference to the dates because an ingenious argument has been advanced before us that the prosecution was belated and was barred under S. 534 Calcutta Municipal Act.

It was suggested that the application for summons was not made till 4th February 1933, which was beyond three months from the date of the sale of the article in question, namely, 2nd November 1932. The facts set out above and the dates referred to above constitute a sufficient refutation of the contention that the prosecution was barred and nothing further need be said on that point. Be that as it may, it appears that an application was made for an adjournment of the hearing of the case on 4th March 1933, and it appears that the case was adjourned to 18th March 1933; but long before that the Corporation or its representatives made an application praying that the case might be treated as one under S. 406 read with S. 488 and not under S. 407 read with S. 488. The application was in writing and is on the record and it appears that that the Magistrate for good and valid reasons granted the necessary permission for the correction of the number of the section under which the prosecution was to be had. At any rate, we are satisfied that the accused firm were not in any way prejudiced by reason of the correction being allowed by the Magistrate.

But the learned advocate who has argued this appeal on behalf of the accused firm, not content with one ingenious argument based on the question of limitation, has advanced a second ingenious argument and it is this: that the correction over the signature of the Ma-

Magistrate was not enough and that, a seal was required in order that the correction itself might derive some validity in the circumstances stated. A mere mention of this argument is sufficient to induce the Court to negative it summarily and we accordingly do so. The third point, that has been taken is that there was no admission before the Magistrate by anybody on behalf of the accused firm of having committed the present offence. It is said that on 18th February 1933, there was a previous offence for which the accused firm were convicted under S. 406 read with S. 488, Calcutta Municipal Act, but on 18th March there was no admission that the accused firm were guilty of having committed the present offence. In support of that contention a worthless affidavit has been put in by somebody on behalf of the accused firm; but it is significant that if as a matter of fact there was no admission of having been guilty of the present offence on 18th March 1933, the learned advocate for the accused firm has not been at all able to explain why it should have been recorded by the Magistrate that the accused had not only admitted the commission of the present offence but had also prayed for mercy. It is said that the person who was in attendance on behalf of the accused firm on 18th March 1933 before the Magistrate might have prayed for mercy. If the accused firm's representative might have prayed for mercy, as it is now represented before us, we can take it as being absolutely certain that the accused's representative did pray for mercy and offer no defence whatsoever.

The fourth point that has been taken is that the conviction should have been under S. 407 (2) read with S. 488 and not under S. 406 read with S. 488. If however the argument that the prosecution were in order in having the case under S. 406 read with S. 488 be found to be correct, then there is absolutely no sense or substance in the last mentioned contention that the conviction should have been under S. 407 (2) read with S. 488. The last argument must also be negated in our opinion. The fifth argument that has been advanced is that the sale was not by the proprietor of the firm who was bed-ridden and ill but by a menial servant who did not

understand what he was doing and what he was selling, and that therefore the amount of the fine should not have been as much as was inflicted on 18th March 1933, namely Rs. 450, but should have been a lenient one. The offence is of a very serious nature and, in our opinion, no circumstances have been shown why a view lenient to the accused should be taken on the present occasion.

A further point was taken that as it was a case of compulsory sale there was no offence committed under S. 406 read with S. 488; and, in support of that contention, the case reported in *Akhoy Kumar v. Corporation of Calcutta* (1) has been cited which related to the sale of a quantity of ghee. The only observation that we need make is that we do not consider ourselves bound in the circumstances of this particular case by the authority cited and that we are not prepared to follow the same. All the points taken by Mr. Banerjee for the accused firm fail. The result is that this appeal must stand dismissed. The fine, if not realized, will now forthwith be realized.

K.S.

Appeal dismissed.

1. A I R 1928 Cal 320=114 I O 189.

A. I. R. 1933 Calcutta 599

PANCKRIDGE AND PATTERSON, JJ.

Arman Ulla and others—Petitioners.

v.

*Jainulla—Opposite Party.*Criminal Revn. Petn. No. 475 of 1932,
Decided on 30th November 1932.

Penal Code (1860), S. 215—Screening or attempting to screen is not ingredient of offence—Proviso is exception to general rule and burden of proving that case comes within it is on defence.

To bring a case within the purview of S. 215, it is enough to prove that the money was demanded and paid for helping the person to recover the property of which he has been deprived by means of a punishable offence. Screening or attempting to screen offender is not a further necessary ingredient. The proviso is clearly an exception to the general rule, and once the elements of offence under S. 215 are established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception is on defence. [P 600 O 1]

Shama Prosanna Deb—for Petitioners.

Patterson, J.—The petitioners have been convicted under S. 215, I. P. O., on the allegation that they together with two other persons, (one of whom was convicted along with them but has not joined in this application), realised a

sum of Rs. 31 in three instalments from the complainant for helping him to recover a boat which had been stolen from his ghat. Both the Courts below found that the complainant's boat had in fact been stolen and the circumstances under which the boat disappeared from the ghat clearly point to this conclusion. As regards the taking of the money, it appears that one Mosrabulla, who was convicted along with the petitioners and whose appeal was also dismissed, was the prime mover in the affair, or at any rate the spokesman of the other persons concerned in the affair. Both the Courts below found that the complainant had in fact paid the money to Mosrab as alleged by him, the former. They have found that the first and last instalments of the money were paid in the presence of the petitioners and that the petitioners were well aware of the purpose for which the money was paid and were in fact in conspiracy with one another and the other accused Mosrabulla. It is clear that the money was demanded and paid on account of helping of the complainant to recover his stolen boat, and both the Courts below have arrived at a finding to this effect.

The findings referred to above clearly bring the case within the purview of S. 215, and are based on evidence which although mainly circumstantial in character is sufficient to justify those findings. It has been suggested on behalf of the petitioners that the prosecution should have been further called upon to prove that the petitioners had screened or attempted to screen the persons concerned in the theft of the boat from legal punishment. But these considerations are only applicable in a case under S. 213, I. P. C., and have no bearing on a case under S. 215 of that Code. S. 215 does indeed contain a saving clause to the effect that a person taking a gratification of the nature mentioned in that section shall not be punished if he uses all means in his power to cause the offender to be apprehended and convicted of the offence; but this is clearly an exception to the generality. Once the elements of an offence under S. 215 have been established by evidence the onus of proving that the person charged is entitled to the benefit of the exception referred to above is on the defence, and in the present case no such defence was

sought to be raised or established. In our opinion, the matter is concluded by the concurrent findings of fact arrived at by the Courts below and the Rule must therefore be discharged. The petitioners who are on bail must surrender to their bail and serve out the remainder of their sentences.

Panckridge, J.—I agree.

V.B./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 600

LORT-WILLIAMS AND MCNAIR, JJ.

Bhuban Bijay Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 163 of 1933,
Decided on 14th June 1933.

Criminal Trial—Prosecution is not under obligation to call all relevant evidence and presumption under S. 114, Illus. (g), Evidence Act, need not be raised simply because prosecution does not call certain witnesses—Evidence Act (1872), S. 114, Illus. (g).

Before the prosecution launches any case, they ought to be satisfied of the truth of the case which they are going to place before the Court. Consequently, it is absurd to expect the prosecution to call witnesses who will speak against that case. If the prosecution find that a number of those who are present will not support the prosecution case, they must make up their minds whether they are truthful witnesses or not. If they come to the conclusion that they are truthful witnesses, they ought to withdraw the prosecution forthwith. If, on the other hand, they come to the conclusion that they are not truthful witnesses, there is no obligation for the prosecution to call them. Practically speaking, therefore, the prosecution ought to call those witnesses who, they think, will support the prosecution case and no others. If the witnesses who are prepared to speak against that case are respectable witnesses who ought to be believed, then the prosecution ought to withdraw the case. It is quite useless to pursue a case and then call a whole series of witnesses who are going to speak against it. On the other hand, if the defence comes to the conclusion that the witnesses are witnesses of truth who ought to have been called, then it is the duty of the defence to call them. Hence simply because the prosecution does not call certain witnesses, the Court need not raise the presumption under S. 114, Illus. (g) when the absence of the witnesses is explained properly.

[P 602 C 2]

Pugh and Shyama Prasanna Dev—for Petitioner.

Anil Chandra Roy Choudhury—for the Crown.

Lort-Williams, J.—The petitioner in this case held certain excise licenses in Moran near Dibrugarh and, according to his petition, used to help the officers of the Excise Department of Dibrugarh

Sadar Circle in detecting excise cases for a number of years. On the morning of 24th July 1932, the petitioner was out with Mr. Baruah, a regular Excise Inspector of Dibrugarh, detecting certain illicit distillation cases in a Nepali village and returned to his shop at Moran at 12.30 p. m. At about 2 p. m. he went to see Mr. Baruah again, in the Moran Inspection Bungalow, about 500 yards away from his shop, and remained talking with him about the Nepali village case until 5 p. m., when a police constable from the officer in charge of the Moran Police Station asked him to go and see him at his shop. The petitioner went there and heard that there had been an occurrence during his absence between his servants and the Excise Officer who had attempted to test the liquor in the shop. The servants had protested at this being done in the absence of their master. The prosecution, on the other hand, say that one Suresh Chandra Das Gupta who was a special Excise Inspector lodged an information in the Moran Police Station stating that at 3.30 p. m. (or 4.21 p. m. Dibrugarh local time) of the same day, when he was examining a bottle of country spirit in the petitioner's shop in the presence of Shah Jalal and Tulsi, constable, the petitioner interfered with the examination by spilling the contents of a glass and snatching away the bottle and aiming a blow with the bottle at the petitioner which was prevented by his peons.

The petitioner and his men attacked the Special Excise Inspector as well as the Special Sub-Inspector of Excise, Moulvi Abdul Majid, and three peons and a party which accompanied him to the shop consisting of Jibeswar Gogoi and others and pushed them all out of the shop and the compound with the result that he had to leave behind him the articles which he used for the purpose of testing liquor. As a consequence of this information, the petitioner and Moroi Singh and Sewjod Singh who, the petitioner says, were respectively a co-lessee and an agent, were placed upon their trial under S. 353, I. P. C., before Mr. MacDonald, the Assistant Commissioner at Dibrugarh. This Rule was issued on the grounds that the Courts below were wrong in not giving the defence the benefit of the presumption

under S. 114 (g), Evidence Act, and, secondly, that the Courts below ought to have secured the attendance of Mr. Baruah and they were wrong in disposing of the case without examining him. Mr. Pugh on behalf of the petitioner has not laid much stress on the second ground and it is, therefore, unnecessary for me to say much about it. There is no question that it is the duty of the Magistrate to secure the attendance of the witnesses for the defence. But in this case it appears that the Magistrate issued three summonses against Mr. Baruah who did not appear. No application was made by those who appeared for the defence that a warrant should issue against him, and in the absence of such an application there was no further obligation upon the Magistrate. Further, the Deputy Commissioner in his letter of explanation has stated that the paragraphs in the petition which refer to this point are false. He says that Mr. Baruah was cited as a defence witness and that he could have been examined by the defence if they had wished until 25th August 1932, the day after the close of the prosecution, and before he went on transfer to another place.

It is clear from his explanation that the summonses could not be served owing to the fact that the accused was late in filing process. Mr. Baruah, was, in fact, present in Court on 22nd October 1932; yet the defence did not call him or examine him. Nor did they ask for any adjournment on that date in order to examine him, nor did they point out the necessity that he should be examined or that the Magistrate ought to examine him in order to meet the ends of justice. In fact, we think that the statement of the Deputy Commissioner is justified, that it was the defence who withheld the evidence of Mr. Baruah. Bearing in mind the fact of the close relationship existing between the petitioner and Mr. Baruah, the local Excise Inspector, and the fact that a Special Excise Officer had been brought from another district for the purpose of detecting breaches of the law and the fact that this officer had brought a criminal charge against the petitioner, we are not altogether surprised that Mr. Baruah was not called for the defence. Criticism has been made of the

judgment of the Assistant Commissioner Mr. MacDonald. I need not deal with this matter because, in our opinion, the learned Sessions Judge, Mr. Lethbridge, has very fairly pointed out both the defects and the virtues of this judgment.

As he says, in most respects it is an extremely good judgment being based upon sound common sense and dealing, as it does, with the facts in a practical and concise way. On the other hand, it is defective in form, because it does not set out either the case for the prosecution or the defence; nor does it deal particularly with the evidence adduced on either side. Consequently, it is practically impossible for this Court to deal with the case without referring to the evidence. This in itself shows that the form of the judgment is defective.

On the other hand, we hope that the remarks of the learned Sessions Judge will not discourage the Assistant Commissioner, because it is a pleasure to find a case dealt with in a concise and practical way and upon a foundation of sound common sense, rather than by adhering to the somewhat worn out conventions according to which many of the judgments of the inferior Courts are framed. The only criticism we make of Mr. Lethbridge's criticism of this judgment is that he suggests that the Assistant Commissioner should adhere to these well known conventions, and that he should cast his judgments in the conventional sequence besides following strictly the provisions of S. 367, Criminal P. C. We agree that every judgment should follow some sequence in order to be intelligible. But we trust that the learned Sessions Judge does not mean that judgments ought to be prefaced with what has been described in many judgments of this Court as the "customary ritual," which precedes so many judgments which come before us, and which is of little use to anybody except to waste our time or, if included in a charge, to confuse the jury.

The main contention of the learned counsel for the petitioner is that a number of witnesses who were included in the Bijhar by the prosecution were not called and that no sufficient explanation has been given for their absence. Therefore he says that as it is the duty of the prosecution to call all relevant evidence and all witnesses except those whom the

prosecution believe to be untruthful, the Court ought to draw the presumption under S. 114(g), Evidence Act. We do not consider this to be a correct statement of the law. S. 114(g) provides that in such circumstances, the Court or a jury may draw such a presumption. Where the Code says "may" it is not proper to use the word "must." No number of decisions as to what the prosecution ought to do can alter the fact that a discretion is given to the Court. It cannot be said that because certain witnesses have not been called, the Judge is not exercising his discretion judicially because he refuses to draw the presumption.

The learned Magistrate in this case very carefully considered the facts and circumstances and refused to draw the presumption, because he thought there was a good explanation of the absence of the witnesses. A good deal of confusion seems to us to be caused from time to time about the suggested obligation on the part of the prosecution to call all relevant evidence. Before the prosecution launches any case, they ought to be satisfied of the truth of the case which they are going to place before the Court. Consequently, it is absurd to expect the prosecution to call witnesses who will speak against that case. If the prosecution find that a number of those who are present will not support the prosecution case, they must make up their minds whether they are truthful witnesses or not. If they come to the conclusion that they are truthful witnesses, they ought to withdraw the prosecution forthwith. If, on the other hand, they come to the conclusion that they are not truthful witnesses, there is no obligation for the prosecution to call them. Practically speaking therefore the prosecution ought to call those witnesses who, they think, will support the prosecution case and no others. If the witnesses who are prepared to speak against that case are respectable witnesses who ought to be believed, then the prosecution ought to withdraw the case. It is quite useless to pursue a case and then call a whole series of witnesses who are going to speak against it. On the other hand, if the defence comes to the conclusion that the witnesses are witnesses of truth who ought to have been called, then it is the duty of the defence to call them.

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TARAPADA V. EMPEROR (Rankin, C. J.)

Calcutta 603

In this case it is suggested that the Special Sub-Excise Officer and some persons were present and could have spoken to this assault and have not been called. The reason given by the Deputy Commissioner is that one Mobarak between the hearing before the First Magistrate and the hearing before Mr. MacDonald had turned hostile. At first he said that he was present at the assault and then he said that he had gone away before the assault took place. Consequently the prosecution did not call him. Two other witnesses were not called because they were friends of his, and came from the same village, and the prosecution did not consider them to be witnesses of truth. Abdul Majid, the Special Sub-Inspector of Excise, was away at North Lakhimpore during the trial and was not examined as a prosecution witness because his attendance could not be obtained without a great deal of inconvenience and expense to Government. Moreover in view of the fact that all he could say would not be of more value than the statement of Suresh Chandra Das Gupta, his superior, it was considered unnecessary to call him. We think that both the Magistrate and the Sessions Judge were justified in the conclusion to which they came and that they were right in refusing to draw any such presumption against the case for the prosecution. On the whole we agree with Mr. MacDonald that there seems to be no conceivable reason why this Excise Officer should have brought a case of this kind against the accused unless it was true, and we see no reason to interfere with the conviction.

We do not understand however why the learned Magistrate thought it necessary to inflict imprisonment for one month upon the appellant as well as a fine of Rs. 200. If he thought it necessary to inflict imprisonment at all, it ought to have been a much longer period, to have been in any way effective. There is not much sense in sending a man to jail for one month who has not been in jail before. We think therefore that we are justified in setting aside the sentence of imprisonment and replacing it by a fine of Rs. 300 in addition to the fine of Rs. 200 inflicted by the Magistrate. Consequently the accused must pay a fine of Rs. 500 in all. In default of payment of the fine, he must suffer rigorous

imprisonment for two months and two weeks in all. The petitioner will remain on the same bail as he is now, pending further orders by the Sessions Judge either to pay the fine or to surrender to his bail.

McNair, J.—I agree.

K.S. Order accordingly.

A. I. R. 1933 Calcutta 603

RANKIN, C.J. AND COSTELLO, J.

Tarapada Mitra and others—Appellants.

v.

Emperor—Opposite Party.
Criminal Admitted Appeals No. 1120, 1123 and 1124 of 1932, Decided on 20th January 1933, against orders of Chief Presidency Magistrate, Calcutta.
(a) Penal Code (1860), Ss. 506, 117 and 120-B—Charge under both Ss. 117 and 120-B is not wrong.

It may or it may not be a duplication to have S. 117 as well as S. 120-B, but there can be no objection to charge under both Ss. 117 and 120-B. [P 604 C 2]

(b) Penal Code (1860), Ss. 506 and 120-B—Introduction of S. 120-B to justify joint trial when justified stated—Criminal P.C. (1898), S. 239.

Where a person is arrested with revolutionary leaflets and another is arrested at a different place distributing the leaflets of the same kind, there is nothing wrong whatever in introducing S. 120-B to justify a joint trial. [P 604 C 2]

(c) Criminal Trial—Conviction—Nature of proof necessary stated.

In order to establish an offence, it is not enough that the prosecution theory is one theory which would explain the facts. It has got to be shown that it is the only theory which in a reasonable sense is compatible with facts. Nor can a person be convicted merely because his own story is false. [P 605 C 1]

Narendra Kumar Basu, Nirod Bandhu Roy, J. C. Gupta, Bhagirath Chandra Das, H. M. Bose, Binode Lal Ghose and Woopendra Nath Neogy—for Appellant.

Khundkar and Anil Chunder Roy Chowdhury—for the Crown.

Rankin, C. J.—We have before us the appeals of three persons who were tried by the learned Chief Presidency Magistrate of Calcutta sitting as a Special Magistrate under Ordinance 10 of 1932. There were four accused at the trial. Abani Banjan Sarker, Ashoka Kumar Chatterjee, Tarapada Mitra and Nirmal Kumar Guha and the case against them, in short, was this: On the 14th September last very early in the morning at about 4 o'clock the accused Abani and Ashoka were seen

coming out of Sitaram Ghose Street and entering Amherst Street. They were seen by two constables and Abani was seen carrying with him a brown paper parcel. We have been shown the parcel; it is not a very large parcel but one of a cylindrical shape. The constables challenged these two people and they said that they were on their way to Sealdah to catch a train to Khulna. The accused Abani was asked what was in the parcel and he said there were warm clothes. The constables felt the bundle and proceeded to open it and they found a quantity of revolutionary leaflets which have been described quite correctly by the Magistrate as leaflets inciting all and sundry to indiscriminate assassination. There was an envelope found on Abani by the constables which shows that Abani was a person who had been entrusted with the duty of disseminating these leaflets and that they were to be published broadcast on the night of the 16th all over Bengal. These people were taken to the thana and there another letter was found upon Abani but nothing incriminating was found upon Ashoke. The place where they were found was about the junction of Sitaram Ghose Street and Amherst Street and it is now clear enough on the admission of both these accused and the other accused Tarapada that these two people had spent the night at a place called 61 Sitaram Ghose Street where Tarapada had for some months been living. There is definite evidence of that and, in particular, there is evidence that Ashoke had a meal on the previous night with Tarapada at that place.

It is not disputed on behalf of the prosecution that there is a train for Khulna at about 5 o'clock in the morning and from the letter found on Abani it would seem clear enough—and this is the prosecution case—that these people were going to Khulna and probably also to Jessore. So far as Abani is concerned that is reasonably plain. The Chief Presidency Magistrate convicted Abani and there is no appeal by Abani before us. He was caught red handed. The Chief Presidency Magistrate also convicted Ashoke and Tarapada and the question is whether there is evidence against those two sufficient to bring home to them the offence of which they have been convicted. The offence of

which Tarapada is convicted—and the same is true of Ashoke—is an offence under S. 506 read with Ss. 117 and 120-B, I. P. C., that is to say, conspiracy to instigate the public to commit criminal intimidation. I see no reason to take any exception to the form of the charge. It may or may not be a duplication to have S. 117 as well as S. 120-B; but in view of certain arguments and decisions it was thought safer to put it in that form. There can be no objection, in my judgment, to that. It was said as regards the accused Nirmal that the charge under S. 120-B was perhaps introduced merely in order to enable him to be tried with the other people. It would be seen, when I come to deal with this accused, that he was convicted of publishing these very same leaflets not in red colour but in white colour. I see nothing wrong whatever in S. 120-B being introduced if it were necessary to justify a joint trial.

The question however is whether the evidence against, in the first place, Tarapada and, in the second place, Ashoke is sufficient to justify their conviction. I have read very carefully and more than once the judgment of the Chief Presidency Magistrate and, as regards Tarapada, I have the greatest difficulty in seeing that there is any tangible evidence or case against him sufficient to justify a finding that he was taking part in any way in this project of distribution of these revolutionary leaflets. It is quite true that Abani who had these leaflets had spent the night at 61, Sitaram Ghose Street; it is quite true that that is the mess where Tarapada had for some time been living but there is no proof at all whether Tarapada was or was not a fellow conspirator with Abani and the Magistrate's observations as to probability, while they may be true, undoubtedly are not based upon evidence which proves them. It is of course quite easy to put the hypothesis that 61, Sitaram Ghose Street, was the centre of an organization though only temporarily and that Tarapada was really the person who had got these two people to come to his house, provided the leaflets and arranged everything. That may be quite a reasonable suspicion, but there is no evidence whatever. In my judgment Tarapada must therefore be acquitted. The case against Ashoke is

very different. There the position is that he was found at this distinctly early hour of the morning in company with Abani who was carrying the leaflets in a brown paper parcel. When they were challenged they told the constables that they were going to Sealdah to entrain for Khulna. There is no reason why Ashoke should not innocently be going to Khulna; as far as we know, he appears to have come from Khulna. The question is whether his association in these circumstances with Abani is sufficient to justify the finding that he knew of Abani's mission as regards the pamphlets and not only knew of it but was taking part in it. They had spent the night in the same place, 61 Sitaram Ghose Street.

It seems that there is a train at this hour of the morning for Khulna and I suppose people must be allowed to go to the station at that hour of the morning to catch it. One cannot help thinking that perhaps the association is more readily explained by the assumption of guilty knowledge and intention on the part of Ashoke than by the failure to make such an assumption. It may even be a reasonable view that it is somewhat more probable than not that Ashoke was a fellow conspirator with Abani. But the question before this Court is not that. The question is whether it is proved and for that purpose we have to remind ourselves that it is not enough that the prosecution theory is one theory which would explain the facts—it has got to be shown that it is the only theory which in a reasonable sense is compatible with the facts. Having very carefully examined the circumstances of the case, particularly in view of the very strong opinion expressed by the Magistrate, (I thought it necessary to examine it over and over again with considerable care.) I have not been able to satisfy myself that there is in this case proof that Ashoke was guilty of taking part with Abani. The Magistrate has proceeded very largely upon what he rightly regards as an untrue story told by Ashoke in his defence. It does not appear that at the time Ashoke told any untrue story; but at the trial at the time of the plea being taken he set up a story about having come to Calcutta to get a cycle repaired, and how he was staying the night at No. 61 Sitaram

Ghose Street and was merely accompanying Abani to Sealdah Station not with the intention of going by train anywhere but merely keeping him company to Sealdah because Tarapada was going to do it and asked him to do it instead. I quite agree with the learned Magistrate that that story is a tissue of untruths altogether.

The story was set up at the time of the trial in order to make out that he was not going from Sealdah by train to Khulna in company with Abani. That is the manifest purpose of it. The prosecution case, in my judgment, is quite right that he was going from Sealdah to Khulna in company with Abani. The learned Chief Presidency Magistrate is of opinion that the fact that he set up that false defence at the trial shows that he not only knew the contents of this paper parcel, but also that he was taking part with Abani in the conspiracy to disseminate these leaflets. I do not think so. One has to remember that false defences are very common. A person cannot be convicted merely because his own story is false. It is quite true that on this question of guilty knowledge the conduct of the accused at the time may be absolutely of the first importance.

It may provide quite good reason for hanging a man; his conduct at the time on a question of guilty knowledge may in probability and in truth be the best evidence in the world. But it is a different thing altogether to give a false defence later at the trial; and merely because that defence is false I do not think that we are entitled to infer that he was taking part with Abani in the conspiracy. It has to be remembered that Abani was a conspirator and it by no means follows that he would be communicating the fact of this conspiracy to all and sundry and to every youth of his own age he met. He might quite well put up for the night with some young fellows without taking all those young fellows into confidence. It would have been a very foolish thing to do in the circumstances in which he was. I do not conceal from myself for a moment that the case of Ashoke is very suspicious, but I cannot find any tangible material on which I think we would be justified in upholding his conviction. He must therefore be acquitted.

As regards Nirmal I have no difficulty. The only question there is whether the evidence of the sergeant and another witness is to be thrown overboard as a tissue of lies because though they say that they saw Nirmal distributing these leaflets, chased him and after he had tripped over a wire fence managed to catch him with the leaflets on him, their story is to be disbelieved altogether because of what is put down in the first information report and in the crime sheet. As regards that, the defence is a particularly unfavourable specimen of a hackneyed and unreasonable argument. There is no doubt that he was caught red-handed. The result is that Nirmal's appeal is dismissed but the appeals of Tarapada and Ashoke are allowed and they must be acquitted and discharged.

Costello, J.—I agree

V.B./R.K.

Order accordingly.

A. I. R. 1933 Calcutta 606 (1)

RANKIN, C. J. AND AMEER ALI, J.

Abdul Khaleque—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 834 of 1932, Decided on 1st February 1933.

Criminal P. C. (1898), S. 297—Charge of rape—No plea of consent—Direction that age or consent of girl need not be considered is misdirection—Penal Code (1860), S. 366.

In a charge of rape, merely because the plea of consent has not been taken by the accused, it is a misdirection to jury to tell them that they need not determine whether she consented or not. The judge ought to tell the jury that the burden was on the prosecution to prove, in addition to the factum of sexual intercourse, that the girl was below 14 or else that the accused committed that act against her will or without her consent. [P 606 C 2]

Hemanta Kumar Das—for Appellant.
Khundkar—for the Crown.

Rankin, C. J.—In my opinion this appeal succeeds. The case was that the accused caught hold of and committed rape on a girl who, according to the medical evidence, would appear to have had sexual intercourse before. The medical evidence is somewhat indeterminate and the learned Judge himself says on the question of the age of the girl that it

was in no way proved that the girl was under 14 years of age, that her age is a matter of guess and the view taken by the jury at one stage had been that at any rate she was not more than 14 years. The learned Judge under the circumstances merely because the accused denied the whole story directs the jury that because the plea of consent has not been taken by the accused they need not determine whether the girl was below 14 or above 14 and they need not determine whether she consented or not. The learned Judge was entirely mistaken in his position. He ought to have told the jury that the burden was on the prosecution to prove, in addition to the factum of sexual intercourse, that the girl was below 14 or else that the accused committed that act against her will or without her consent. That being the whole gist of the offence, unless there is evidence sufficient to satisfy the jury of the circumstances that the girl was not consenting, the jury were not entitled to convict him at all. It appears to me that the charge as given to the jury is erroneous on fundamental points of law. The man has been given 5 years' rigorous imprisonment upon that charge. It is not possible for us to allow the conviction to stand.

The appeal is allowed and the conviction and sentence are set aside and we direct that the accused be retried. He may remain on the same bail as before subject to any order of the Sessions Judge.

Ameer Ali, J.—I agree.

R.K.

Appeal allowed.

A. I. R. 1933 Calcutta 606 (2)

LORT-WILLIAMS AND MCNAIR, JJ.

J. E. James—Appellant.

v.

Emperor—Opposite Party.

Criminal (admitted) Appeal No. 73 of 1933, Decided on 9th June 1933, against order of Addl. Presidency Magistrate, Calcutta.

Penal Code (1860), S. 193—Divorce proceedings between husband and wife—Complaint of theft against wife by husband of certain sum of money—Statement of husband

in examination that he got such money from certain lady as loan — Examination of lady and isolated question put to her regarding money among several other questions—Denial of alleged payment of loan by lady—Criminal proceedings should not be taken against husband merely on answer of this isolated question — Criminal P. C. (1898), S. 195 (b).

There was unhappiness and mutual recrimination between the husband and wife which resulted in divorce proceedings. The husband some time later lodged a complaint of theft of money among some other things against the wife and during examination, when asked as to where from he got the money, stated that he had taken it as a loan from a lady with whom he was living as a paying guest. The lady when subsequently examined, was asked several other questions and in the course of such examination one isolated question was put to her whether she had lent money to the husband. She replied that she had not done so as far as she could remember. On this the Magistrate came to the conclusion that the husband's statement was a deliberate falsehood and made a complaint under S. 195 Criminal P. C., for prosecuting the husband under S. 193 Penal Code for perjury.

Held: that the charge of perjury was a serious charge and should not be lightly made or based upon a mere isolated answer as in this case, that though the Magistrate had discretion as to whether or not he should give the accused an opportunity to show cause as to why a complaint should not be made, still the Magistrate ought to have given notice to accused so that he might have explained the circumstances under which he gave his evidence and that people are not to be trapped for purpose of prosecution for perjury but should be prosecuted only after a proper examination. [P 608 C 1,2]

N. Barwell and Monindra Nath Mukherjee—for Appellant.

B. M. Sen—for the Crown.

Lort-Williams, J.—This is an appeal against an order of the Additional Presidency Magistrate of Calcutta summoning the appellant under S. 193 I. P. C., on a complaint made by the Chief Presidency Magistrate under S. 195 (b), Criminal P. C. The case arises out of an unfortunate matrimonial trouble between the appellant and his wife. Apparently there had been unhappiness for some time between them, and mutual recrimination, which ultimately resulted in divorce proceedings instituted by her. The appellant went on leave in 1931, and when he returned to Calcutta he stayed with friends, and eventually with Mr. Hope Johnson whose name was mentioned in the matrimonial proceedings. This lady's husband was dead, and she used to take in paying guests. On 28th October 1932,

the appellant was served with a notice in divorce proceedings.

On 1st December he left Calcutta for Bandel, and on his return found that Mrs. James had entered Mrs. Hope Johnson's flat in the absence of her and her daughter and servants, on the night he left Calcutta. According to the evidence of the appellant and Mrs. Hope Johnson and others, the flat was found in a state of disorder, and a gramophone and a suit case were missing. The appellant also missed a sum of Rs. 410 which he had left in an unlocked drawer. The appellant reported the matter to the police and Mrs. James and her lady friend who accompanied her to the flat were charged with theft of these articles and the money. Mrs. James claimed the gramophone and the suit case, which turned out to be a blouse case worth about Rs. 10, presents given to her by her husband. She did not dispute the fact that he had paid for them both, except that the gramophone which was bought on the instalment system, was not fully paid up. The learned Magistrate deduced from this fact that it was obvious that Mrs. James did not act dishonestly. We are not quite sure that such a deduction can be made even on the evidence as it stands, because it was quite unnecessary to throw the whole of the furniture of the flat into disorder in order to possess herself of these articles. However it is perfectly obvious that she was an angry woman, and no doubt the appellant was equally angry when he informed the police of what had happened. Probably the Magistrate was quite right in treating the case against her as trivial one which he dismissed.

But during the examination of the appellant he was asked about the Rs. 410 and where he got this money from. He answered that it was part of a sum of Rs. 500 which he had borrowed from Mrs. Hope Johnson, to pay his lawyer in connexion with the divorce proceedings which were the going on. When Mrs. Hope Johnson came into the box to be cross-examined she having been absent when the appellant made his statement about the loan, she was asked a number of questions about the car, and the taxi, and the time when the appel-

lant returned home, and then without further introduction she was asked whether she had lent Mr. James Rs. 500. She shook her head and said "I did not lend Mr. James Rs. 500. I have my own business" and then she paused and said "as far as I can remember." The next question was whether she had helped Mr. James to assault Mrs. James on the night of 9th October 1932, and whether there was a double bed in their room and other questions. It is clear therefore that question put to her about the loan was an isolated one, without explaining to her what the question was directed to, when the loan was made, what it was for, or any of the circumstances surrounding it. If she had been asked these questions, it might possibly be that she would have remembered assisting him with money which he urgently required for meeting the demands of his lawyers. However the learned Magistrate allowed the evidence to be left in this incomplete state, and came to the conclusion that the appellant's statement was a deliberate falsehood.

He says that Mrs. Hope Johnson, who was cross-examined immediately after the conclusion of Mr. James' cross-examination, was asked whether she had lent Rs. 500 to Mr. James. She shook her head and said, she "never" lent him Rs. 500. She repeated that at least twice. Realising that she had blundered and given Mr. James away, she lamely added, "As far as I can remember." I accept the notes of evidence attached to the record and supplied by the learned Chief Presidency Magistrate as accurate, and accepting them as such, they do not bear out the statements made in his judgment. If the learned Magistrate has correctly stated the evidence, it is clear that he has exaggerated it in his judgment. The Magistrate says that from these facts, he is satisfied that Mrs. Hope Johnson had never lent Mr. James the money, and that Mr. James committed perjury by stating that he had left Rs. 410 in an unlocked drawer, and that his whole story was palpably false, and that in the interests of justice he thinks that the appellant should be prosecuted for perjury.

As I have pointed out, no opportunity was given to Mrs. Hope Johnson to ex-

plain her isolated answer, nor was the appellant recalled to amplify the evidence which he had given. It appears almost as if a trap having been laid in this way for the appellant, such a trap is not to be used for the purpose of prosecuting him for perjury. That is not the way in which criminal cases ought to be instituted. Courts are not established to set traps and catch people out, but, after a proper examination of the facts, to decide whether they ought to be prosecuted for criminal acts or not. A charge of perjury, obviously, is a serious charge, and it ought not to be lightly made or based upon a mere isolated answer, such as this.

For these reasons, we think that the complaint ought not to have been made. Although the Code gives a Magistrate or a Judge a full discretion as to whether or not he shall give the accused an opportunity to show cause why a complaint should not be made against him, we think that this was a case in which the learned Magistrate ought to have given notice to the accused before making the complaint because the accused might well have been able to explain more fully the circumstances in which he gave his evidence, and to satisfy the learned Magistrate that in fact, he had not made any false statement. We think therefore that in such a case as this, the discretion of the learned Magistrate was not exercised judicially, although in many other cases it may be quite unnecessary to give any notice or even to make an enquiry. We accordingly, allow this appeal and set aside the order of the Additional Presidency Magistrate and the complaint and quash the proceeding.

McNair, J. - I agree.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 609

MUKERJI, J.

Surenāra Nath Sarkar—Appellants.

v.

Poorṇaahandra Mukherji—Respondents.

Appeals Nos. 2446 to 2448 of 1930, Decided on 20th December 1932, against appellate decrees of Addl. Sub-Judge, Nadia, D/- 8th July 1930.

(a) Land Tenures—Utbandi—Position prior to 1928 was precarious.

Prior to the amendment introduced in 1928 into the Bengal Tenancy Act, 1885, which has secured some measure of protection to utbandi raiyats in the matter of rent and status, their position was very precarious under the Act as it stood till then. [P 609 C 1]

(b) Land Tenures—Utbandi—General conception of such holdings enunciated.

The outstanding general conception of all utbandi holdings seems to be that the land which is specified remains the khas khamar land of the landlord, and the raiyat is allowed to occupy it for a season or for a year, and the raiyat pays rent at a given rate for so much of it as he cultivates during that term; that the landlord is not bound to give the land to the same raiyat nor is the raiyat bound to take it in the next season or the next year; that in some places there is a custom, under which the raiyat has a sort of lien, which entitles him to occupy the lands for three years, if he elects to do; and that there is an implied agreement that, if, without fresh rates being fixed, the raiyat occupies the lands for the next season or year, he would pay at the same rate also for the lands he may cultivate during the period of such occupation. [P 609 C 2]

(c) Land Tenures—Utbandi—Notice is necessary—Tenure is not governed by T. P. Act, S. 106.

For ejectment of an utbandi raiyat no notice is necessary. In the absence of any provision as regards this matter in the Bengal Tenancy Act the general law has to be looked to. The tenancy cannot be regarded as a lease from year to year and S. 106, T. P. Act, therefore, can have no application. The rights of such tenants are in no sense higher than those of tenants at will and in the absence of any written lease a verbal demand for possession is sufficient. [P 609 C 2]

Phanibhushan Chakrabarti for *Prakashchandra Pakrashi*—for Appellants.

Debendranath Bagchi (Jr.), *Mohini-mohan Bhattacharya* and *Neelmani Goswami*—for Respondent.

Judgment.—Prior to the amendment introduced in 1928 into the Bengal Tenancy Act, 1885, which has secured some measure of protection to utbandi raiyats in the matter of rent and status, their position was very precarious under the Act as it stood till then. The nature of their rights and liabilities have been explained in several cases amongst which reference may be made to *Kinny v. Issur*

Chunder (1), *Mirzan Biswas v. Hille* (2), *Dwarkanath v. Nobod Sirdar* (3), *Prem-anund v. Shoorendra Nath* (4) and *Bena Madhab v. Bhoban Mohan* (5). Descriptions given of the characteristics of utbandi holdings are not quite the same in all these cases and it is clear that the incidents of such holdings vary under the influence of custom. But the outstanding general conception of all utbandi holdings seems to be that the land which is specified remains the Khas Khamar land of the landlord, and the raiyat is allowed to occupy it for a season or for a year, and the raiyat pays rent at a given rate for so much of it as he cultivates during that term; that the landlord is not bound to give the land to the same raiyat nor is the raiyat bound to take it, in the next season or the next year; that in some places there is a custom under which the raiyat has a sort of a lien which entitles him to occupy the lands for three years if he elects to do so; and that there is an implied agreement that if without fresh rates being fixed, the raiyat occupies the lands for the next season or year he would pay at the same rate also for the lands he may cultivate during the period of such occupation.

The question to be considered in these cases is whether for ejectment of an utbandi raiyat notice is necessary, and if so, notice of what character. Utbandi raiyats cannot acquire a right of occupancy until they have held the land for 12 continuous years [S. 180 (1)], and Ch. 6 of the Act which deals with non-occupancy raiyats is not applicable to them [S. 180 (2)]. It is true that the Bengal Tenancy Act not having made any provision as regards this matter, we have to look to the general law. Now, having regard to the incidents of utbandi holdings to which reference has been made, it is clear that unless it is otherwise under a special custom that there may be in vogue, the right to occupy the land does not endure beyond a particular season or a particular year, and therefore an ordinary utbandi tenancy, having regard to custom, such as regulates it ordinarily, cannot be regarded

1. (1864) W R Gap (Act X) 9.
2. (1865) 9 W R (Act X) 159.
3. (1870) 14 W R 193.
4. (1878) 20 W R 829.
5. (1890) 17 Cal 323.

as a lease from year to year. S. 106, T. P. Act, therefore, can have no application. No exceptional circumstances nor any extraordinary custom such as has been referred to above have been established in this case. It must therefore be held that under the custom by which the tenancies in these cases are to be regulated, the tenants remain tenants only so long as the period of the agreement has not run out, but as soon as that period expires the tenancy ceases and their occupation of the lands depends entirely on the will of the landlords, and that in that view their rights, if any, are in no sense higher than those of tenants at will.

That being the position, and there having been no written lease, a verbal demand for possession was, in my opinion, sufficient: *Deonandan v Maghi* (6). It may be pointed out that it has been held by this Court that as the settlement is for a year only no notice is required to be given by an utbandi tenant to the landlord in abandoning the holding: *Amrita Lal Mukerjee v. Girdhari Ghose* (7). Such verbal demand has been proved. Another contention has been put forward, namely that the decision should be revised in view of the result of the proceedings taken under S. 160-A of the Act, after the institution of the suits. This contention cannot be upheld. The appeals are dismissed with costs.

R.K. Appeals dismissed.

6. (1907) 84 Cal 57=5 C L J 181=11 O W N 225.

7. (1907) 5 C L J 898=11 O W N 581.

A. I. R. 1933 Calcutta 610

MUKERJI, J.

Arjun Chandra Mandal and others—
Plaintiffs—Appellants.

v.

Trailakya Mani Dassi and others—
Defendants—Respondents.

Appeal No. 2353 of 1930, Decided on 13th December 1932, against decree of Addl. Sub-Judge, Khulna, D/- 22nd May 1930.

(a) Bengal Tenancy Act (1885), S. 85—Permanent sub-lease by Hindu widow—No legal necessity—Sub-lease bona fide—Under-riyat acquiring occupancy right by custom during widow's lifetime—He is protected from eviction by reversioners—Hindu law—Widow—Alienation.

Where an under-riyat comes upon the land under a permanent sub-lease from a Hindu widow, but the sub-lease is otherwise bona fide, even

though the sub-lease is not justified by legal necessity and as such not binding upon the reversioners, the under-riyat is protected from eviction at the instance of reversioners, if he has acquired an occupancy right by custom within the widow's life time. [P 611 C 2; P 612 C 1]

(b) Bengal Tenancy Act (1885), S. 85 (2)—Sub-lease in contravention of sub-S (2)—Sub-lease can be admitted to prove fact of under-riyat coming upon land

Where an under-riyat comes upon the land under a permanent sub-lease, which is not entitled to be admitted to registration under S. 85 (2), though it cannot be put in as evidence of a transaction by which any right is created in favour of the under-riyat, the fact that the under-riyat came upon the land as a tenant of the lessee can be proved by production of this document as also by other means. [P 611 C 2]

(c) Hindu Law—Widow—Alienation—Widow granting permanent lease in excess of legal necessity—This fact in itself does not prove fraud.

The mere fact that a widow grants a permanent lease in excess of her necessity is not a fact from which fraud or collusion can necessarily be inferred. [P 612 C 1]

Prokash Chandra Pakrashi—for Appellants.

Hira Lal Ganguly—for Respondents.

Judgment.—This is an appeal preferred by the plaintiffs who had instituted a suit for recovery of khas possession of certain lands from the defendants. The subject-matter of the suit were certain lands and a hut constituting an under-tenancy which was created by one Brahnamoyi, a Hindu widow, so far back as 1898. The under-tenancy was created by a document which purports to have been a permanent lease granted by the said Brahnamoyi in favour of the defendants. The document is a registered one. By this document she purported to create a permanent under-tenancy in the lands in respect of which she said that she had a Kaymi Mourashi right. In 1915-16 there was a settlement Record of Rights in which the rights of the defendants were recorded as being those of a Koria tenant with a right of occupancy acquired by custom. Brahnamoyi died some time about the year 1932. Thereafter, the plaintiffs, as reversioners to the estate of Brahnamoyi's husband, had instituted the present suit for ejecting the defendants. The trial Court decreed the suit.

The Subordinate Judge has reversed the decision of the trial Court and has dismissed the suit. The principal question in the case was as to whether the lease that was granted by Brahnamoyi in favour of the defendant was justified

by legal necessity. The trial Court appears to have recorded some findings which would go to indicate that it was not satisfied as to the bona fide character of the lease and yet towards the end of its judgment the said Court laid down a condition on which the plaintiffs would be entitled to recover khas possession. The condition so laid down was that an amount of Rs. 50 which defendant 1 alleged that he had paid to Brahnamoyi on account of this lease together with interest at the rate of 6 per cent per annum from the date of the lease to the date of the suit would have to be paid within a month of the date of decree. The trial Court ordered that if this condition was fulfilled the plaintiffs would be entitled to eject the defendants.

The Subordinate Judge has held that there was no legal necessity for the transaction, but he has dismissed the suit holding that the defendants have acquired a right of occupancy. One of the arguments that has been addressed to me on behalf of the appellants is that the Subordinate Judge has not gone into the question of the bona fides or otherwise of the transaction and that if he had done so he could have held that the defendants who come upon the land as a result of a lease which was not granted bona fide could acquire no rights under it. It appears to me on a perusal of the judgment of the Subordinate Judge that this contention is not well founded. The learned Judge appears to have expressly referred to this condition which the Munsif had laid down and then he observed as follows:

"I should say that the fact of the payment of the money by defendant 1 to Brahnamamoyee and of the latter's appropriation thereof for a just and commendable purpose does not by itself make the transaction as being one for legal necessity."

This passage, in my opinion, sufficiently indicates that while the learned Judge was prepared to agree with the trial Court that there was no justifying necessity for the transaction yet he had no doubt whatsoever that the money, that is to say Rs. 50, had been received by Brahnamoyi from defendant 1 and had been appropriated by her for a just and convenient purpose. This, in my opinion, sufficiently shows that in the view which the learned Judge took of

this transaction the transaction itself could not be condemned as not being a bona fide one. Now, the findings of both the Courts below are that there was no legal necessity for the permanent lease and the rest of the case will have to be considered on the basis of that finding.

The Subordinate Judge has declined to make a decree in plaintiff's favour upon the ground that although on account of the absence of legal necessity the permanent lease would not be binding on the plaintiffs, yet defendant 1 had, as a matter of fact, acquired a right of occupancy as is evidenced by the Record of Rights and that the plaintiff had not succeeded in establishing that the entry that is to be found there in favour of defendant 1 is incorrect. To challenge this view which the learned Judge has taken, an argument has been advanced on behalf of the appellants based on the provisions of S. 85, Ben. Ten. Act. It has been argued that as the Record of Rights is based entirely upon a tenancy which was created by the aforesaid permanent lease and as the said permanent lease is void by reason of the provisions of S. 85, Ben. Ten. Act, it should be held that defendant 1 had acquired no rights under the lease and therefore he had not also acquired a right of occupancy in respect of the land. With this contention I am not prepared to agree. It is quite true that a sub-lease by a raiyat shall not be admitted to registration if it purports to create a term exceeding 9 years. That is Cl. 2, S. 85, Ben. Ten. Act.

This sub-lease therefore was not entitled to be admitted to registration and it follows that it cannot be put in as evidence of a transaction by which any right was created in favour of defendant 1 to be on the land. But the fact that as between Brahnamoyi on the one hand and defendant 1 on the other there was a transaction by which defendant 1 came upon the land as a tenant under Brahnamoyi is a fact which can be proved not merely by production of this document but also by other means. And whatever the validity or invalidity of this sub-lease may be, as between the two, Brahnamoyi would surely be bound to regard defendant 1 as tenant. While this was the position and a period of more than 12 years having expired since the date of the sub-lease, defendant 1

did acquire an occupancy right by custom as is evidenced by the entry which is there in the Settlement Record of Rights. In these circumstances defendant 1 is perfectly entitled to discard the sub-lease altogether which he cannot put in evidence, but he can rely upon the fact that having come upon the land as a tenant under Brahmamoyi, a fact, which he is well entitled to prove, he did in point of fact acquire a right of occupancy which would protect him from eviction. I am of opinion, therefore that the learned Judge was right in holding that notwithstanding that the document is not admissible in evidence, defendant 1 is protected by the occupancy right which he acquired and which right is recorded in the Record of Rights. The learned Judge has pointed out that it was for the plaintiffs to show, that the entry is wrong. Now, the plaintiffs in their plaint had undertaken to show that the entry was wrong by suggesting that there was fraud or at least collusion between Brahmamoyi and defendant 1 in consequence of which the entry came into existence.

I do not think that any evidence has been adduced to establish this position. The mere fact that the widow grants a permanent lease in excess of her necessity is not a fact from which fraud or collusion can necessarily be inferred. The only other way in which the correctness of this entry could have been challenged was by showing that the custom referred to in the decree does not in fact exist. On this point again no evidence appears to have been adduced on behalf of the plaintiffs, as the learned Judge also observed in his judgment. I am of opinion, that the view which the learned Judge has taken of this case is correct and the appeal accordingly must be dismissed with costs. Leave to appeal under S. 15, Letters Patent, has been asked for, but I do not consider that it is a fit case in which such leave should be granted.

V.B.

Appeal dismissed.

A. I. R. 1933 Calcutta 612

MUKERJI, J.

Badal Chandra Sadhukhan — Defendant—Appellant.

v.

Debendra Nath Dey—Plaintiff · Respondent.

Appeal No. 2022 of 1930, Decided on 14th December 1932.

(a) Transfer of Property Act (1882), S. 106 — Permanent lease—Unregistered lease-deed does not create title nor can it be construed as agreement to lease.

A permanent lease can be created only by a registered instrument. If it is unregistered, it does not create any title in favour of the tenant nor can be it construed as an agreement to lease on the basis of which a claim for specific performance can be made by the tenant for even this requires registration before it can be put forward. The unregistered document is certainly admissible for all collateral purposes but for the purpose of the tenant's defence against eviction either as having created a permanent title to him or as entitling him to a permanent lease, it is useless: *Walsh v. Lonsdale* (1882), 21 Ch D 9, *Rel on.* [P 613 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 182 — Tenancy having distinct and definite origin — S. 182 has no application.

Where a particular tenancy has a distinct and definite origin, S. 182 has no application even though the terms of such tenancy are not capable of proof. [P 613 C 2]

(c) Transfer of Property Act (1882), S. 107 — Document creating lease not admissible for want of registration—Oral evidence as to terms is not admissible—Evidence Act (1872), S. 91.

When the origin of the tenancy is known and the document by which it purports to have been created and which as the primary evidence of the transaction is ruled out, oral evidence as to the terms of the tenancy is not admissible, nor can attendant circumstances be looked into to find out what its nature or incidents were. [P 613 C 2]

(d) Evidence Act (1872), S. 115 — Estoppel — Permanent lease—Document unregistered — Tenant believing that he had obtained permanent lease building permanent structures—Landlord can evict tenant only paying tenant money spent by him on ground of equitable estoppel—T. P. Act (1882), S. 51.

Ignorance of law is no excuse and it is not open to a tenant to plead an estoppel against a landlord where the document is unregistered and a suit for eviction is filed even though the landlord's intention to create lease is clear; but where the tenant, believing that he has obtained a permanent lease, spends money by constructing permanent structures, the landlord is entitled to evict only on the payment of money spent by the tenant on the ground of equitable estoppel. [P 613 C 2, P 614 C 1]

Rupendra Kumar Mitter and *Bijan Behari Mitter*—for Appellant.

Radhabinod Pal and *Premranjan Roy Choudhury*—for Respondent.

Judgment.—This is an appeal from a suit which was brought to eject the defendant from a considerable plot of land on which stand their homestead and other structures. The defendant's grandfather took what purports to have been a permanent lease of the land for residential purposes from the then proprietors, the Mridhas, in March 1883. The lease was created by a document, which however was not a registered one. Certain persons, the Mitras, subsequently purchased the interest of the Mridhas and eventually granted a permanent lease of the land to the plaintiff in 1926. In 1927 the plaintiff instituted the present suit alleging that the defendant was a tenant-at-will and purporting to have served on him a notice to quit. The defendant denied the plaintiff's title, asserted his own Mourashi Mokurari right and challenged the service of the notice. The Courts below have been concurrent in plaintiff's favour. The defendant has appealed.

Much of the arguments advanced on behalf of the appellant was directed to establish the admissibility of the unregistered lease on which is based the defendant's title. The document is certainly admissible for all collateral purposes, but such admission would not really help the appellant in proving its terms on which his title rests. Under the Transfer of Property Act, 1882, by which the tenancy is governed, a permanent lease could be created only by a registered instrument. The document not being registered it could not create any title in defendant's favour. It cannot be construed as an agreement to lease; but even if it could be so construed it would require registration before it could be put forward as an agreement on the basis of which a claim for specific performance could be made to protect the defendant from eviction on the principle of *Walsh v. Lonsdale* (1). For the purpose of the appellant's defence, either as having created a permanent title in him or as entitling him to a permanent lease, the document must be regarded as useless.

The appellant has next invoked the aid of S. 182, Ben. Ten. Act, as affording him protection on the ground that his tenancy is to be governed by the inclosure Act of 1859. *1. (1882) 21 Ch D 9=52 L J Ch 2=31 W R 109*
=46 L T 858.

dents of his utbandi raiyati holding in the village. I have read the evidence such as there is in this connexion, but I do not find that it has been established that at the time when the present tenancy was created the appellant's grandfather who took this tenancy had an utbandi raiyati holding. And even if he had any such holding at the time, the very fact that this particular tenancy had a distinct and definite origin, only the terms of the tenancy not being capable of proof, would, in my opinion, prevent the applicability of S. 182, Ben. Ten. Act. Certain Dakhilas have been relied on on behalf of the appellant as showing that his rights were Mourashi and Mokurari. So far as the Dakhilas from from the Mridhas are concerned, the two Courts have taken the view that they are fabricated. As regards the Dakhilas granted by the Mitras, in which permanency is indicated, the relevant word really seems to have been interpolated as both the Courts have thought.

When the origin of the tenancy is known and the document by which it purports to have been created and which as the primary evidence of the transaction is ruled out, oral evidence as to the terms of the tenancy is not admissible, nor can attendant circumstances be looked into to find out what its nature or incidents were. Indeed S. 107, T. P. Act, would be defeated if such a course was permissible. That the intention of the Mridhas was to create a permanent tenancy is more than clear. But the law will stand in the way of that intention fulfilling its purpose, as the purpose was sought to be effected in a way which the law does not permit. Ignorance of law is no excuse. It is not open to the defendant to plead an estoppel against the Mridhas against the statute and none can operate against the plaintiff in so far as the defendant has been put to proof of his title.

But there is a question of equitable estoppel which arises by reason of the fact that the defendant, acting though he may have been under an inoperative deed and led into the belief that he had obtained a permanent tenancy in the land, has spent money on it in raising permanent structures. This equitable estoppel must be, in my judgment, equally operative against the plaintiff.

as it was against the Mridhas or the Mitras. Giving effect to this equitable estoppel I hold that the decree passed by the Courts below should be conditional on the payment by the plaintiff to the defendant of the value of the structures at their present market-price.

The appeal is allowed to this extent that the decree of the Subordinate Judge would be set aside and the case would be sent back to his Court so that the question of valuation may be gone into there, and the value being assessed a decree should be made in plaintiff's favour conditional on his paying the amount to the defendant within a given time. The decree for costs made by the Court of appeal below will stand. There will be no order for costs in this appeal. Future costs in the Court of appeal below will be in the discretion of that Court.

K.S.

*Order accordingly.***A. I. R. 1933 Calcutta 614**

MITTER, J.

Shekandar Mia—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 918 of 1932,
Decided on 24th November 1932

Penal Code (1860), S. 182 — Information reported to be false by police — Warrant under S. 182 issued — Naraji petition against report of police — Court ought to entertain petition and dispose of it before trial under S. 182.

S lodged an information with the police, which was reported to be false by the investigating officer, and a warrant was issued against him under S. 182, Penal Code. On receipt of the warrant, he appeared in Court and filed the naraji petition against the report of the police. The Court apparently did not entertain the petition and dismissed it, being of opinion that the petitioner "will have ample opportunity to adduce evidence to prove his case if it is true, when he enters into his defence under S. 182." Ultimately without any inquiry into the naraji petition, S was tried and convicted:—

Held: setting aside conviction that the Court should have in the first instance inquired into the naraji petition and after he had disposed of that petition taken proceedings under S. 182 if he thought necessary, and that by the course taken the accused was prejudiced, and the trial vitiated: *A I R 1932 Cal 287 and A I R 1933 Cal 50, Ref.* [P 615 C 1]

*Suresh Chandra Talukdar—*for Petitioner.

Judgment. — This Rule arises in the following circumstances: It appears that a burglary is alleged to have been com-

mitted, in the house of the petitioner on the night of the 6th February last. The petitioner lodged an information with the Daulat-kha police on the morning following the night of the alleged occurrence suspecting three persons: Elahi Buksh, Rahim Buksh and Hadu. The Sub-Inspector of Daulat-kha who investigated the case reported it to be false and asked for sanction for the prosecution of the petitioner under S. 182, I. P. C. The petitioner produced his witnesses before the investigating officer and he states that he was altogether ignorant of the result of the investigation until the warrant was issued against him under S. 182, I. P. C. The petitioner further states that on receipt of the warrant he appeared in Court and filed a naraji petition against the report of the police which was put up before the Subdivisional Officer of Bhola on 15th March 1932. The Subdivisional Officer apparently did not entertain the naraji petition and dismissed the complaint, being of opinion that the petitioner

"will have ample opportunity to adduce evidence to prove his case if it is true when he enters into his defence under S. 182, I. P. C."

He accordingly did not see any reason to hold any inquiry into the naraji petition. Ultimately the Subdivisional Officer convicted the accused, the petitioner, under S. 182, I. P. C., and sentenced him to pay a fine of Rs. 40. The petitioner asked for a reference to this Court before the Sessions Judge of Bakargunj. The learned Sessions Judge was not prepared to make the reference asked for. It is argued in support of this Rule that no processes should have been issued against the petitioner before the learned Magistrate had disposed of the naraji petition filed by the petitioner against the report of the police officer for prosecuting him under S. 182, I. P. C. In support of this contention the learned advocate for the petitioner has referred to two cases: *Abdulla v. Emperor* (1) and *Charles John v. Emperor* (2). Both these cases lay down that where there is a naraji petition by the complainant objecting to the police report that his case is false, no process

1. AIR 1932 Cal 287 = (1932) Or O 213 = 137 IC 138 = 33 Cr L J 406.

2. AIR 1932 Cal 560 = (1932) Cr O 550 = 139 IC 217 = 33 Cr L J 724.

can be issued against him either under S. 211 or under S. 182, I. P. C., before that petition has been inquired into. It is true that in both these cases the accused moved this Court as soon as process was issued against him. He did not wait till the trial of the case under S. 182 had terminated. That circumstance no doubt distinguishes this case from the two cases cited; but it is pointed out by Mr. Talukdar that his client did all that was in his power to do and that he put in the *naraji* petition before the Subdivisional Officer as soon as he came to Court in answer to the warrant under S. 182, I. P. C.

It is true that he came after a month as the learned Judge has pointed out in rejecting the application for reference and that he really pressed this point as soon as he came to Court and having regard to authorities it was the duty of the Subdivisional Officer to have stayed the proceedings under S. 182, I. P. C., and to have inquired into the petitioner's *naraji* petition and to dispose of it. At the first blush it appeared to me that, having regard to the course of events, namely the determination of the trial under S. 182, I. P. C., the petitioner had not been prejudiced. It has been pointed out however and there is some force in this, that the petitioner was in this position of disadvantage when proceedings were started against him under S. 182, I. P. C., namely he was in the position of an accused and could not make any statement on oath and was not in the advantageous position of the complainant when he could give his statement on oath. That is a circumstance which no doubt requires to be considered and it is to this extent that the accused was prejudiced and the course taken in the Court below was prejudicial to the trial of the case.

In these circumstances I set aside the conviction and sentence of the petitioner and direct that the Subdivisional Officer should in the first instance inquire into the *naraji* petition and after he had disposed of that petition take proceedings under S. 182 if he thinks it necessary. The Rule is made absolute and the fine if paid must be refunded.

V.B.

Rule made absolute.

A. I. R. 1933 Calcutta 615

MUKERJI, J.

Lalit Mohan Ray and others—Plaintiffs—Appellants.

Kali Mohan Saha and others—Defendants—Respondents.

Appeal No. 1753 of 1932, Decided on 13th December 1932, against decree of Dist. Judge, Dacca, D/ 4th July 1932.

(a) *Navigable River*—What is stated.

A river to be navigable must be navigable throughout the year for ordinary boats for commercial purposes. [P 616 C 2]

(b) *Navigable River*—Test of public navigable river stated.

In order to come to a finding that a channel is a public navigable river, it is no doubt true that the Court is primarily concerned with the present condition of the channel, but all the same an investigation into its past history is not without importance. For if it is found that at one time the channel was connected with two navigable streams at its two ends it would not be an unreasonable inference to draw to hold that it at that time formed a part of an entire navigable system, and though the river as a whole may cease to be navigable, right of the public is entitled to protection in that part. [P 617 C 1]

(c) *Navigable River*—Construction of bridge at point when obstruction stated.

Although the channel may not be navigable near the site of the proposed bridge, yet if it was navigable at a spot further down and if the proposed bridge would interfere with the navigability of that portion such a bridge will not be allowed to be constructed. [P 619 C 2]

Atul Chandra Gupta, Charu Chandra Chowdhury and Phani Bhusan Chakravarty—for Appellants.

S. C. Basak and Prakash Chandra Pakrashi—for Respondents.

Judgment.—The suit which has given rise to this appeal was instituted by the appellants as plaintiffs for a permanent injunction restraining the defendants from constructing a bridge over a water-course which goes by the name of *Hari-dhoa* and for a mandatory injunction ordering the defendants to remove such portions of the bridge as have been already constructed. The appellants have been unsuccessful in both the Courts below. It is not necessary to repeat here the facts of the case which have been set out in detail in the judgments of the Courts below. The plaintiffs' claim is based upon the allegation that the channel in question, or at least the part of it from its mouth on the *Meghna* river up to the point where the bridge is being constructed, is a public navigable river. The defence case is that the channel is not a river but only a *khal* which is neither

tidal nor navigable all the year round, that for about six months in the year the channel remains fordable and during the remaining months only small boats can pass through it, that the bed of the channel is not the property of the Crown, and the public have no rights of navigation over it.

The appellants' contentions, in substance, are (1) that the Court's below, in their endeavour to find out whether the channel is a navigable one or not, have applied to the case a test which is not the real test for determining such a matter; (2) that the District Judge has been in error in supposing that the Court, in the present case, is not at all concerned with an investigation into the past history of the channel but should confine itself to an examination of its actual condition at the present moment; (3) that certain documents from which an inference in plaintiffs' favour as regards the navigability of the channel and the rights of the public in it might reasonably have been drawn have not been properly construed and their legal effect has been misconceived; and (4) that certain other documents have been ignored or their legal bearing on the question has been overlooked.

The findings of the Courts below may be conveniently summarized here. The Munsif after a somewhat elaborate research arrived at the conclusion that the channel Haridhoa, variously stated to be a river or a khal, was at one time a branch of the big river Brahmaputra which had died out at various parts even before the Permanent Settlement; that at the time of Major Rennell's Survey (1764-67) Haridhoa was connected with the river Lakshya by which name a portion of the river Brahmaputra used to be called: that such connexion has Haridhoa had with Lakshya gradually ceased in course of time; that there was positive evidence (Survey Maps of 1911-14) that about the years 1911-14 Haridhoa had no connexion at all with the river Lakshya during the dry season; and that at the present moment the channel Haridhoa is not a channel connecting two navigable streams at its two ends, but that it gets its supply of water from the Meghna alone at one of its ends. He then found that the channel follows a serpentine course, meeting with

obstructions, natural as well as artificial, at various points, and so only a part of it at its mouth on the river Meghna is under the influence of the tides in that river. On the question of the present condition of the river he was not prepared to accept in its entirety the evidence adduced on either side. There is just a little conflict in the conclusions that he has drawn from the evidence which he was prepared to rely on. But taking the finding which is most in favour of the appellants and overlooking the findings which may detract from it to their disadvantage it runs thus:

"The portion of the river from the Meghna to the railway godown is tidal and at low tide in the dry season is navigable for small boats and during high tides for little bigger boats. The portion of the river from the railway godown up to Putia is navigable for only very small boats and this portion of the river is not tidal."

It may be stated here that the site of the bridge is just beyond the first of these portions and lies in the second portion a little beyond the railway godown towards the Putia side.

The District Judge, while agreeing with the Munsif in holding that navigability of the channel has not been established, has recorded his own findings which, if anything, are less in favour of the appellants. His own findings have been expressed thus:

"After a careful examination of the evidence I have come to the conclusion that so far as the portion above the bridge is concerned, that is the portion between Putia and the bridge, the river is impassable even for small boats during certain times of the year. So far as the portion between the proposed bridge and the Meghna is concerned the river is deeper and has more water, but it is impassable for ordinary boats of commerce during the dry season.

It is well settled now that a river is not navigable unless it is navigable throughout the year for ordinary boats used for commercial purposes. A much higher test laid down in certain cases that navigability is to be determined with reference to steamers and big boats may perhaps be discarded. On the other hand, small boats of the description spoken to by the witnesses examined in the case on whose evidence apparently the Courts below have acted would clearly not serve as a test. I have read the evidence which I was asked by the parties to read, but I do not see that any wrong standard has

been applied by either of the Courts below. I do not think that the Courts below while speaking of small boats meant to imply flat-bottomed pleasure boats, as has been suggested on behalf of the appellants. Had they done so it might be complained that they had misunderstood the evidence. The appellant's first contention therefore in my judgment is not well founded. As regards the third and the fourth contentions I have examined the several documents in connexion with which these contentions have been pressed but am unable to hold that the appellants have any just cause for complaint. No useful purpose would be served by going into details.

The second contention I am bound to say is not without foundation. It is quite true that what the Court is primarily concerned with is the present condition of the channel, but to come to a decision on the question of navigability an investigation into its past history is not without importance. For if it be found that at one time the channel was connected with two navigable streams at its two ends it would not be an unreasonable inference to draw to hold that it at that time formed a part of an entire navigable system. That was indeed the Munsiff's finding. If that finding be correct, then even though that navigability might have partially diminished, the plaintiffs may justly ask that what little is left is yet entitled to protection. But even then what has to be proved on behalf of the plaintiffs in order to entitle them to the reliefs that they have asked for is that at some places within this stretch of the channel the channel is still navigable all the year round. But such a finding being impossible, the omission on the part of the learned Judge to look into the past history has occasioned no real prejudice to the appellants. There is one other point on which the learned Judge's judgment seems to me to be somewhat faulty. He has observed:

"A great deal of evidence has been given to prove the navigability of the Haridhoa in its southern portion, that is near its junction with the Meghna. The condition of the river near this side is of not much importance. Its condition near about plots No. 202 (i. e. the railway godown) and No. 188 (i. e. the bridge site) and higher up is what has to be considered."

This remark is open to criticism. For

even though the channel may not be navigable near the site of the proposed bridge yet if it was navigable at a spot farther down and if the proposed bridge would interfere with the navigability of that portion the plaintiffs could get the reliefs they wanted. But after all, the evidence relating to that portion also has been considered by the learned Judge and in his view, with which I agree, in no part of the channel has navigability been established. The appeal is dismissed with costs. The application filed on behalf of the respondents is rejected. Leave to appeal has been asked for, but it is rejected.

V.B./R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 617

MALLIK, J.

*Sasanka Kumar Nayak and others—
Plaintiffs—Appellants.*

v.

*Hitalal Sow and others—Defendants —
Respondents.*

Appeal No. 1052 of 1930, Decided on 11th August 1932, against appellate decree of Addl. Sub-Judge, Burdwan, D/- 29th November 1929.

(a) Bengal Tenancy Act (8 of 1885), S. 52 — Enhancement of rent on ground of additional area—There is presumption that standard of measurement is same unless anything to contrary is proved.

The landlord, before he can get an enhancement on the ground of additional area, must show that the present area is in excess of the area at the time of inception of the tenancy. There is a presumption that the standard of measurement at the time of letting out is the same as at the time when enhancement is claimed unless anything to the contrary is proved : *A I R 1927 Cal 15, Rel on.* [P 618 C 1, 2]

(b) Bengal Tenancy Act (8 of 1885), S. 52 — Enhancement of rent — Interest of both Landlord and Tenant must be considered.

For the purposes of equity the landlords are not the only persons to be taken into consideration. The interest of the tenants also ought to be borne in mind when considering the question of equity as between the tenant and the landlord. [P 619 C 1].

*Hemendra Chandra Sen and Bon Behari Mukherjee—*for Appellants.

Purna Chandra Chatterjee — for Respondents.

Judgment.—This appeal arises out of a suit for enhancement of rent of a holding on two grounds : on the ground of excess of area and also on the ground of rise in prices. The plaintiffs claimed enhancement of rent on the ground of

rise in prices at the rate of six annas in the rupee and their case was that when the land was let out, the area mentioned in the kabuliyat was 34 bighas only, whereas on actual measurement it has been found to be 42 bighas 17 cottas and the plaintiffs were therefore entitled to an additional rent on the excess area of 8 bighas 17 cottas there having been a stipulation in the kabuliyat that the tenant would be liable to enhancement if the area of the holding would be found on actual measurement to be more than 34 bighas. In the plaint it was also stated that at the time when the land was let out the standard of measurement was 80 cubits to a bigha and 18 inches to a cubit.

The plaintiffs' claim was resisted by the defendants on the allegation amongst others that at the time of the settlement, the area was given Dak Surat which I take it means something like guess. The Court of first instance found in favour of the plaintiffs on the question of excess area and gave to the plaintiffs an enhancement of rent on the ground of additional area. It gave to the plaintiffs also enhancement of rent on the ground of rise in prices at the rate of 2 annas 9 pies in the rupee having taken for comparison purposes two decennial periods, one of 1916 to 1925 and the other of 1906 to 1915; the first period, viz. 1916 to 1925 being the period immediately preceding the institution of the suit. Against this decision of the trial Judge there was an appeal preferred by the defendants and the plaintiffs also filed a cross-objection. The appellate Court disallowed the plaintiffs' claim for enhancement of rent on the ground of additional area and it disallowed also the plaintiffs' cross-objection keeping the first Court's decree for enhancement on the ground of rise in prices intact. The plaintiffs have come up to this Court in second appeal.

I do not think the order of the lower appellate Court by which it refused to give any enhancement of rent on the ground of additional area can be maintained. It is no doubt true that the landlord before he can get an enhancement on the ground of additional area must show that the present area is in excess of the area at the time of incep-

tion of the tenancy. In the present case it is an undeniable fact that the present area of the holding has been found to be 42 bighas 17 cottas when measured by the standard measurement of 80 cubits to a bigha and 18 inches to a cubit. The learned Subordinate Judge refused this enhancement to the plaintiffs on the ground that there was no evidence to show what had been the standard of measurement at the time when the tenancy was created. But as has been held in a decision of this Court in *Birendra Kishore v. Bhola Mia* (1) the presumption must be that the standard of measurement at the time of letting out was the same as it is now unless anything to the contrary is proved. In the present case there was an allegation from the very beginning that the standard of measurement at the time of letting out the tenancy was 80 cubits to a bigha and 18 inches to a cubit, and although there was a denial in the written statement to the effect that the standard of measurement was not as alleged in the plaint, there was no proof in the case to the contrary that the standard was not what had been alleged in the plaint. That being so, on the strength of the decision in *Birendra Kishore v. Bola Mia* (1), it must be presumed that the same standard continued, or in other words the standard of measurement at the time when the land was actually measured and found to be 42 bighas 17 cottas in area was the same as it had been at the time of letting out the land. The case in *Birendra Kishore v. Bhola Mia* (1) appears to have been cited before the learned Subordinate Judge. The learned Subordinate Judge no doubt in his judgment says that that case had no application to the present case, but he made no attempt to distinguish the one from the other.

On behalf of the appellants it was said that the plaintiffs were entitled to an enhancement at a rate higher than what has been allowed to them. The contention is that the Courts below did not exercise proper discretion when they accepted for the purpose of comparison the two decennial periods, 1916 to 1925 and 1906 to 1915. It was said that to accept the decennial period of 1906 to 1915 for the purpose of comparison was

not equitable. The learned advocate for the appellants however could not satisfy me as to why it was not equitable. No doubt it is true that if another decennial period, e. g. 1887 to 1896, would have been accepted for comparison purposes the plaintiffs might have been entitled to something more than 2 annas 9 pies in the rupee. But for the purposes of equity the plaintiffs landlords are not the only persons to be taken into consideration. The interest of the tenants also ought to be borne in mind when considering the question of equity as between the tenant and the landlord. I would not therefore interfere with that part of the decree of the lower appellate Court by which the plaintiffs have been allowed an enhancement on the ground of rise in prices at the rate of 2 annas 9 pies only.

The result therefore is that the plaintiffs will get an enhancement on the ground of excess area as claimed by them and also on the ground of rise in prices at the rate of 2 annas 9 pies in the rupee, or in other words the decree of the Court of first instance is affirmed. There will be no order as to costs.

K S.

*Order accordingly.***A. I. R. 1933 Calcutta 619**

COSTELLO, J.

Chairman, Dist. Board, Midnapur—
Complainant.

v.

Atul Chandra Pal—Accused.

Criminal Ref. No. 207 of 1932, Decided on 1st February 1933, from order of Dist. and Sessions Judge, Midnapore.

(a) Bengal Food Adulteration Act (6 of 1919), Ss. 6 (1) (e) and 21—Mustard oil not conforming to standard required stored for sale—Accused is guilty even though he calls such oil by some other name.

Accused had stored for sale an oil, the bulk of which was mustard oil but mixed with linseed oil. Accused chose to call that oil not as mustard oil but fuel oil and alleged that he had not intended that it should be used for human consumption:

Held: that what was stored was mustard oil which was an article of food within the meaning of S. 6 and that as the oil in question did not conform to the standard required by the section accused was guilty. [P 621 U 1]

Held further: that it was not an essential part of the offence that what is done should be done with a view to or for the purpose of human consumption: *A I R 1930 Cal 278, Ref.*

[P 620 C 2]

(b) Bengal Food Adulteration Act (6 of 1919), S. 6 (1)—Exposing for sale or selling

article which contains amongst other things mustard oil—Whether offence—*Quaere.*

Quaere.—Whether it will be an offence merely to expose for sale or even to sell an article which amongst other things contains mustard oil.

[P 620 C 2]

*Banerji—*for Complainant.

Hiralal Ganguly and Panchanan Pal
—for Accused.

Santos Kumar Pal and Sambhunath

Order.—This is a Reference by the District and Sessions Judge of Midnapore under S. 438, Criminal P. C., concerning a conviction of one Atul Chandra Pal under S. 21 read with S. 6 (i) (e), Bengal Food Adulteration Act 6 of 1919 (B.O.). The accused was sentenced to pay a fine of Rs. 100 for selling and exposing for sale adulterated mustard oil. There seems to be some doubt as to what actually occurred at the time when the Sanitary Inspector, employed by the Midnapore District Board, visited the shop belonging to Pal in company with the Circle Officer, Nagendra Nath Majumdar. It is to be regretted that the learned Magistrate who tried the case did not record in a systematic way the evidence of the two or three witnesses who were called before him. He recorded their evidence in indirect speech which makes it somewhat difficult to ascertain what the sequence of events in the shop really was. But the learned Magistrate has stated in his judgment:

"The salient facts of this case are admitted. The accused Atul Chandra Pal has got a shop at Fatesingpur, P. S. Garbetta where he stores for sale flour, ghee, mustard oil, kerosine oil, salt, spices, etc. On 10th April 1932 the Sanitary Inspector of the Midnapore District Board visited the shop along with witnesses including Babu Nagendra Nath Majumdar, Sub-Deputy Collector and Circle Officer at Garbetta. In presence of these witnesses the Sanitary Inspector purchased from the agent of the accused, a man named Ambica De, some quantity of oil which the Sanitary Inspector purchased as mustard oil but which the seller insisted on describing as "jalani tel" (fuel oil), (vide sale receipt Ex. 1 in the case)."

The oil which the Sanitary Inspector, in fact, took was subsequently found, on analysis by the Public Analyst to the Government of Bengal, to be a sample of adulterated mustard oil. In his certificate the Public Analyst says: "It is mustard oil in which linseed oil is present" and he describes it as "adulterated mustard oil." The case set up for the defence seems to have been that the oil which was taken by the Sanitary Inspector was compounded of a number of

different oils including mustard oil and that a notice was displayed in the shop of the accused to that effect and that the tin cannisters containing this oil were marked in letters engraven with acid "jalani tel". It was further said that the article in these cannisters was not intended to be sold as an article of food at all. The learned Sessions Judge, in referring the matter to this Court, has suggested that the conviction was wrong in law, because, according to him, there is nothing in the Bengal Food Adulteration Act of 1919 to prevent a shop-keeper from selling or exposing for sale or storing for sale an article which happens to have as one of its ingredients a certain amount of mustard oil, provided always the composite article is not sold or intended to be sold as food for human beings. It seems to me however that in this particular case the learned Sessions Judge has somewhat misread the facts as they are set forth in the judgment of the learned Magistrate who tried the case; though the learned Sessions Judge himself does summarise those facts in this way :

"The Sanitary Inspector of the District Board, Midnapore, went to the shop on 16th April 1932 and demanded mustard oil from the shopman. The latter said that he did not sell oil in the name of mustard oil and that the oil stocked was described in the books as jalani tel. The Inspector then demanded and got a sample, which on analysis was found to be adulterated mustard oil. The servant of the shop states that the oil is never used as a food, and that the words "jalani tel" are inscribed in acid on the tin cannisters containing this oil. The shop also contained mustard oil for human consumption. He added that if a customer demanded cheaper oil it was not sold unless he stated the use for which it was required. He states also that the house-holders use ordinary mustard oil for fuel for their oil lamps."

Upon that statement of facts the learned Sessions Judge said :

"The Magistrate holds the view that S. 6 of the Act, as interpreted in the case cited, that is to say the case of *Rakhal Chandra v. Purna Chandra* (1), lays down that in no circumstances can anything containing mustard oil be sold other than pure mustard oil."

Then he proceeds to discuss the case which was cited and on which he bases his reference to this Court. But what the learned Sessions Judge has overlooked, I think, is this: that in this particular case it was not a question of the defendant, having or storing for sale in

his shop some article which, as one of its ingredients, contained mustard oil. The report of the Analyst seems to me to show that in this case the article was mainly mustard oil with a slight admixture of linseed oil. In that view of the matter, it seems quite clear that the accused was exposing for sale or storing for sale mustard oil which was not up to the standard required by the proviso in sub-clause 5, S. 6 (1), which says, "in the case of mustard oil, it shall be derived exclusively from mustard seed."

Reading that proviso with the main part of the section, the effect is that no person shall, directly or indirectly, himself or by any other person on his behalf, sell, expose for sale or manufacture or store for sale, mustard oil unless it shall be derived exclusively from mustard seed. Now, it has been argued before me that there can be no offence under the Act of 1919 unless the article in question is sold, exposed for sale or stored for sale for human consumption and not otherwise. The case of *Rakhal Chandra Dutt v. Purna Chandra Ghosh* (1) as also the unreported decision of M. C. Ghose, J., to which I have been referred seem to emphasise the fact that nowhere in this particular Act is there any qualification of that description; it is nowhere made an essential part of the offence that what is done should be done with a view to or for the purpose of human consumption of the oil. It is quite true, as Mr. Ganguly has said, that the articles enumerated in S. 6 (1) are articles of food; and no doubt the policy of the Act is to prevent either the sale or the exposing for sale or the keeping or storing for sale of articles of food unless they are up to a certain standard of purity. But it cannot rightly be held in my opinion that it is a sufficient defence for the accused merely to say that it was never intended by him that the things should be used for human consumption. It is quite clear that the mere placing of a label on a cannister containing some article, if in fact it can be used as an article of food, will not help him in escaping a conviction. It seems to me that in the present case it is not necessary to go into the question which is the real question raised in the reference, namely as to whether it will be an offence merely to expose for sale or even to sell an article which, amongst

other things, contains mustard oil. It is quite certain from the report of the Public Analyst to the Government of Bengal that the bulk of the commodity which was taken by the Sanitary Inspector was in fact mustard oil. I think the matter is concluded by the findings of fact arrived at by the learned Magistrate and that no fresh question of principle really arises. On the facts of this case, it does appear that in this shop there was stored for sale mustard oil which did not conform to the standard required by the section. That being so, this reference is not accepted and the conviction of and the sentence passed on the accused Atul Chandra Pal by the learned Magistrate of Midnapore, Mr. S. K. Majumdar, are upheld.

K.S.

Conviction upheld.

** A. I. R. 1933 Calcutta 621

MITTER AND M. C. GHOSE, JJ.

Govind Chandra Ghose—Appellant.

Jamaluddin Mondal and others—Respondents.

Appeal No. 228 of 1931, Decided on 24th January 1933, against order of Addl. Dist. Judge, Rajshahi, D/- 9th February 1931.

* * Civil P. C. (1908), O. 34, R. 1 and O. 1, R. 9—O. 34, R. 1 controls O. 1, R. 9—All mortgagees or heirs of mortgagee must be parties to suit—Necessary party joined after limitation whole suit fails.

Order 34, R. 1 must not be read as being controlled by O. 1, R. 9 but that O. 1, R. 9 is subordinate to O. 34, R. 1. A mortgage deed is one and indivisible and action on such a security must be brought at the instance of all the mortgagees or where one mortgagee is dead, at the instance of the heirs of the said mortgagee or at the instance of one of the several mortgagees where the other mortgagees have refused to join in which case they must also be impleaded in the category of defendants; and if a necessary party has not been impleaded at the time of the institution of the suit but has been brought on the record after the period of limitation has expired, the whole suit must be dismissed: 1 *Pat L J* 468, *Foll.* [P 622 O 1, 2]

*Bireswar Bagchi—for Appellant.**Sarat Chandra Jana—for Respondents.**Bireswar Chatterjee—for Deputy Registrar.*

Mitter, J.—This is an appeal on behalf of defendant 3 and is directed against an order of remand made in a mortgage suit. It appears that a suit was brought in the Court of first instance for recovery of Rs. 999 on a mort-

gage executed on the 27th Aswin 1321 B. S. said to have been executed by the defendants in favour of one Esmon Bibi, by her brother one Jamaluddin Mondal who is now plaintiff 1. in the suit. The suit was brought on the allegation that the mortgage money really belonged to him and not his sister Esmon and that Esmon was only his benamidar. The due date of mortgage was the end of Chaitra 1321 B. S. which date corresponded to 13th April 1915. The suit on the mortgage would ordinarily be barred on 14th April 1927. On 25th August 1927 after the period of limitation had expired Jamaluddin abandoned his case that Esmon was really a benamidar for him and asked for amendment of plaint alleging that he was one of the heirs of Esmon and as such he was entitled to sue on the mortgage bond with the other heirs of his sister. Some of the heirs of Esmon were already on the record as pro forma defendants, but one Abdul Mondal one of the pro forma defendants who was also one of the heirs of Esmon was brought on the record for the first time on 25th August 1927 after the statutory period of limitation had expired. He was made a co-plaintiff on that date. Amongst the numerous defences to the suit one defence taken was that the suit by the added plaintiff Abdul was obviously barred by the statute of limitation and as the suit was on a mortgage and the mortgage is one and indivisible the effect of that would be that the entire suit must fail. The other defence taken was that defendant 3 was added as a party after the period of limitation and the suit should be dismissed as against him on that ground also. The Munsif came to the conclusion that the suit was barred so far as Abdul Mondal was concerned and the effect of this was that the suit was also barred in its entirety; and he dismissed the suit with costs.

Against this decision an appeal was taken to the Court of the Additional District Judge of Rajshahi who allowed the appeal and remanded the suit to the Court of first instance for trial of the suit on merits. The learned Additional District Judge was of opinion that the suit could not be dismissed on the ground of non-joinder of one of the heirs of Esmon and referred to the provisions of O. 1, R. 9, Civil P. C., which provides

that no suit shall be dismissed by reason of non-joinder of parties. In arriving at the conclusion that O. 34, R. 1, Civil P. C., is now controlled by O. 1, R. 9 of the same Code the learned Judge points out that the word "must" which occurred in S. 85, T. P. Act, having been dropped and S. 85, T. P. Act, having been transferred to the Code of Civil Procedure the question as to the effect of non-joinder is governed by the provisions of the Code.

Against this order of remand the present appeal has been brought and substantially two grounds have been taken in support of this appeal by Mr. Bireswar Bagchi who appears for defendant 3, the appellant in the present appeal. He contends in the first place that the suit must be held to be one not framed in accordance with the provisions of law seeing that one of the heirs of the mortgagee was neither added as a plaintiff to the suit in proper time nor was he added as a pro forma defendant and it is argued that the effect of the absence of one of the heirs of Esmon from the category of the plaintiff is that the suit cannot be maintained. He contends that O. 34, R. 1 must not be read as being controlled by O. 1, R. 9, but that O. 1, R. 9 must be held as being subordinate to O. 34, R. 1, having regard to the nature of the suit on which it was brought. It is said that the mortgage deed was one and indivisible and action on such a security must be brought at the instance of all the mortgagees or where one mortgagee is dead at the instance of the heirs of the said mortgagee or at the instance of one of the several mortgagees where the other mortgagees have refused to join in which case they must also be impleaded in the category of defendants. In support of this contention the learned advocate for the appellant has drawn our attention to a decision of the Patna High Court in the case of *Girwar Narain Mahton v. Mt. Makbunessa* (1). That decision lays down the proposition that R. 9, O. 1, Civil P. C. (1908), is subordinate to R. 1, O. 34, that a mortgage is indivisible; and if all the parties entitled to share in the money due on the mortgage are not on the record the suit must be dismissed in its entirety and that when a necessary party has not been impleaded at the

time of the institution of the suit but has been brought on the record after the period of limitation has expired, the whole suit must be dismissed. This decision supports fully the contention put forward on behalf of the appellant, and is also in accordance with the principles which governs such cases. Sir Rash Bihari Ghose in his classical book on the Law of Mortgage makes certain observations which are instructive with regard to the point with which we are now dealing and they may be usefully reproduced here. The learned author says at p. 611, Edn. 5 thus:

"Beginning with the proper plaintiffs in such actions I will observe that the cardinal rule on the subject is that all persons who have an interest in the mortgage debt should join in an action to enforce the security, as there can be no effective decree for foreclosure, unless all the parties entitled to the mortgage money are before the Court. Where therefore several persons are entitled to the mortgage debt, all of them should be joined as plaintiffs in the action. Thus, one of several persons, though entitled to distinct share of the mortgage money, cannot sue alone, if it has been laid out by trustees in a single sum. If any of the mortgagees refuse to join as plaintiffs, they may be made defendants. For in equity it is sufficient that all parties interested in the subject of the suit should be before the Court either in the shape of plaintiffs or defendants."

The same principle would apply in regard to actions for sale of the mortgage property. We are therefore of opinion that this contention of the appellant must succeed and the suit is dismissed in its entirety. It is not therefore necessary to consider the other question raised in this appeal, namely, whether the suit as against defendant 3 is barred by limitation. The result therefore is that this appeal is allowed. The order of the lower appellate Court is set aside and that of the Court of first instance is restored. There will be no orders as to costs.

M. C. Ghose, J.—I agree.

R.K.

Appeal allowed.

A. I. R. 1933 Calcutta 622

JACK AND MITTER, JJ.

Susheelasundaree Dasee—Appellant.

v.

Bishnupada De—Respondent.

Appeal No. 498 of 1931, Decided on 8th December 1932, against appellate order of Dist. Judge, Khulna, 3rd July 1931.

(a) Hindu Law—Succession—Dayabhaga—Stepbrother is preferred to nephew.

In the absence of the brothers, the stepbrother comes in the next line of succession to the brothers' property in preference to nephews: *A I R 1926 Cal 428, Dist*; *4 I A 147 (P C), Rel on.* [P 624 C 1]

(b) Bengal Tenancy Act (as amended by Act 4 of 1928), S. 170 (3)—Amended Cl (3) has wider import than original clause.

The words "any person whose interests are affected by the sale" in the amended S. 170 (3) are of much wider import than the original words "any person having interest voidable on the sale": *A I R 1922 Cal 95, Dist.* [P 624 C 2]

(c) Bengal Tenancy Act (as amended by Act 4 of 1928), Ss. 170 (3) and 174—Reversioner's interest is to be recognized—Next reversioner can apply if presumptive reversioner has waived right to preserve estate.

The interest of the next reversioner is a mere contingent interest; but still it is an interest which has to be recognized. The word "interest" in S. 174 is wide enough to include not only a proprietary or possessory interest but also the contingent interest of a reversioner. If the property is sold in execution of a decree for rent against a limited owner, a possible reversioner has a right to protect the property, in the reversion of which he may have a possible interest, if the immediate reversioner does not save the property from sale. An application under S. 174 may be maintained therefore by a contingent reversionary heir if the presumptive reversionary heirs who would succeed if the widow were to die at the moment do not care to preserve the estate, e. g. the next reversioners have waived their right to preserve the estate by making the deposit and have thereby concurred in the sale by their conduct: *6 Cal 761 (P C)* and *A I R 1925 P C 55, Rel on.* [P 624 C 2; P 625 C 1]

Kshirodenarayan Bhuina—for Appellant.

Shreeshchandra Datta — for Respondent.

Mitter, J.—This is an appeal from the order of the learned District Judge of Khulna, dated 3rd July 1931, affirming the order of the Munsif at Satkhira dated 16th July 1930. The circumstances which led to this litigation may be briefly stated thus: It appears that there was a tenure which belonged originally to one Anandaprasad Sadhukhan. That tenure was sold in execution of a decree for rent held under the Bengal Tenancy Act. Sarada and Annada were two uterine brothers, and Khagendra and Bhupendra were the stepbrothers of Sarada and Annada. Durlabhmani, against whom the rent decree was passed, was the widow of Annada, who is now dead. In the rent execution case an application was made under S. 174, Ben. Ten. Act, as now amended for the setting aside of the sale by one Bishnupada;

who claims to be the nephew of Annada that is his brother's son. An objection was raised by the auction-purchaser, Susheelasundaree, who is the appellant before us, that the application under S. 174 did not lie, as Bishnupada was not a person, whose interests were affected by the sale within the meaning of S. 174, Ben. Ten. Act, as amended by Bengal Act 4 of 1928. It was stated by the Munsif, who dealt with the matter in the first instance, that it was admitted that Bishnupada was the reversioner and the Munsif accordingly set aside the sale the conditions for setting aside of the sale having been fulfilled by him.

An appeal was taken to the Court of the District Judge, who by his order, dated 4th May 1931, sent back the case to the Munsif for the purpose of enabling him to record evidence in respect of the assertion that Bishnupada was the reversionary heir, it being stated before the learned Judge that the Munsif had fallen into an error in holding that it was admitted before him that Bishnupada was the reversionary heir of the judgment-debtor, Durlabhmani. The case went back to the Munsif, who came to the conclusion that Bishnupada was the next reversioner he being the brother's son of Durlabhmani's husband, whereas the two stepbrothers of Durlabhmani's husband were not the preferential heirs under the Dayabhaga school of Hindu law. The Munsif apparently relied upon the decision of Greaves, J., in the case of *Sukhamayee Biswas v. Manoranjan Choudhury* (1) and on a statement in Mr. Golapchandra Sarkar Shastri's Hindu Law, Edn. 6, 1927, pp. 519 and 520. The learned District Judge after considering the finding of the Munsif, also came to the conclusion that Bishnupada was the next reversionary heir and he consequently dismissed the appeal and set aside the sale. Against the concurrent decisions of the Courts below the present appeal has been brought and a preliminary objection has been taken to the hearing of the appeal on the ground that only one appeal is allowed, under the provisions of S. 174, Cl. (5) as amended by the Act of 1928 and no second appeal lies. It is not necessary to decide this.

1. *A I R 1926 Cal 428=89 I C 827.*

question in the view that we take of the merits of the appeal.

It has been contended on behalf of the appellant that the Munsif was clearly in error in coming to the conclusion that Bishnupada was the preferential heir. This contention seems to us to be right. It appears that the Munsif was misled by the decision of Greaves and Cuming, JJ., in the case of *Sukhamayee Biswas* just referred to; because that was a case of stridhan property and the question arose regarding succession to such property and this fact was overlooked and has misled also the editor of Golapohandra Sarkar's book on Hindu law, where he had put the stepbrother as coming not only after a brother's son but also after the sister's son in the line of succession under the Dayabhaga school. The text of the Dayabhaga on this point is as follows:

"In the absence of her mother there is the right of a uterine brother only; . . . in the absence of uterine brothers the stepbrothers of the same caste will inherit."

This shows that, according to Jeemutabahana, in the absence of the brothers the stepbrother comes in the next line of succession to the brothers' property. That that is the correct view appears from the opinion of Mr. Mayne and of Mr. Rajkumar Sarbadhikari as given in his well-known treatise on Hindu Law of Inheritance, p. 363. 2nd revised edition (1922). In *Sheo Sundary v. Pirtheo Singh* (2), the Privy Council held that the half brother comes immediately after the brothers of whole blood just as the son of a whole brother succeeds before the son of a stepbrother. The Munsif and the learned Judge were therefore wrong in coming to the conclusion that the present respondent was the next reversioner to the estate of Durlabhmani's husband. But although the Courts below have fallen into this error, it appears to us that Bishnupada, who is the next presumptive reversioner after the stepbrothers is a person, whose interests are affected by the sale within the meaning of S. 174, Ben. Ten. Act. It has been contended, in view of a decision of this Court in the case of *Mohendra Nath v. Baidya Nath* (3) that a reversioner to a Hindu widow's estate, who is entitled to the estate on the

8. A I R 1922 Cal 98=70 I O 197.
2. (1877) 4 I A 147 (P.O.).

death of the widow, did not have "any interest" in the tenure or holding "voidable on the sale" within the meaning of S. 170, Cl. (3), Ben. Ten. Act, as it stood before its amendment by Bengal Act 4 of 1928. It is sufficient, for our present purposes, to say that the learned Chief Justice, Sir Lancelot Sanderson and Chotzner, J., were dealing in that case with the provisions of the statute, where the words used were to the effect that the person, whose interest was voidable on the sale was entitled to come in and apply. The words, now used after the amendment are "any person whose interests are affected by the "sale" and the words are undoubtedly of much wider import.

It has been argued on behalf of the appellant that the reversioner has only got a spes successionis or a chance or possibility of succession which cannot be regarded as an interest in the reversion. This is an entirely erroneous view to submit to the Court. It may not be an interest in praesenti in the property, which the female owner holds for her life. It may be that until the estate vests in him on her death, he has nothing to assign or to relinquish or even transmit to his heirs: see *Amrit Narayan Singh v. Gaya Singh* (4). It has been pointed out in the decisions of the Judicial Committee that the estate, which a Hindu widow inherits from her husband, is an estate of inheritance to herself and to the heirs of her husband. It is not right to say that the widow's estate is mere life estate as is understood in English law: see *Moniram Kolita v. Keri Kolitani* (5). It is not known till the female owners' death as to who will be the actual reversioner. It may be that the two stepbrothers might not survive the widow. The interest of the next reversioner is a mere contingent interest; but still it is an interest which has to be recognized. It is sought to be argued that a mere chance of succession is not an interest within the meaning of S. 174, which must be restricted to a present proprietary interest. We are unable to see why that restricted interpretation should be put on the language of the statute which runs as follows: "any

4. A I R 1917 P C 98=44 I C 406=45 I A 85=
45 Cal 590 (P O).
5. (1880) 5 Cal 778=7 I A 115 (P O).

person whose interests are affected by the sale" may come in under 'S. 174. The word "interest" is wide enough to include not only a proprietary or possessory interest but also the contingent interest of a reversioner.

It is next argued that, in any event, having regard to the circumstances that now exist, Bishnupada is not the immediate reversioner and he has no right to come in. There can be no gainsaying the fact that he has an interest in the preservation of the estate, which would pass out of him, if he at any time happens to be the reversioner. If the property is now sold in execution of a decree for rent against a limited owner a possible reversioner has a right to protect the property, in the reversion of which he may have a possible interest, if the immediate reversioner does not save the property from sale. We are of opinion, that this application may be maintained by a contingent reversionary heir as the presumptive reversionary heirs, i. e., the step-brothers, who would succeed if the widow were to die at this moment, do not care to preserve the estate. This view finds indirect support from two decisions of their Lordships of the Judicial Committee of the Privy Council: *Anand Kunwar v. Court of Wards* (6) and *Pateh Sing v. Jogannath Bakhsh Singh* (7). In the latter case it was held that a suit for a declaration, that a gift by a Hindu widow is void as against the reversionary heirs of the husband is prima facie competent only to the nearest prospective reversioner and that, if a more distant relation claims to sue he can only maintain the suit by showing that the nearer reversioner has colluded with the widow or for some similar reason. Those reasons were indicated in the earlier judgment as follows: If the nearest reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or if he concurred in the act alleged to be wrongful. Here the next reversioners have waived their right to preserve the estate by making the deposit and have thereby concurred in the sale by their conduct and I don't see

why the remote reversioner should not take steps to protect the estate. We affirm the decision of the Courts below, although we differ from them on the question that Bishnupada is the immediate reversioner; we think that Bishnupada, although not the immediate reversioner, has sufficient interest to make the application under S. 174, Ben. Ten. Act. On this ground we affirm the decisions of the Courts below and this appeal is, accordingly, dismissed. There will be no order as to costs in this appeal. It is not necessary to make any order on the application made in the alternative.

Jack, J.—I agree.

R.K.

Appeal dismissed.

*** * A. I. R. 1933 Calcutta 625**

MITTER AND M. C. GHOSE, JJ.

Gouranga Behari Basak and another—Appellants.

v.

Manindra Nath Das Gupta—Respondent.

Appeal No. 337 of 1931, Decided on 17th January 1933, against order of Dist. Judge, Rajshahi, D/- 4th May 1931.

*** * Civil P. C. (1908), S. 64 and O. 38, R. 5 — Defendant depositing amount with plaintiff's pleader under Court's order—Deposit subject to result of pending action—Subsequent insolvency of defendant—Plaintiff is entitled to deposit in preference to general creditors—Insolvency.**

No doubt an attachment before judgment does not confer upon the decree-holder any right prior to that of the Official Assignee and that a decree does not constitute the judgment-creditor a secured creditor and give him any charge or lien over the attached property; but where a sum is deposited by the defendant with the plaintiff's pleader under an order of the Court that the deposit is to be in part satisfaction of the money to which the plaintiff may be entitled as a result of the action the plaintiff is secured in obtaining satisfaction of his decree, if he obtains one, and on a decree being obtained, the plaintiff is entitled to be paid out of this sum forthwith in preference to the other creditors: *Ex parte Banner*, *In re Keyworth*, (1874) 9 Ch. 879; *Bird v. Barstow*, (1892) 1 Q. B. 94; *A I R 1925 Cal 416* and *A I R 1919 Mad 607, Rel on.*

[P 626 C 2; P 627 C 1]

Radhatenode Pal and Subodh. Ch. Roy Chowdhury—for Appellants.

Mitter, J.—It is unfortunate that the respondent has not appeared in this case but Dr. Pal who appears for the appellants, has put the case with great fairness before us. It appears that the appellants brought a suit for partnership and accounts on 22nd September

6. (1880) 6 Cal 764=8 I A 14 (P O).

7. A I R 1925 P C 55=91 I C 380=52 I A 100=47 All 156=27 O C 334 (P O).

1921 against two other persons who have since been adjudicated insolvents. The suit was brought by the plaintiffs who were two brothers and their case was that there had already been accounts taken and a sum of Rupees 2,000 odd was found due from the defendants who have been declared insolvents subsequently. The defence of the defendants in that suit was the denial of the averment about the accounts taken. The parties went into an arbitration and an award was given. The award was against the defendants for a sum of Rs. 1,600 out of which they deposited Rs. 500 with a certain gentleman and offered to deposit Rs. 1,000 with the plaintiffs' pleader Bhabani Gobinda Choudhury. An order was made by the Court in that suit on 27th September 1921 to the following effect :

"It is agreed by the parties that defendants should deposit Rs. 1,000 in cash by 29th September with Babu Bhabani Gobinda Choudhury, pleader for the plaintiffs, in part satisfaction of the money to which the plaintiffs may be entitled. If the defendants fail to make this deposit, order on the plaintiffs' application for appointment of receiver will be passed on 29th September."

On 29th September the following order was made :

"The defendants have paid Rs. 1,000 to plaintiffs' pleader Babu Bhabani Gobinda Choudhury."

On the 30th there is the further order:

"The plaintiffs' prayer for payment of Rupees 1,000 deposited by defendants with Babu Bhabani Gobinda Choudhury, pleader for the plaintiff, is considered. Defendants oppose the petition. I think that the money should be kept in deposit with Babu Bhabani Gobinda Choudhury until further orders. This order will not affect the plaintiffs' right to interest to which they may be found entitled to."

The suit was dismissed by the Court of first instance; but eventually on 18th February 1931 that decree of dismissal was set aside and the suit was decreed for Rs. 2,048-3-9 with costs and interest as per judgment. In the meantime another creditor of the defendants in that suit filed a petition in insolvency on 17th September 1930 and had an ad interim receiver appointed in those proceedings on 15th November 1930. The defendants were adjudicated insolvent on 15th May 1931. The receiver applied for withdrawal of this sum which was deposited with Mr. Bhabani Gobinda Choudhury pleader for the plaintiffs as being the amount payable to the plaintiffs in the event they succeed in the Partnership account suit. On the application of the

receiver the learned District Judge of Rajshahi passed the order that this sum of Rs. 1,000 which was in deposit with Mr. Bhabani Govinda Choudhury must be treated as a part of the assets of the insolvents and he accordingly directed that the money should be paid to the Receiver for the benefit of the general body of the creditors of the insolvents. It is against this order which is dated 4th May 1931, that the present appeal has been brought and it is argued that the learned District Judge was not right in treating this sum as money which had been attached before judgment and in applying the rule of law that attachment before judgment does not confer upon the decree-holder any right prior to that of the Official Assignee and that a decree does not constitute the judgment creditor a secured creditor and give him any charge or lien over the attached property. It is said that this principle has no application to the present case. So far as the statement of the law is concerned with regard to the properties which were attached before judgment no question can be raised; and it has been conceded by the learned Advocate for the appellants that the Judge is right in the view of law regarding the properties attached before judgment under O. 38, R. 5, Civil P. C.

But it is argued that in this case the money was really ear-marked for the plaintiffs and the effect of the order of 27th September 1921 which has been quoted above is to treat this money as being payable to the plaintiffs the moment they obtain the judgment for the sum or anything in excess of that sum. It is argued that the effect of the deposit and of the order of 27th September 1921 is that it really belongs to the plaintiffs or to the person who is found eventually to be entitled to the sum in dispute. As authority for this contention reference has been made to some English cases as well as to some Indian cases. Reference may be made to the case of *Ex parte Banner In re Keyworth* (1) and to the case of *Bird v. Barstow* (2). In the first case a certain sum was paid into Court in order to abide the event

1. (1874) 9 Ch. 379=43 L J B K 102=30 L T 620.
2. (1892) 1 Q B 94=61 L J Q B 1=56 J P 196=40 W R 71=65 L T 666.

of action and this was said by James, L. J., in that case.

"It is similar to what is constantly done in this Court when a bill is filed to restrain an action at law and the plaintiff is ordered to pay into Court the amount claimed in the action. It belongs to the party who is found eventually to be entitled to the sum in dispute."

In the latter case the facts were as follows :

"In an action against the defendant, a widow, on a covenant for payment of money entered into by her when she was a married woman, the plaintiff applied for leave to sign judgment under O. 14. An order was made giving the defendant leave to defend on bringing into Court Rs. 500 which she accordingly did. On the trial of the action the Judge gave judgment for the plaintiff, but directed that the money should remain in Court pending an enquiry whether the defendant had separate property available in execution."

It was held that the meaning of the order under O. 14, was that the money was to be brought into Court to abide the event, and that the plaintiff being successful was entitled to have the money forthwith paid to him. It was pointed out in that case that the effect of the order was to secure the plaintiff in obtaining satisfaction of a judgment, if he obtains one, on the terms that if he does, it (the money) shall be paid out to him, so far as it goes to satisfy the judgment. Following these cases the Judges in the Indian Courts have taken the same view. Reference may be made to the case of *Chowthmull Maganmull v. Calcutta Wheat and Seeds Association* (3) and to the case of *Ramiah Aiyar v. Gopalur* (4). It makes no difference in principle as to whether the money was actually deposited in the Court or whether the money was put into the hands of the plaintiffs' pleader under the order of the Court earmarking that money to be paid to the plaintiffs in part satisfaction of the money to which the plaintiffs might be found entitled as a result of the pending action. In this view we are of opinion that the order of the learned District Judge must be set aside and we direct that the receiver be directed to pay this sum of Rs. 1,000 if he had taken it under the order of the District Judge, to the appellants. No order is made as to costs.

M. C. Ghose, J.—I agree.

R.K.

Order set aside.

3. A I R 1925 Cal 416=84 I C 992=51 Cal 1010.

4. A I R 1919 Mad 607=49 I C 20=41 Mad 1058.

A. I. R. 1933 Calcutta 627

MITTER AND M. C. GHOSE, JJ.

Midnapore Zamindary Co., Ltd. —
Decree-holders—Appellants.

v.

Abdul Zalil Mia—Judgment-debtor—
Respondent.

Appeal No. 239 of 1932 and Civil Rule No. 707-M of 1932, Decided on 17th January 1933, against order of Sub-Judge, Nadia, D/- 29th March 1929.

(a) Civil P. C. (1908), S. 152—Amendment of decree—Decree can be brought into conformity with judgment at any time unless third parties have acquired rights under erroneous decree.

A decree can be brought into conformity with the judgment even after the lapse of years and the only limitation is that the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous. And the Court can amend the decree even in the course of execution, where the executing Court and the Court which passed the decree are one and the same : *Hutton v. Harris*, (1895) A C 547, *Ref.*

[P 629 C 1]

(b) Execution Sale—Court has no jurisdiction to sell properties of persons who are not parties to proceedings or properly represented—Such sales are nullity.

A Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the records. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside : 32 Cal 269 (P C), *Ref.* [P 629 C 2]

(c) Minor—Minor not represented in suit but represented by guardian in execution proceedings—Sale held is not valid—Decree—Execution.

Where a decree is obtained in a suit in which a minor is not represented, a sale of the minor's property in execution proceedings is void even though in such execution proceedings he is represented by his guardian. [P 629 C 2]

(d) Minor—Ratification—Sale in execution of rent decree obtained against person while minor — Surplus of sale proceeds allowed to be taken in execution of subsequent rent decree after attaining majority — Sale must be regarded as ratified.

A sale of minor's property was held in execution of a rent decree obtained against a minor who was not at all represented in the suit ; on attaining majority, the minor allowed the surplus of the sale proceeds to be taken in execution of rent decree for subsequent period :

Held : that the minor must be deemed to have ratified the sale by his conduct and that he was estopped from denying its validity. [P 629 C 2]

U. N. Sen Gupta and Manmatha Nath Das Gupta—for Appellants.

Rupendra Kumar Mitter and Phanindra Nath Dey—for Respondent.

Mitter, J.—This appeal is directed against two orders embodied in one judg-

ment of the Subordinate Judge of Nadia which is dated 29th March 1932. The first order which is attacked is an order directing amendment of a rent decree and the second order challenged by this appeal is one refusing personal execution of the decree against the respondent as asked for by the decree-holders appellants.

The questions which fall for determination in this appeal depend on facts which are either admitted or have been proved in this case. They may be briefly stated: It appears that the Midnapur Zamindary Co. Ltd., now appellants, brought a rent suit in the year 1923 against four persons, namely, Abdul Jalil Mia, now respondent, Esmail Hossein Mia, a minor represented by his guardian ad litem Ainuddin and two other persons who were the darpatnidars under them. The rent suit was for arrears for the period 1327 to Pous kist of 1329 B. S. The defence to the suit was that the plaintiffs, the Zamindary Co. Ltd., had dispossessed the defendants from a portion of the darpatni and there should be entire suspension of rent. This defence was given effect to by the Subordinate Judge who tried the suit in the first instance and plaintiff's suit was dismissed. This decree of dismissal was affirmed by the District Judge on appeal. There was a further appeal to the High Court by the plaintiff company and during the pendency of the second appeal Ainuddin, the guardian of Esmail, died but no new guardian was appointed in his place. On 10th February 1928 the High Court decreed the appeal and sent back the case for determination of the extent of dispossession by the plaintiffs and for passing a decree in plaintiffs' favour after allowing proportionate abatement of rent to the defendants on account of the dispossessed area. On remand Esmail was not represented by a guardian and a decree was passed in favour of the plaintiffs for Rs. 4,092 odd not only against the three defendants who were properly represented but also against Esmail Mia, who was not represented by a guardian ad litem. In execution of this decree the sale of the darpatni took place on 9th July 1931 and it was purchased by the plaintiffs company for Rs. 35,000. As the claim for rent was for Rs. 5,000 there was a surplus of Rs. 30,000 in favour of

the judgment-debtors, the four defendants in the suit.

During the pendency of this suit before the Subordinate Judge after remand by the High Court, two other suits for rent of the same darpatni for a subsequent period had been instituted by the plaintiffs' company. They were Rent Suits Nos. 7 of 1926 and 11 of 1930. These suits were jointly tried and were decreed on 31st March 1931. From the surplus sale proceeds of the sale in execution of the rent decree in Suit No. 3 of 1923 the entire claim of the Rent Suit No. 11 was satisfied and a substantial portion of the decree in Rent Suit No. 7 of 1926 was satisfied. The plaintiffs company have executed the decree for the balance in Rent Suit No. 7 of 1926 and have attached the personal properties of the respondent Abdul Jalil Mia who is one of the judgment-debtors in the suit. In order to understand the objection of the judgment-debtor Abdul Jalil Mia one fact has to be borne in mind and that is this: in the judgment of Rent Suit No. 7 it was directed that the tenure should be sold first in execution of the decree in accordance with a stipulation in the darpatni patta (Ex. 2) to that effect, but this clause was omitted from the decree and an application was made for the amendment of the decree by bringing it into conformity with the judgment, and the amendment of the decree has been made. The order allowing amendment, as has been already stated, has been attacked in this appeal and we will return to this hereafter. The main objection of the respondent judgment-debtor to this personal execution is that as according to the decree as amended the tenure must be sold in the first instance, and as the sale of three annas share of Esmail Mia is absolutely void as the sale was in pursuance of a decree in a suit in which he was not properly represented, three annas share of the tenure still remains unsold, and according to the decree no personal execution can issue against one judgment-debtor till the darpatni tenure in its entirety is sold. This objection has prevailed with the learned Subordinate Judge below and he has allowed the objection and has directed that the tenure should be sold first and if any balance be left, then it could be executed personally against the judgment-debtor.

The Midnapur Zamindary Co. has accordingly preferred this appeal and the learned counsel raises two contentions before us: (1) that the decree in Suit No. 7 of 1926 should not have been allowed to be amended at the late stage after it has been partly satisfied and that execution Court has no jurisdiction to amend the decree. (2) The second contention may be subdivided under three heads: (A) that the sale of Esmail's share is not a nullity and (B) even if the sale be regarded as void, the fact that Esmail was represented in the proceedings in execution and his guardian took part in the proceedings relating to the settlement of value of the property to be advertised for sale estops him from challenging the validity of the sale and (C) even if that is not so, the fact that Esmail after attaining majority allowed the surplus sale proceeds of the sale which is impeached as void to be applied to the satisfaction of the decree in Rent Suit No. 11 and partly of Suit No. 7 of 1926 estopped him from challenging the sale. The first contention of the appellant has really no substance, for it is now well settled that a decree could be brought into conformity with the judgment even after the lapse of years and that the only limitation is that the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous: see *Hutton v. Harris* (1). In the present case no rights of third parties had intervened at the date of the amendment of the decree. We are consequently of opinion that amendment has been rightly allowed. There is no substance also in the contention that the Court could not amend the decree in the course of execution. It appears that the executing Court and the Court which passed the decree are one and the same and it was at the instance of the appellant that orders on the petition for amendment were not passed till after the merits of the objection case was heard.

Taking now the first branch of the appellants' second contention that the sale of Ismail's share is not a nullity it appears to me that this contention can-

not be sustained, for, it is now well established on the highest authority that the Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions, it may be found in the judgment of Sir Barnes Peacock in *Kishen Ghose v. Asman* (2); see the observations of Lord Davey in *Khirajmal v. Dain* (3). In the present case Ismail was not represented in Rent Suit No. 7 after remand. Consequently the sale of his share is void and of no effect in law. The second branch of the second contention is that even if the sale be regarded as void as Ismail was represented in the execution proceeding which led to the sale by his uncle Jahiruddin (see Ex. B) it must be taken that the sale of Ismail's share was ratified. This contention does not seem to me to be right, for Ismail was a minor at the date of the execution proceedings and no act done by his guardian during his minority can render a void sale valid.

The third branch of the second contention, namely, that there was ratification of the sale by Ismail after he had attained majority seeing that after attaining age he allowed the surplus sale proceeds to be taken in execution of the decree for rent for the subsequent period seems to me to be well founded and must prevail. It has not been disputed before us that Ismail had attained the age of majority when the rent decree in Suit No. 11 of 1930 was executed and the said proceeds were applied to his use or for his benefit as it extinguished his liability for rent for the period covered by Suit No. 11 of 1930 and this circumstance must be regarded as ratification by him of the sale in execution of the rent decree in the suit of 1923. In allowing the surplus sale proceeds to be taken for satisfying his liability in the rent decree No. 11 he has ratified the sale by a course of conduct which stops him from denying the validity of the sale and indeed it is a significant circumstance that Ismail has never applied to

2. Marshall 647.

3. (1905) 32 Cal 296=34 I A 23 (P C).

set aside the sale. The law with regard to ratification of void sale by the acts of the parties in interest has been well put by Mr. Freeman in his Law of Void Judicial Sales (S. 50, p. 170) and may be usefully reproduced here :

"As a general rule a confirmation or ratification cannot strengthen a void estate. 'For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law.' If this rule be one of universal application, then there can be no necessity for considering the question of ratification in connexion with void judicial sales. But this is one of those rules which are so limited by exceptions, that the circumstances to which it may be applied are scarcely more numerous than those from which its application must be withheld. There can now be scarcely any doubt that void judicial sales are within the exceptions, and are unaffected by the rule. These sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Thus if the defendant in execution after a void sale of his property has been made, claims and receives the surplus proceeds of the sale with a full knowledge of his rights, his act must thereafter be treated as an irrecoverable confirmation of the sale."

Ismail having ratified the sale it is not open to him again to challenge the validity thereof and far less is it open to the present respondent to impeach the sale. There can be no question that as against him the sale of Ismail's share must be regarded as valid. The result is that the Subordinate Judge's order regarding the amendment of decree must stand and that his order directing that the tenure should be sold first must be set aside. The plaintiffs decree-holders will be entitled to proceed against the respondent judgment-debtor for the realization of the balance due under the decree in Suit No. 7 of 1926. This appeal, in so far as it is directed against the order giving effect to the objection of the respondent Abdul Zalil Mia to personal execution, is allowed with costs here and in the Court below. We assess the hearing fee in this Court at two gold mohurs. In view of our judgment in the appeal no order is necessary in the Rule (Civil Rule No. 707-M of 1932.)

M. C. Ghose, J.—I agree.

K.S.

Order accordingly.

A. I. R. 1933 Calcutta 630

S. N. GUHA, J.

Kabil Gazi—Petitioner.

v.

Madari Bibi—Opposite Party.

Civil Rule No. 943 of 1932, Decided on 9th January 1933, against order of Dist. Judge, 24-Parganas, D/- 28th May 1932.

Mahomedan Law — Marriage — Dissolution — Proper procedure is to file suit for dissolution of marriage according to law.

The proper procedure for a Mahomedan wife to ask for dissolution of marriage against her husband is not by a mere application which can be disposed of in a summary proceeding but by filing a suit for dissolution of marriage in accordance with law. [P 630 C 2]

Abinash Chandra Ghose and Ramendra Nath Majumdar—for Petitioner.

A. K. Fazlal Huq and Abdul Ali—for Opposite Party.

Facts.—A Mahomedan wife made an application on payment of court-fees of annas 12 against her husband for dissolution of marriage before the District Judge's Court at Alipore. The grounds for her application were that her husband had unjustly charged her with having committed adultery and subjected her to cruel treatment. The husband denied the allegations of fact and raised objections as to the competency of the Court to exercise the functions of a Kazi and its forum, the form of the proceedings and the sufficiency of the court-fees paid. The Judge overruled the objections as to jurisdiction, forum, court-fees, etc., and found in favour of the imputation of adultery and cruel treatment, and granted the wife's prayer for divorce. The husband thereupon obtained the Rule against the order of dissolution of marriage under S. 115, Civil P. C., read with S. 107, Government of India Act.

Order.—After hearing the learned advocates appearing for the parties in this case, it appears to me that leave should be granted to the opposite party in this Court, the petitioner by whom the application for dissolution of marriage was made before the learned District Judge of 24-Parganas to withdraw her application. It would be open to the party, the applicant for dissolution of marriage, to file a suit for dissolution of marriage in accordance with law; and any finding come to by the learned District Judge in his order against which this Rule is directed, will not affect her

rights of the parties. As the application on which the order of the learned District Judge, 24-Parganas was made, is allowed to be withdrawn, the order against which this is Rule is directed is discharged, and this Rule made absolute. There is no order as to costs in this Rule.

K.S.

Rule made absolute.

A. I. R. 1933 Calcutta 631

MITTER AND BARTLEY, JJ.

Central Co-operative Stores Ltd.—Appellant.

v.

Santinidhan Roy—Respondent.

Appeals Nos. 415 to 417 of 1931, Decided on 25th April 1932, against appellate orders of Sub-Judge, Jalpaiguri, D/- 23rd May 1931.

Co-operative Societies Act (2 of 1912), S. 42, Cls. (b) and (d) — Order determining liability of member without taking evidence — Application for execution should be dismissed.

Proceedings taken before the liquidator under S. 42, Cls. (b) and (d), are to some extent in the nature of quasi judicial proceedings. And the liquidator may issue summonses to persons whose attendance is required either to give evidence or to produce documents. He may compel the attendance of any person to whom a summons has been issued and for that purpose issue a warrant for his arrest. In order to arrive at any conclusion on the question of the determination of the liabilities of any member of a society, some evidence is required by the rules to be taken. Where the liquidator passes an order without following this procedure, application for execution of his order should be dismissed.

[P 632 C 2]

Dwijendra Krishna Dutt and Asaduzzaman—for Appellant.

Atul Chandra Gupta and Urukramdas Chuckerbutty—for Respondent.

Judgment.—These are three appeals which are directed against the order of the Subordinate Judge of Jalpaiguri, dated 23rd May 1931, passed in certain proceedings arising out of execution of orders purporting to have been made under S. 42, Cls. (b) and (d), Co-operative Societies Act (11 of 1912). The application was made at the instance of the liquidator who was appointed under sub-S. (1), S. 42. Amongst objections to the execution of these orders the principal objection taken was that the orders which were sought to be executed in these three proceedings out of which the three appeals arise were not orders made under S. 42, Cls. (b) and (d) of the Act. The order which was

filed was the order dated 26th March 1930, in which it is recited that previous orders had been made on 18th February 1929, assessing contributions on all share-holders to the fullest extent of their respective liabilities under S. 42 (2), Cl. (b), Act 11 of 1912, and this order of 26th March is said to be in continuation of that order. The Munsif who dealt with the matter in the first instance overruled the objection of the members of the Society who took these objections. Against these orders appeals were taken to the Court of the Subordinate Judge and the learned Subordinate Judge has reversed the decision of the Munsif mainly basing his decision on this: that the order of 18th February 1929 which must be taken to be the foundation of the liquidators' proceedings under S. 42, Cls. (b) and (d) is not before the Court. He points out that no copy of that order was filed for execution by the civil Court.

Under these circumstances he dismisses the application of the liquidator in each of these three proceedings. The liquidator has consequently preferred these appeals and it is contended on his behalf that the order of 26th March 1930 was in substance the order which the liquidator purported to pass under the provisions of S. 42, Cls. (b) and (d). In one of the appeals, viz., No. 415 of 1931, Mr. Gupta who appears for the respondent points out that the order of 26th March 1930, purporting to have been passed by the liquidator shows that the contribution towards the assets and the costs of the liquidation amount to Rs. 106; whereas in accordance with the order of 18th February 1929 the cost of liquidation and the contribution towards the assets amount to Rs. 99. It is said that there is a substantial variation from the order which was passed on 18th February. He contends therefore that as the order of 18th February which was for a smaller sum, was not before the Court it could not be said that the latter order really complies with the requirements of the section read along with the rules which under the Act were made by the local Government under the provisions of S. 43, Cl. (c). It is argued for the respondent that proceedings taken before the liquidator under S. 42, Cls. (b) and (d), are to some extent in the nature of quasi judicial pro-

ceedings. For according to R. 29, Cl. (e), Bengal Government Rules, the liquidator may issue summonses to persons whose attendance is required either to give evidence or to produce documents. He may compel the attendance of any person to whom a summons has been issued and for that purpose issue a warrant for his arrest.

In order to arrive at any conclusion on the question of the determination of the liabilities of any member of a society, some evidence is required by the rules to be taken. It does not appear that this procedure was followed so far as the order of 26th March 1930, was concerned, and that was the order which was before the Court. In these circumstances we are of opinion that the Subordinate Judge was right in dismissing the three applications out of which these appeals arise. It is not necessary therefore to consider the validity or otherwise of the preliminary objection taken by Mr. Gupta in Appeal No. 415. The result accordingly is that these appeals fail and must be dismissed. We assess the hearing fee in M. A. No. 415 of 1931 at one gold mohur. There will be no order as to costs in the other appeals.

K.S.

*Appeals dismissed.***A. I. R. 1933 Calcutta 632**

MITTER AND M. C. GHOSE, JJ.

Maharaja Bir Bikram Kishore—Plaintiff—Appellant.

v.

Munshi Tafazzal Hussein and others—Defendants—Respondents.

Appeal No. 168 of 1931, and Civil Revn. Cases Nos. 368 and 481 to 519 of 1931, Decided on 13th January 1933, against appellate order of First Addl. Sub-Judge, Noakhali, D/- 16th January 1931.

(a) Civil P. C. (1908), O. 41, R. 4—Appeal by some of defendants—Non-appealing defendants are entitled to take advantage of decision in appeal.

Where a decree is passed against several defendants although only some of the defendants appeal from the decree the other non-appealing defendants are entitled to take advantage of any decision which might be arrived at in favour of the appealing defendants. [P 634 C1]

(b) Bengal Cess Act (9 of 1880), S. 54—Notice under S. 54 is condition precedent to pay cess—Defendant failing to raise want of notice in written statement but raising it in course of argument—Plaintiff should

prove notice—Civil P. C. (1908), O. 6, R. 6 and O. 8, R. 2.

In order that a zamindar or a superior landlord may be entitled to obtain decree for cesses as against a tenure holder or against a nishkardar he must establish that there has been a notice under S. 54, Cess Act. Hence that notice is really a condition precedent to the tenure holder's or nishkardar's liability or rather the foundation of his liability. Where a defendant fails to raise the plea of want of notice in his pleadings but raises it at the time of argument, the plaintiff is not relieved from proving the service of notice which is the foundation of the defendant's liability as the service of notice cannot be implied under O. G. R. 6 when there is no such allegation in the plaint: 13 Cal 197, *Rel on. AIR 1924 Pat 205, Dist.* [P 634 C2]

(c) Civil P. C. (1908), O. 41, R. 23—Suits tried in entirety on evidence by lower Court—Remand should not be under O. 41, R. 23.

Where the suits are tried by a Munsif in their entirety on evidence and not on preliminary points alone, it is not open to the appellate Court to send back these suits for determination to the Court of first instance, O. 41, R. 23 not applying to such a case. [P 635 C1, 2]

Jogesh Chandra Roy, D. L. Kastgir, Romesh Chandra Sen, Birendra Chandra Das and Santomoy Mazumdar—for Appellant.

Bhagirath Chandra Das—for Respondents.

Mitter, J.—This appeal and the forty revision cases arise out of an order of the Subordinate Judge of Noakhali, dated 16th January 1931, by which he directed a remand for re-hearing of the suits in which this appeal and these revision cases arise. It appears that His Highness the Maharaja of Hill Tipperah instituted the forty-one suits in which this appeal and these revision cases arise in the Court of the Munsif at Feni for recovery of arrears of cesses for four years covering the period from 1332 to 1335 B. S. His case is that the defendant or defendants in each of these suits are the owners of nishkar lands within the ambit of his zamindari and they used to pay cesses to the Collector of Tipperah but since 1913 these Nishkar lands having been affiliated to his zamindari under the provisions of the Cess Act the Maharaja had been paying cesses to the Collector and realizing cesses from the defendants. The cesses were subjected to a re-valuation after an interval of ten years and the Maharaja being a mere Collector of cesses imposed according to the latest re-valuation claimed these cesses from the defendants as finally assessed by the Deputy Cess Collector under the provisions of the Bengal Cess Act, Act 9 of 1880. The Maharaja had.

in pursuance of those provisions paid cesses to the Collector according to the said re-valuation. In these suits which were tried together the defendants appeared, but they did not take a plea to the effect that they were not liable to pay the cesses as the plaintiff had not caused a service of notice in each mouza as contemplated by the provisions of S. 54, Cess Act. The Munsif accordingly refused to allow them to take the plea at the time of the argument as it had not been taken in the written statement filed by them. He was of opinion that to allow them to take the plea at that stage of the argument would operate to the prejudice of the plaintiff, the Maharaja. He accordingly decreed the suits for cesses as claimed by the plaintiff in each of the suits.

Against these decrees the defendants preferred appeals to the Court of the Additional Subordinate Judge of Noakhali, and the learned Subordinate Judge was of opinion that as the notice under S. 54 was the foundation of the defendants' liability to pay cesses it was really a part of the plaintiff's case to establish the service of these notices before the defendants can be called on to pay the cesses paid by the Maharaja to the Collector. It appears that these 41 suits were tried along with about 33 more suits the suits being altogether 74 in number; in some of these suits there was some evidence to the effect that the notice under S. 54 was published in the village Dakhin Sripur and Nilakhi in the month of Chaitra 1335 B. S. that is, for the period just outside the period for which claim for cesses had been made in each of these suits. In this view the Subordinate Judge was of opinion that an opportunity should be given to the plaintiff for establishing the publication of notices more particularly in view of the fact that the plaintiff offered to prove the notices in the Court of the first instance but could not do so as there was objection on the part of the defendants. It may be mentioned that except the nishkar lands in the two suits with regard to which there are two revision petitions, namely, revision petitions Nos. 482 and 495 all the other nishkar lands are situate in either Nilakhi and Dakhin Sripur. The Subordinate Judge seemed to think that in view of these facts it would not be right to

throw out the plaintiff's suit altogether but that an opportunity should be given to him to prove that the notices under S. 54 had been served. Although in respect of the suits to which revision cases Nos. 482 and 495 relate, nishkar lands are situate outside the two mouzabs. I have mentioned, the Subordinate Judge is of opinion that the two suits to which Appeals Nos. 33 and 50 of 1930 before him relate were also governed by the same consideration; and he directed that there should be an order of remand in all these suits to the Munsif who should determine the question of service of notice and also any other relevant issues that might arise for consideration.

Against this decision the plaintiff Maharaja has preferred one appeal and has filed forty applications in which Rules have been granted; and in support of this appeal and the revision cases it has been argued by Mr. Jogesh Chandra Roy who appears for the Maharaja appellant that the judgment or rather the order of remand of the Additional Subordinate Judge is vitiated on several grounds. It is argued in the first place that the form of the order of remand is bad and as all the suits in their entirety were tried by the Munsif on the evidence in the case the remand to the Munsif made by the Subordinate Judge in respect of all these suits contravenes the provisions of O. 41, R. 23, Civil P.C. It has been argued in the second place that the service of notice under S. 54 being a condition precedent to the institution of the suits it must be taken to have been implied in the allegation in the plaint that such a notice had been served in view of the provisions of O. 6, R. 6, Civil P. C., and it was for the defendant or defendants in each of these suits to dispute the question of the maintainability of these suits on the ground of want of notice having regard to the provisions of O. 8, R. 2, Civil P.O. It has next been argued that even if there was no notice under S. 54, Cess Act, that does not debar the Maharaja from recovering cesses not at the double rate as contemplated by the provisions of S. 58 but at any rate according to the old rate. In this appeal and in these revision cases a further ground has been taken, namely, that there being an ex parte decree against many of the defendants in these suit and only some of the

defendants having appealed before the Subordinate Judge, so far as the non appealing defendants are concerned the decree for cesses against them as made by the Munsif should be allowed to stand.

We may dispose of the last contention at once by saying that although only some of the defendants did appeal the other non-appealing defendants were entitled to take advantage of any decision which had been arrived at in favour of the appealing defendants by reason of the provisions of O. 41, R. 4, Civil P. C. So there is not much substance in this last contention of Mr. Roy. It becomes necessary to deal in the first instance with the second ground for if the appellant succeeds on that ground it would not be necessary to deal with the other contentions. So that ground really goes to the root of the defence. It is said that although it was not specifically alleged in the plaint that the notice under S. 54, Cess Act, had been served yet if one examines the provisions of O. 6, R. 6, of the Code it must be taken that the fulfilment of the condition precedent, namely, service of notice, must be implied. O. 6, R. 6 runs as follows :

"Any condition precedent, the performance or occurrence of which is intended to be contested shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleadings."

It is said further that having regard to the provisions of O. 8, R. 2 the defendants should not be permitted to raise the defence as one of notice under S. 54 as the defendant in each case did not take the same in their respective written statement. O. 8, R. 2 runs as follows :

"The defendant must raise by his pleading all matters which show the suit not to be maintainable"

It is not necessary to quote the other part of the rule. It is argued that this rule is really a reproduction of O. 9, R. 14 of the Supreme Court Rules and according to O. 6, R. 6 it does away with the necessity of general averment of the performance or occurrence of all conditions precedent; and in support of this contention reliance has been placed on the decision of the case of *Gates v. W. A. & R. J. Jacobs, Ltd.* (1) which

lays down the proposition which is now embodied in O. 6, R. 6 of the Code. An examination of that case however will show that that case is no authority for the proposition that although notice may be impliedly taken to have been served where there is no such allegation in the plaint the plaintiff is relieved from proving the service of the notice which is really the foundation of the liability of the defendants.

It has now been settled by the decisions of this Court, a type of which is to be found in the case of *Ashanullah Khan v. Trilochan Bagchi* (2) that in order that a zemindar or a superior landlord may be entitled to obtain decree for cesses as against a tenure holder or against a nishkardar he must establish that there has been a notice under S. 54, Cess Act. In other words that notice is really a condition precedent to the tenure holder's or nishkardar's liability or rather the foundation of his liability. In support of this view a case has been placed before us from the Patna High Court which was also a case under the Cess Act where the question now in controversy was directly raised. That decision is in the case of *Murli Manohar v. Raja Nand Singh* (3), where Ross, J., sitting singly held that notice under S. 54, Cess Act is a condition precedent to the liability to pay cess. A defendant must, the learned Judge says, if he contends non-service of such notice, state this specifically in his pleadings otherwise due service of the notice will be presumed. The circumstance which distinguishes this case before Ross, J., from the present case is that in the case before Ross, J., the point was really taken before the lower appellate Court. In the present case it appears that although the point was not raised in the pleadings that is in the written statement in each of these suits, the defendants raised this contention in the course of the argument at a late stage of the suits, and at that stage the plaintiff offered to prove the notice which was objected to by the defendants. The other circumstance which distinguishes these cases from the Patna case is that these cases were tried along with 33 other cases in which there was some evidence led to show that notices under S. 54 were published in villages

1. (1920) 1 Ch D 567=89 L J Ch 319=128 L T 238=64 S J 425.

2. (1886) 18 Cal 197.

3. A I R 1924 Pat 205=72 I C 1.

Dakhin Sripur and Milakhi in the month of Chaitra 1335 B. S., that is, after the period for which cess has been sued for in these suits, and this circumstance is relied on by the Subordinate Judge when he thought that the ends of justice will be met by directing a remand. There was no such evidence in the Patna case. The subordinate Judge makes the following pertinent observation in this behalf which may be usefully reproduced here. He says this:

"The ruling reported in *Gan Kim Swee v. Ralli Bros* (4) is also to the effect that cesses may be recovered as they fall due after the publication of such a notice, and not cesses such as fell due prior to such publication. To this the plaintiff-respondent's pleader replies that the evidence of the publication of notices under S. 54 that was adduced related to those cases only in which such an objection has been raised and those cases were dismissed as the Munsif considered the evidence to be insufficient and there have been no appeals in them. On the other hand the plaintiff as it appears offered to put in papers showing the publication of notices which were refused by the Court on defendant's objection and so nothing is known, so far as the plaintiff's pleader in this Court is advised as to how and when the notices on the present cases were published, for the lower Court did not consider that the plaintiff was called upon to prove this. It is further pointed out that it will not be fair to have refused the plaintiff's documentary evidence about publication in the lower Court, and to non-suit the plaintiff here on account of absence of evidence to prove publication of notice under S. 54 here. This contention appears to be prima facie reasonable just as much as contention by the learned pleader for the appellants that once some evidence about the publication of such notices is admitted at the joint trial of group of cases and is rejected, or is (as now) suspected to be insufficient, it will not be permissible to think that fact, the more specially as the publication of such notices is the legal pre-requisite to defendants being called upon to pay any cess at all. In these circumstances for the ends of justice the suit must be remanded for a fresh trial after investigation of the question of the publication of notices under S. 54 and any other relevant issues that will arise for consideration."

We are therefore of opinion that the Subordinate Judge has taken a correct view so far as the merits of the order of remand is concerned and we think, except in the two cases to which we shall advert presently, the order of the Subordinate Judge on the merits can be sustained. This brings us to the other point, namely that the order of the remand is bad in form. That is the first contention which has been put forward and we agree with the learned advocate

4. (1886) 13 Cal 287=18 I A 60=4 Sar 722 (PO).

for the appellant that that is so. The suits not having been decided on the preliminary point it was not open to the appellate Court to send back these suits for determination to the Court of first instance, O. 41, R. 23 not applying to such a case. The result is that except in the two revision cases to which we will refer presently the order of the Subordinate Judge directing a remand to the Court of first instance must be set aside and he is directed to deal with the appeals in these cases after either taking such evidence on the question of notice under S. 54, Cess Act, and on other questions as he may deem expedient or if he so chooses by directing the Court of first instance to take evidence on these points and by asking it to send the evidence after recording its own findings to the lower appellate Court. The lower appellate Court in these cases is directed to deal with the further question raised before this Court, namely as to the liability of the defendant to pay cesses even if no notice had been served under S. 54; and the right of the plaintiff to get cesses at the old rate will also be determined by the said Court. The learned Subordinate Judge is also directed to determine as to whether notice under S. 54 is a pre-requisite in each of these 41 cases. The lower appellate Court will re-hear these cases in the light of these observations. Costs will abide the result. The hearing fee of this Court is assessed at one-half gold mohur, i.e. Rs. 8, for each of these cases.

With regard to Civil Revision Cases Nos. 482 and 495 it appears that the nishkar lands are not situated within either the village of Dakhin Sripur or the village of Nilakhi and therefore the considerations which justify the Subordinate Judge in thinking that an opportunity should be given to the plaintiff for establishing the publication of the notice in the other cases do not apply to these two cases. The result is that the order of the Subordinate Judge in each of these two cases is set aside and that of the Munsif is restored with costs throughout in each case. The hearing fee of this Court is assessed at one half gold mohur, that is, Rs. 8 in each case. The Rules are thus made absolute.

M. C. Ghose, J.—I agree.

K.S.

Order accordingly.

A. I. R. 1933 Calcutta 636 (1)

JACK AND MITTER, JJ.

Rajaneekanta Laha—Petitioner.

v.

Atulchandra Seal—Opposite Party.

Civil Revn. Petn. No. 629 of 1932,
Decided on 25th January 1933, against
order of Munsif, Amta, D/- 18th February
1932.

**Bengal Tenancy Act (8 of 1885), Ss. 26-F
and 188 — Application for pre-emption by
some of cosharers — Other cosharers joined
only after period of limitation—Application
is not maintainable.**

An application for pre-emption by some of
cosharers is not maintainable where the other
cosharers are not impleaded within the period of
limitation for the institution of such a suit even
though cosharers who are impleaded subsequent
to such period state that they had no wish to
purchase the land : *A I R 1933 Cal 460, Rel on;*
Cal Civ Revn. 184 of 1930, not Foll. [P 636 C 2]

*Herambachandra Guha, Sateeshchandra
Chaudhuri and Narendranath Banerji*—for Petitioner.

Rupendra Kumar Mitra — for Opposite
Party.

Jack, J.—This Rule has arisen out of
an application by the petitioner for the
transfer of certain land to them under
S. 26-F, Ben. Ten. Act. This application
was made on 17th November 1931.
Subsequently, by an order of the Court,
dated 9th January 1932, the petitioners
added the other cosharer landlords, the
opposite parties Nos. 5 to 20 in this
application. Thereafter, these opposite
parties entered appearance, refused to
exercise their right of pre-emption and
gave their consent to the purchase of
the land by the petitioners. The learned
Munsif rejected the petitioners' application
on the ground that it was not
maintainable, inasmuch as, at its inception,
the application was not in form in
accordance with the provisions laid down
in S. 188, Ben. Ten. Act. This order the
petitioners seek to set aside.

A notice was served on the landlords
in this case on 17th September 1931,
and it is admitted that the other
cosharer landlords were not made parties
within two months of the date of the
notice or within one month from the
date of the application. S. 188, Tenancy
Act, lays down that

"subject to the provisions of S. 148-A, where
two or more persons are cosharer landlords, anything
which the landlord is under this Act required
or authorized to do must be done either
by both or all those persons acting together
or by an agent authorized to act on behalf of both
or all of them : Provided that one or more co-

sharer landlords, if all the other cosharer landlords
are made parties defendant to the suit or
proceeding in manner provided in sub-Ss. (1) and
(2), S. 148-A, and are given the opportunity of
joining in the suit or proceeding as co-plaintiffs or
co-applicants, may file an application under sub-
S. (1), S. 26-F."

It has been argued that, in the present
case, inasmuch as the other cosharer
landlords were ultimately made parties,
no question of limitation arises and that
the deficiency in the original application
was made good inasmuch as the other
cosharer landlords came forward subsequently
and stated that they had no
wish to purchase the land. In support
of this argument, an unreported case of
this Court *Bahirdas Pandit v. Shitaldas
Chatterji* (1) has been referred to. In
that case, the cosharers did not join in
the original application, and, having
been subsequently added as parties to
the application it was held that no
question of limitation arose. This was
a decision of a learned Judge sitting
singly. We find, on the other hand, the
contrary view taken by a Division Bench
in *Barkatulla Pramanik v. Ashutosh Ghose*
(2). It is expressly laid down in S. 188
of the Act that the cosharers must be
given the opportunity of joining the suit
as plaintiffs at the time the application
is filed. It seems to me therefore that
inasmuch as the cosharers had not been
given this opportunity before the period
of limitation, the application is not
maintainable under S. 188, Ben. Ten.
Act. This was the view taken by the
learned Munsif. This Rule is therefore
discharged. In the circumstances of
this case there will be no order as to
costs.

Mitter, J.—I agree.

K.S.

Rule discharged.

1. Civil Revn. No. 184 of 1930, Decided on 24th
July 1930, by S. K. Ghose, J.
2. *A I R 1933 Cal 460.*

A. I. R. 1933 Calcutta 636 (2)

MITTER AND M. C. GHOSE, JJ.

Sm. Balkish Bibi and others—Decree-
holders—Appellants.

v.

Faridal Alam and another — Judgment-debtors—Respondents.

Civil Appeal No. 331 of 1931, Decided
on 19th January 1933, against original
order of First Court Sub-Judge, Chittagong,
D/- 18th April 1931.

**Bengal Land Revenue Sales Act (11 of
1859), S. 34—Sale held where there is no**

arrear of revenue—Land Revenue Sales Act does not apply.

A sale held where there is no arrears of revenue is not a sale under the provisions of Revenue Sales Act. And hence the law of special limitation provided for by S. 34 for the execution of the decree does not apply to such sales: 25 Cal 888 (P C) and A I R 1924 Pat 604, *Rel. on.*; 12 W R 276, *Dist.* [P637 C 1]

Narendra Kumar Das and Bhupendra Kumar Das—for Appellants.

Chandra Sekhar Sen—for Respondents.

Mitter, J.—The question raised by this appeal turns on the construction of Ss 33 and 34, Revenue Sales Act—Act 11 of 1859. It appears that the property of the appellants before us was sold at what purports to be a revenue sale under Act 11 of 1859. A suit was brought by the appellants for setting aside that sale which was in respect of a tenure to which the combined provisions of Act 11 of 1859 and Act 7 of 1858 of the Bengal Council were applicable. The suit ultimately resulted in a decree by the High Court in favour of the appellants—a decree setting aside the sale. The High Court was of opinion that the sale was altogether without jurisdiction as there was no arrears of revenue due from the appellants. The Judges were of opinion that the case was governed by the decision of their Lordships of the Judicial Committee in the case of *Haji Buksh Elahi v. Durlar Chandra Kar* (1) and that the sale was premature and, as has already been stated, without jurisdiction and liable to be set aside. After this decision of the High Court which is dated 23rd August 1928, there was an application for execution of the decree of the High Court which directed not only the setting aside of the sale but declared that the plaintiffs the appellants would be entitled to recover possession of the properties if they had been dispossessed.

The present application for execution out of which this appeal arises was filed before the Court of the Subordinate Judge at Chittagong on 24th November 1930. To this application the present respondents objected on the ground that the application for execution was barred under the provisions of S. 34, Act 11 of 1859, it not having been filed within six months as is provided for in that section. The objection prevailed with the

learned Subordinate Judge of the Court below and he came to the conclusion that the application for execution having been made beyond the statutory period as is provided under S. 34 it was clearly time-barred. He dismissed the execution case. Against this order the present appeal has been brought by the decree-holders and it has been contended on their behalf that the provisions of S. 34, Act 11 of 1859, are not attracted to the facts of this case seeing that the sale was not under Act 11 of 1859 but it was held in a case where there had been no arrears of revenue according to the findings of the highest Court of appeal in India. It is argued that by the express terms of S. 34, the section applies if the sale is made under the Act and the sale in the present case is not under the Act as on the findings there was no arrears of revenue. This view is supported by the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Balkishen Das v. Simpson* (2), where their Lordships of the Judicial Committee made the following observations. Lord Watson in delivering the judgment said this:

"Section 3, Act 11 of 1859, provides that, in default of payment of revenue, within the time appointed for each district by the Board of Revenue the 'estate in arrear' in those districts shall be sold at public auction to the highest bidder. The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Government revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of S. 3, Act 7 of 1878 (Bengal), are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. The enactments of 1859 and of 1868 are obviously intended to apply to cases in which, if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid."

It appears clear from this decision that a sale held where there is no arrear of revenue is not a sale under the provisions of the Revenue Sales Act. To such sales the Land Revenue Sales Act cannot possibly apply. We are therefore of opinion that the law of special limitation provided for by S. 34 for the execution of the decree does not apply to the present case. In the view which we take we are supported by the decision of *P. R. Das and Ross, JJ.*, in the case of

1. (1912) 39 Cal 981=16 I C 821=8 I A 177 (P C).

2. (1898) 25 Cal 838=25 I A 151=7 Sar 363 (P C).

Hakim Mahammad Idris v. Lachman Das, reported in an unauthorized report (*A. I. R. 1924 Pat. 504*). The learned Judge points out that a distinction is clearly drawn in the judgment of the Judicial Committee between a case where the sale is authorized but is attended with some irregularity or illegality and a case where the sale is not authorized at all. The learned Judge proceeds further and says this:

"In my opinion all these decisions establish conclusively that when there is no jurisdiction in the Collector to put up a property to sale, the sale cannot be regarded as a sale under Act 11 of 1859. S. 34 only applies where the sale is held under S. 11 of 1859 and is annulled by a final decree of the civil Court."

It remains to notice the authority cited by the learned advocate for the respondents in support of his contention that S. 34 applies to a case where the sale is held either under the Act or on the ground of want of jurisdiction; and we are referred to the case of *Sreemunt Lall Ghose v. Shama Soonduri Dassee* (3). We do not think that in that case that question was directly raised. It was only incidentally remarked by Markby, J., who delivered the judgment and he said this:

"An application has been made to us, to make an order under the provisions of S. 34, Act 11 that the purchase money should be refunded to the defendant by the Collector; but I think that order must be made, not by us but in the execution of the decree. We are also asked to make a special declaration that the sale is annulled, but that appears to us to be unnecessary. For the purposes of S. 34, Act 11 of 1859, we consider that the sale is already annulled by the decree for possession."

These are observations which are obiter and these observations were made at a time when the view prevailed in India that even a sale held where there was no arrear of revenue was a sale under the Act. That view is no longer tenable in the face of the clear pronouncement of their Lordships of the Judicial Committee in the case of *Balkishen Das v. Simpson* (2) referred to above. The result is that the order of the Subordinate Judge is set aside and it is directed that he should entertain this application for execution and proceed to deal with it in accordance with law. There will be no orders as to costs.

M. C. Ghose, J.—I agree.

K.S.

Order accordingly.

S. (1869) 12 W R 276.

A. I. R. 1933 Calcutta 638

COSTELLO AND S. K. GHOSE, JJ.

Manir Sheikh and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 716 of 1932, Decided on 13th January 1933, against order of Addl. Sessions Judge, Mymensingh, D/- 2nd June 1932.

Criminal P. C. (1898), S. 276, Prov. 2—Procedure for making up deficiency in jurors applies to special as well as common jurors.

Where special jurors to the number of 18 had been summoned but only five of them were present:

Held: that it was open to the Judge to supplement the five special jurors, who were available and who were chosen by lot, and one special juror who happened to be present, with three persons, who were jurors awaiting in another Court but presumably were not on the special jury list at all: *A I R 1931 Cal 793, Rel on.*

[P 639 C 1, 2]

Hemantakumar Biswas—for Appellants.

Khundkar—for the Crown.

Costello, J.—In this case the three appellants, Manir Sheikh, Syedali and Abbasali, were charged, the first two under S. 302 and the third under S. 302 read with S. 109, I.P.C. All the three were found guilty by the jury and were sentenced to transportation for life. Mr. Biswas on behalf of these appellants has attacked the summing of the learned Additional Sessions Judge of Mymensingh in several particulars, but the chief ground for criticism is in reference to the evidence given by a witness named Safiruddin Fakir. This case for the prosecution, put very shortly, is this: The deceased man, Kasem Fakir, and his brother Yasin were returning home from Katakhal hat on 30th June 1931. Kasem was walking ahead of his brother and when he reached a bund by the Kalibajail river, Yasin heard a cry from Kasem. He then ran towards him and saw the accused, Syedali, strike Kasem with a sulpi. Subsequently Manir gave certain blows with a dao on the neck of the deceased, Kasem, and the third man, Abbas, attacked the deceased with a sulpi. When Yasin came up towards Kasem, he was driven away by Syed with the sulpi, which was in his hand. The evidence given by Yasin is corroborated by a man named Abdul Gani, who was also an eyewitness of a considerable part of the occurrence. The alarm, which was raised by Yasin, at-

tracted to the spot a number of persons, two of whom saw the three accused making off with weapons in their hands and the rest of them heard from Yasin that the three accused were the assailants of his brother. (After discussing the merits of the case, and the charge to the jury, the judgment proceeded). Looking at the charge as a whole we are of opinion that it is quite satisfactory and that the case has been fairly and properly put by the learned Judge to the jury.

There is one other matter, to which I must allude. Mr. Biswas took what he described as a preliminary objection, which was based on the manner in which the jury who tried these appellants was constituted. It appears from the order-sheet that this is what happened: The case was to have been tried by a special jury. In accordance with the provisions in that behalf contained in the fourth proviso to S. 276, Criminal P. C., special jurors to the number of 18 had been summoned for the purpose of the trial. The order-sheet records what happened in these words: The cards of the 18 special jurors summoned in this case

"were taken and drawn by lot one after another. As each card was drawn by lot the name and address of the corresponding juror were called aloud and in the case of cards Nos. — (then the learned Judge enumerates 13)—"the jurors were found absent, while in the case of each of the cards Nos. —" (he mentions five)—"the jurors stood up and the accused were asked if they objected to be tried by that juror and the accused and their pleader had no objection. As there were no other jurors summoned in this case present, one gentleman—Nagondrakumar De—who happened to be present in Court and who said his name appeared in the list of special jurors and —" (he mentions by name three other persons, who were summoned as jurors in another Sessions Court—"are chosen as jurors in this case by me and in the case of each juror the accused were asked, if they objected to be tried by that juror, and the accused had no objection. The defence pleader and the Public Prosecutor also had no objection to any of the four jurors chosen."

Upon that state of affairs, Mr. Biswas has proceeded to argue at considerable length that the whole trial ought to be declared irregular and the conviction quashed on the ground that the jury was not properly constituted, in that it was not open to the learned Additional Sessions Judge to supplement the five special jurors, who were available and who were chosen by lot, and one special juror who happened to be present, with

three persons, who were jurors awaiting in another Court but presumably were not on the special jury list at all. In any event, I would have been of opinion that there was no real substance in the point urged by Mr. Biswas having regard to the fact that both the accused and their legal representative at the trial categorically said that they had no objection to what was taking place and no objection to their being tried by these imported jurors. Further, to my mind, the word of the second proviso to S. 276, Criminal P. C., are sufficiently wide in their import to cover a case such as the present one. That proviso says:

"in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present."

Had this point come before me and I had had to decide it without reference to any authority, I would still have said that the point had no substance in it; but it appeared, after we had listened to Mr. Biswas for some considerable time, that he had at hand an authority, which was not only in point and directly in point but, so far as it was material, on all fours with the present circumstances: I refer to the case of *Shaheb Ali v. Emperor* (1), where it was held by Lord-Williams and S. K. Ghose, JJ., that the second proviso to S. 276, Criminal P. C., which provides for the making up of deficiency in jurors from among persons, other than those summoned, present in Court applies to special juries as much as to common juries. With that decision I respectfully and entirely agree. It is quite obvious that that authority entirely disposes of the point sought to be made by Mr. Biswas in the present case as regards the constitution of the jury. For the reasons I have already given it follows that this appeal must be dismissed.

S. K. Ghose, J.—I agree.

K.S.

Appeal dismissed.

1. A I R 1931 Cal 793 = 1931 Cr O 1057 = 39
Cr L J 129=58 Cal 1272=135 I C 485.

A. I. R. 1933 Calcutta 639

RANKIN, C. J. AND AMBER ALI, J.

Hafez Molla and others — Appellants.
v.

Emperor—Opposite Party.

Criminal Appeal No. 607 of 1932, Decided on 17th January 1933.

Criminal Trial—Verdict of jury and conviction of accused—Foreman of jury convicted of having taken bribe—Verdict and conviction cannot be sustained.

Where in a trial, some of the accused were acquitted and some convicted and it was found that the foreman was subsequently convicted of having taken a bribe in connexion with same trial:

Held: that the verdict of the jury could not be sustained and that the conviction should be set aside. [P 640 C 1]

Fazlul Huq—for Appellants.

Khundker—for the Crown.

Rankin, C. J.—In this case it appears that ten persons were put on their trial on charges under Ss. 304, 326, 324 and 365, I. P. C., certain charges being against some and not against the others. In the result, six were acquitted and the four appellants before us have been convicted under S. 326, I. P. C., and sentenced, three of them to seven years' rigorous imprisonment each and one to three years' rigorous imprisonment.

It appears that the foreman of the jury was subsequently convicted of having taken a bribe in connexion with this very trial and, in these circumstances, as that fact is not disputed and as he has been convicted formally of the offence, we have to consider whether it is possible to let the verdict against the four appellants stand. I am of opinion that it is quite impossible. There is no saying how to the corrupted mind of a jurymen, who had taken a bribe, the receipt of money from certain accused might not be an influence, which tempted him to convict the other accused. Under the circumstances, the verdict cannot be sustained, and there must be an order that the conviction of and the sentences on the four appellants be set aside and that the appellants be retried.

Ameer Ali, J.—I agree.

K.S.

Retrial ordered.

A. I. R. 1933 Calcutta 640

COSTELLO AND S. K. GHOSE, JJ.

Rafat Sheikh and others—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 698 of 1932, Decided on 13th January 1933, against order of Asst. Sess. Judge, Pabna, D/- 18th June 1932.

Criminal P. C. (1898), Ss. 306 and 307—Obvious and inconsistent verdict of jury—Judge can make further charge to jury without referring matter to High Court.

Where a Judge is not minded to accept what is obviously and admittedly an inconsistent ver-

dict of the jury, he can make further charge to the jury without referring the case to the High Court for consideration. [P 641 C 2]

Deeneshchandra Ray—for Accused.

Khundker—for the Crown.

Costello, J.—In this case six persons were put upon their trial before the learned Assistant Sessions Judge of Pabna on charges under S. 304 read with S. 34, I. P. C., S. 304 read with S. 149 and S. 147 of that Code. Appellant, Rafat Sheikh, was convicted by the jury under S. 304, read with S. 34, and on that charge he was sentenced to seven years' rigorous imprisonment; appellant 2, Sonaula, was convicted under S. 304 read with S. 34 and on that charge was sentenced to five years' rigorous imprisonment; appellant 3, Bhasa Sheikh, was convicted under S. 304 read with S. 149 and sentenced upon that charge to four years' rigorous imprisonment and appellants 4 and 5, Kefat Sheikh and Mianullah Sheikh, were convicted under S. 304 read with S. 149 and upon that charge sentenced to three years' rigorous imprisonment. Accused 6, Moyezuddin Sheikh, was acquitted. Upon the charge under S. 147, I. P. C., all the accused were in the first instance acquitted by the jury in that the jury upon that charge, when they were asked to say what was their verdict under S. 147 said: "All are not guilty under S. 147." It appears that the learned Judge at the trial immediately appreciated the fact that that verdict of the jury with regard to S. 147 was inconsistent with the verdict which they had already given with regard to the other charges. It appears that he thereupon invited the learned counsel for the prosecution and for the defence to make their submissions to him on the question, whether or not he ought to re-charge the jury in order that they might arrive at a proper verdict as regards the charge under S. 147. In the petition of appeal before us in para. 8 it is represented that after the jury had given their first verdict upon the charge under S. 147, the Judge held a discussion with the Government Pleader, Mr. Bhaumik, for an hour. The paragraph further states that certain authorities were quoted—*Hamid Ali v. Emperor* (1) and other cases were placed before the Court—and that thereafter the learned Judge re-charged the

1. AIR 1930 Cal 820 = 1930 Cr O 401 = 125 I O 97 = 57 Cal 61.

jury, who again retired to consider their verdict. It is further complained in this petition of appeal that the Hindu jurors knew English and the appellants had the grievance that those of the jurors, who knew English, followed and understood the discussion that took place between Mr. Bhaumik and the learned Judge. Now that paragraph manifestly is not an accurate account of what in fact took place at the trial and it is now conceded by Mr. Ray, who appears for all the appellants before us, that what in fact took place was that both the learned counsel, that is to say the advocate for the prosecution and the advocate for the defence took part in the argument before the learned Judge and the proceedings as regards that part of the matter was in proper form of law. Mr. Ray has founded an argument upon the basis of para. 8 of the petition in the nature of a preliminary objection. Mr. Ray has invited us to hold that because the learned Judge was not minded to accept what was obviously and admittedly an inconsistent verdict with regard to S. 147, he ought not to have made any further charge to the jury, but to have dealt with the matter by referring the case to this Court for consideration. It appears to me that there is an authority of this Court which is very much in point, and indeed it disposes of the argument put forward by Mr. Ray—the case of *Hamid Ali v. Emperor* (1). In that case the learned Chief Justice in dealing with an analogous situation said this:

"If he (the Judge trying the case) thought it fairer and clearer and simpler to re-charge the jury on certain specific points and to tell them to go and get their heads clear on the subject and give a proper verdict, there is nothing in the Code against that. The Judge put the matter in a much better position than it would have been if he had endeavoured to cross-examine the jury, which as a matter of fact, means cross-examination of the foreman."

In the present instance Mr. Ray has frankly admitted that the verdict of the jury with regard to the charge under S. 147 was in point of fact obviously inconsistent with the decision, which the jury had already expressed in connexion with the other charge against the accused. We are of opinion that the learned Judge adopted a reasonable and proper course in order to prevent having on the record a verdict which in the circumstances of the case would be an

absurd one. (After discussing the evidence, the judgment concluded). Looking at the charge as a whole, we are quite satisfied that there is no such material misdirection as would justify us in interfering with the verdict of the jury. The appeal must accordingly be dismissed. Those of the appellants who are on bail must surrender to their bail and serve out the sentence imposed upon them.

S.K. Ghose, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 641

LORT-WILLIAMS, J.

Chand Bibi and others—Plaintiffs,

v.

Santoshkumar Pal—Defendant.

Original Suit No. 2036 of 1929, Decided on 18th January 1933.

(a) Limitation Act (1908), Arts. 113 and 116—Purchaser agreeing to release property of mortgage—Purchaser failing to do so suit by vendor on such covenant is governed by Art. 116—And if it is for specific performance then by Art. 113.

Where a purchaser of a portion of property has agreed to release it of an existing mortgage but he fails to do so, the cause of action for a suit by the vendor on such covenant arises either on the date when such payment is to be made or at lease not later than the date when vendor calls upon purchaser to do so. Such a suit is governed by Art. 116 and if it is for specific performance it is governed by Art. 113. [P 643 C 1]

(b) Contract Act (1872), S. 125—Purchaser agreeing to release property purchased of existing mortgage—Covenant to indemnify vendor in case he is made liable for such debt—Purchaser is neither trustee, nor can vendor be indemnified unless he has paid mortgage.

Where a purchaser of property agrees to release the property of an existing mortgage and on default to do so if the vendor is made liable for the debt, further agrees to indemnify the vendor, a suit by the vendor when he has not paid anything to the mortgagee is not in the nature of suit to enforce a trust and is premature so far as this action is concerned. [P. 643 C 1]

B. C. Ghose and I. P. Mukherjee—for Plaintiffs.

S. N. Banerjee (Jr.)—for Defendant.

Judgment.—On 29th December 1920 a Bengali kabala or deed of sale to Akhilchandra Pal was executed by Chand Bibi, Alifjan Bibi, Sheikh Badruddin and Mahabunnessa Bibi, which stated inter alia as follows: That, in 1892, one Nawabjan executed a deed of wakf in respect of certain properties; that, on 1st May 1914, Alifjan Bibi as mutawalli mortgaged the properties, including the scheduled properties, to Haripada Ray.

and subsequently sold some of them to pay off part of the mortgage debt; that, in 1919, Badruddin, one of the heirs of Nawabjan, filed a suit for partition of the whole property left by Nawabjan including the wakf property, which suit was decreed on 11th June, that

"We have all agreed to repay the debt of the said Haripada Ray. We have also admitted that certain properties were sold for the repayment of the said debt."

That by the decree the executants obtained an 11-annas share, and one Izatunnessa Aibi a 5-annas share in certain property, including the property covered by the deed of sale; that about Rs. 4,000 was still due on the mortgage, of which Rs. 2,700 was the share payable by the executants, and Rs. 1,300 by Izatunnessa; that Haripada was not willing to take these amounts separately or to execute separate reconveyances; that

"we are conveying to you our undivided 11-annas share in the scheduled properties, subject to a payment of Rs. 2,700, for principal and interest on receipt of Rs. 1,300, and you shall have the said share released, and by releasing our other properties along with the same, return to us title deeds relating thereto. We admit receipt of the amount of consideration. . . . We have made over possession of our share sold to you. By being malik with right of sale or gift you shall go on enjoying the same. Any amount of interest payable from to-day shall be paid by you. If we are made liable for the said debt, then you remain bound to make good the loss sustained by us. . . Mortgage debt Rs. 2,700 and cash Rs. 1,300, total Rs. 4,000. . . We jointly received Rs. 1,300."

On 19th January 1920, Nurul Huq, the husband of Chand Bibi, had purchased from Badruddin and Mohabunnessa Bibi their share in one of the properties other than those included in the schedule. On 29th June 1920 the purchaser's solicitor had written to the executants saying:

"The purchaser of your 11-annas share in 5-1B, Ismail Street, will get a reconveyance of the mortgage in favour of Haripada Ray by 5th October 1920. I will personally see that this is done within that time. You have paid Rs. 80 for out-of-pocket costs for the reconveyance. All the costs will be paid by the purchaser."

On 21st May 1921, Nurul Huq for Chand Bibi wrote a registered letter to Babu Akhilchandra Pal, saying:

"11-annas share of our land in 5-1. Maulvi Ismail Street, was purchased by you through Manmatha Babu subject to the mortgage of Babu Haripada Ray. Our other properties are included in that mortgage and we cannot deal with the same until you get a release for us for our properties. We did not write to you so long because Manmatha Babu was ill. Now please get us the release and oblige."

On 22nd September 1921 a pleader on

behalf of the executants wrote to the purchaser's solicitor asking him to get a reconveyance of the mortgage as promised in his letter of 29th June 1920. On 13th December 1922 an attorney wrote to Babu Akhilchandra Pal, on behalf of Nurul Huq, threatening proceedings unless he got a release of the property. But A. C. Pal did nothing and, subsequently, Alifjan, Mohabunnessa, Izatunnessa and A. C. Pal all died. Later on the mortgagees began to press the surviving executants for payment, and, on 26th April 1928, the solicitor, now acting for the plaintiffs in this suit, wrote on behalf of Chand Bibi and Badruddin to Santoshkumar Pal, the present defendant, as legal representative of his father A. C. Pal, telling him that the mortgagees had been pressing for payment and threatening proceedings and asking him either to pay off the mortgage debt, or refund the sum of Rs. 2,700 retained by his father out of the purchase price, with interest. On 27th March 1929 the mortgagees again pressed for payment and threatened Badruddin, Nurul Huq and S. K. Pal with proceedings.

On 5th September 1929 the present suit was instituted, asking that the defendant be ordered to pay the said sum of Rs. 2,700 with interest for payment to the mortgagees and to get a reconveyance at his cost, or alternatively the sum of Rs. 2,700 and interest and the cost of obtaining such reconveyance by way of damages. Subsequently, by way of amendment, the plaintiffs asked for specific performance of the contract. By his written statements, the defendant said that the only effect of the deed was that his father bought the equity of redemption in the 11-annas share for Rs. 1,300, that the claim (if any) was barred by limitation, that the legal representative of Alifjan ought to have been joined as plaintiff, that it was understood and agreed that A. C. Pal would get a release of the properties only if and when Izatunnessa paid her share of the mortgage debt, viz., Rs. 1,300, and that the Court had no jurisdiction to try the suit which was in respect of land outside the jurisdiction. Izatunnessa's share of the mortgage debt has not been paid, and of her 5-annas share of the property, part has been sold and the rest is now in the hands of her

grandson. The plaintiff's properties have not been released. Alifjan's legal representatives ought to have been joined as such, but, as Badruddin is her legal representative, the objection is only technical, and I allow the plaint to be amended so as to show that he sues as legal representative of Alifjanas well as of Mahabunnessa.

This is not a suit for land within the meaning of Cl. 12, Letters Patent, and the Court has jurisdiction to try it. Nor is it a suit to enforce a trust. In my opinion, the meaning and effect of the deed was that A. C. Pal bound himself absolutely to get a release of the properties and cannot plead Izatunnessa's default as an excuse. He agreed also to indemnify the plaintiff.

But the plaintiffs' cause of action on the first part of the contract arose either in 1920, 14 days after the execution of the deed, or in any case not later than 1922, when the plaintiffs called upon A. C. Pal to fulfil it. It is therefore barred by limitation under Art. 116, Lim. Act, or if for specific performance under Art. 113. No cause of action under the second part of the contract has yet arisen. The plaintiffs have not yet had to pay anything in respect of the mortgage, though they have been called upon to do so. The mortgagee has not yet taken any proceedings on the mortgage, and the plaintiffs have not yet suffered any damage. The suit is premature so far as this cause of action is concerned. Consequently there must be judgment for the defendant. I regret to have to give this decision. Owing to the obstinacy of the defendant in refusing to accept my suggestion of compromise, unnecessary costs may be incurred by all the parties. I trust that commonsense will be applied even now, and that some amicable arrangement will be made to avoid further litigation. There will be no order for costs.

K.S.

*Suit dismissed.***A. I. R. 1933 Calcutta 643**

MUKERJI, J.

Banowari Lal Saha and another — Appellants.

v.

Gopal Chandra Saha and others—Respondents.

Appeal No. 1695 of 1930, Decided on 12th December 1932.

Landlord and Tenant—Parent holding an agricultural one—Tenancy created before Bengal Tenancy Act for residential purposes to non-agriculturist—Permanent lease granted by under-riyat—Lease is governed by Transfer of Property Act and not Bengal Tenancy Act—T. P. Act (1882), S. 106.

A tenancy was created for residential purposes before the passing of the Bengal Tenancy Act in favour of a non-agriculturist. The lands were purchased from the lessee by the plaintiff; but before the sale permanent lease had been granted in respect of the lands by the lessee. Plaintiff sued for recovery of possession of land on which stood a homestead.

Held: the case was governed by the Transfer of Property Act and not by the Bengal Tenancy Act and that the suit was not maintainable without service of notice. [P 644 C 1, 2]

Radhabinode Pal and Premranjan Roy—for Appellants.

Gopal Chandra Das and Bhuban Mohan Saha—for Respondents.

Judgment.—One Umacharan Rai and one Sobhan Biswas owned a raiyati jama to which the lands of the present suit appertain of which they granted a lease to one Baburam Karal in 1290. Baburam left two sons Judhisthir and Gayanath. The plaintiff purchased the lands by a kobala from Judhisthir in 1326 and from Gayanath's widow in 1333. In 1304 Gayanath had granted a permanent lease in respect of the lands to one Tarachand Dhupi, and some persons, alleging themselves to be the heirs of the said Tarachand Dhupi, granted a permanent lease of the lands to defendants 4 and 9 in 1332. The plaintiff instituted the present suit for recovery of khas possession of the lands on which stands a homestead. The defence taken was that the case was governed by the Transfer of Property Act, that the suit was not maintainable without service of notice, that Tarachand Dhupi had transferable and heritable rights and the defendants' permanent lease from Tarachand's heirs would protect them from eviction.

In the last cadastral survey and settlement the superior landlords Umacharan Roy and Sobhan Biswas were recorded as settled raiyats; and the plaintiff's vendors as well as one Saroda Sundari, who is said to have been a mistress of Tarachand, were recorded as korfa raiyats with customary rights of occupancy. The plaintiffs' case rests on the state of things as shown in the record of the said settlement, that is to say, that Tarachand was himself an under-raiyat and so any permanent lease

granted by his heirs is not of any avail as against the plaintiff. The Munsif held that the Transfer of Property Act would govern the tenancy of Tarachand Dhupi. On this view, and upon other findings that he arrived at, the Munsif dismissed the suit. The Subordinate Judge was of opinion that the Bengal Tenancy Act was applicable to the tenancy and accepting the plaintiffs' case he reversed the Munsif's decision and decreed the suit. Defendants 4 and 9 have appealed. The question to be considered is whether it is the Transfer of Property Act or the Bengal Tenancy Act that is applicable.

I have read the relevant documents relating to this tenancy, viz., Ex. 2, the lease of 1290, by Uma Charan Rai and Sobhan Biswas to Baburam Karal; Ex. 3 the kobala of 1326 by Juddhisthir to the plaintiff; Ex. 4 the kobala of 1333 by Gayanath's widow to the plaintiffs; Ex. A, the lease of 1304, in favour of Tarachand Dhupi, and Ex. B, the sub-lease of 1332 by Tarachand Dhupi's alleged heirs in favour of the defendants. Leaving aside the more recent of these documents which, it may be said, are of no assistance in determining the question we have to consider, the documents Ex. 2 and Ex. A are of importance. The Munsif has dealt with these two documents very fully in his judgment and has stated in detail the inferences to be drawn from them. He has also referred to the other circumstances connected with these demises with commendable care. It would be sufficient for me to say, instead of repeating what he has said, that I entirely endorse the view that he has taken. The Subordinate Judge was in error in supposing that as the superior holding of Umacharan Roy and Sobhan Biswas was an agricultural holding the subordinate holding created out of it must be governed by the incidents which belonged to it. That may be so in a case in which the subordinate holding has been created since the Bengal Tenancy Act came into being. In the present case whatever the character of the parent holding may have been, the tenancy that was created in 1290 (prior to the passing of the Bengal Tenancy Act and at a time when the Transfer of Property Act had come into existence) was created expressly for residential purposes, and in favour of a person who was

not an agriculturist by occupation but a fisherman and who has not been shown to have had any lands for purposes of cultivation, and there is no indication anywhere that these lands were put to agricultural use at any time. It is true that the settlement records are in plaintiff's favour; but whatever presumption may arise upon them it has, in my judgment, been amply rebutted.

The appeal is allowed. The decision of the Subordinate Judge being set aside, the case is sent back to his Court so that the other questions arising in the case may be dealt with and the whole appeal in that Court be disposed of on the footing of the case being governed by the Transfer of Property Act. Costs of this appeal will abide the result of the remand.

K.S.

*Case remanded.***A. I. R. 1933 Calcutta 644**

BANKIN, C. J. AND COSTELLO, J.

Bhagabaticharan Patra—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 646 of 1933, Decided on 12th January 1933, from order of Chief Presidency Magistrate, Calcutta, D/- 7th July 1932.

Evidence Act (1872), S. 24—Superior officer holding out inducement to subordinate—Confession by latter cannot be used.

If a superior officer holds out some inducement to a subordinate and then any confessional statement is made by that subordinate it cannot be used against him in a subsequent prosecution. Accused fell at his superior officer's feet and begged to be saved, if he disclosed everything. The latter said that if he told the truth, he would try his utmost to save him. The accused said he would tell everything to the Postmaster and his superior said he would do all he could to get him saved:

Held: that some kind of inducement was held out by the investigating postal superior officer to his subordinate which had the effect of inducing him to make a confession of his guilt and that the confession was inadmissible. [P 646 C 1, 2]

B. C. Chatterjee and Beereshwar Chatterji—for Appellant.

Khundkar—for the Crown.

Costello, J.—In this case the accused, Bhagabaticharan Patra, who was a despatcher in the Registered Letters Sorting Branch of the Calcutta General Post Office, was convicted by the Chief Presidency Magistrate, Calcutta, on charges relating to two postal packets. He was originally charged in respect of three packets. The first charge related to a

registered letter No. E-1 35, containing two currency notes of Rs. 100 each, which was for despatch to Bombay. The charge was that he had abstracted from that packet both the notes. That is alleged to have taken place on 2nd December 1931. The second charge related to a registered letter No. 617, from which he is said to have abstracted three currency notes of Rs. 10 each on 7th December 1931, and the last charge related to a registered letter No. 590, from which he is said to have abstracted ten currency notes of Rs. 10 each on 26th December 1931. He was convicted in respect of the first and the third charges and acquitted with regard to the second charge, no evidence having been put before the Court in respect of the package, to which that charge related, that the money said to be the contents thereof was in fact despatched in that letter.

The evidence before the learned Presidency Magistrate was to the effect that the two packages, in respect of which the accused was convicted passed through the hands of the accused in his capacity as despatcher. After the accused had made an entry with regard to those packages, they passed through the hands of the Supervisor, Registered Letters Sorting Department of the Post Office, and it was his duty apparently to check the number of the registered packages in the bag, which was sent to him by the accused, before the bag was despatched.

The allegation against the accused was that he had abstracted money from the two postal packages in question by slitting the end of the registered covers and then concealing what he had done by affixing a slip of paper, which has been referred to as "acknowledgement due slip." As these packages in question had not been insured, there was no question that any acknowledgment was required. In the ordinary way, registered packages of this character would not bear slips of that nature. It has been suggested by Mr. B. C. Chatterjee for the accused, that something is to be said on behalf of the accused by reason of the fact that the last person, handling the packages before they were despatched, saw nothing wrong with them.

The learned Chief Presidency Magistrate has really based the conviction up-

on the fact that the accused is said to have made a confession of guilt. The question of that confession depends upon the evidence of two witnesses. The first of these is Niladrinath Mukherji, who was an Inspector charged with the duty of investigating certain complaints, which were sent to the post office with regard to the packages in question. It appears that the addressees of the letters wrote to the post office complaining that they arrived with the contents as regards the money missing and an investigation was accordingly set on foot. Mr. Mukherji made an investigation and ultimately he called upon Bhagabati-charan Patra for an explanation with regard to certain discrepancies, which were found in one of the lists. It appears, as a matter of fact, that these discrepancies related to the second charge—the charge in respect of which the accused had been acquitted. When the accused was called upon for an explanation, according to the evidence of Mr. Mukherji, he failed to give any explanation and according to that evidence the accused fell at the Inspector's feet. The actual words with regard to this incident are these :

"He fell at my feet on 14th March 1932, in the office of the Presidency Postmaster and begged for mercy and to be saved. I asked him to put it in black and white. He then made a statement, which I recorded in the presence of witnesses. The accused signed it as a result of his statement."

Now, in cross-examination that witness said :

"At accused's request I went out of the correspondence room to the verandah and accused spoke to me there. Then he made his confession. The accused was the despatcher of the three letters in question. The fact alone was not the cause of suspicion against him. It is not true that I threatened accused with a criminal prosecution. It is not true that I told accused that, if he confessed, he would be made approver and I would do my best to save him. What I said was this—after his confession accused begged me to help him. I said I would request the Presidency Postmaster and the Postmaster-General to deal with him leniently. That was on the verandah. That was after accused's statement had been recorded."

Now, had the whole of the evidence before the learned Magistrate with regard to the alleged confession consisted of the testimony of this particular witness, it might be that no criticism could have been made as to the validity of the confession. But another officer of the post office, who was present at the time

when the accused was interrogated by the investigating Postal Inspector, namely, another Mr. Mukherji—H. K. Mukherji—who was a clerk in the Correspondence Department of the Calcutta General Post Office, said this :

" On 14th March 1932, the accused's statement was recorded in my presence in the Correspondence Department of the Calcutta G. P. O. It was recorded by Mr. N. N. Mukherji. Nobody else was present at the time. Mr. Mukherji asked accused to reconcile certain discrepancies in his registered list that day. The accused could give no explanation and fell at his feet and begged of him to save him and then admitted his guilt. It was then that Mr. Mukherji recorded his statement."

Now, again, if the evidence with regard to the alleged confession had stopped at that point, very little adverse criticism might have been possible with regard to the admissibility of this confession. But this witness in his cross-examination throws altogether a different light on the matter. In his cross-examination he says this :

" Inspector Niladri Babu, myself and accused were present, when accused made his statement, when accused fell at Niladri's feet and begged to be saved, if he disclosed everything. Niladri said that, if he told the truth, he would try his utmost to save him. The accused said he would tell everything to the Postmaster and Niladri Babu said he would do all he could to get him saved. I cannot remember, if Niladri Babu told accused that he was a Brahmin and would see that accused came to no harm, if he confessed. Accused himself asked Niladri Babu to go with him to a quiet place, where he could speak to him."

If that is a true account of what happened at the time the accused is said to have made his confession, it seems abundantly clear that some kind of inducement was held out by the investigating postal officer to this man, which had the effect of inducing him to make a confession of his guilt. The learned Chief Presidency Magistrate has not in terms made any finding as to whether he accepted the version given by the first witness for the prosecution, Mr. N. N. Mukherji, or whether on the other hand he was of opinion that the story given by the other Mr. Mukherji was the correct version of the matter ; but by implication, it does appear from the judgment of the learned Chief Presidency Magistrate that he has taken the view, that there was an inducement of the kind indicated by the evidence of the second Mr. Mukherji, but that inducement was not of such a nature as would

vitiating the confession and would render it inadmissible in evidence. The learned Chief Presidency Magistrate says this :

" It was, on 14th March 1932, that the accused, made a confessional statement (Ex. 18) under circumstances, which will appear from the evidence of P. W. 1., the postal inspector, P. W. 15, H. K. Mukherji, a clerk in the Correspondence Department of the G. P. O., and P. W. 8, J. C. Basu, Assistant Presidency Postmaster. In the course of his inquiries, the Postal Inspector had found discrepancies in the registered lists prepared by the accused. Then he refers to the number of the letter. When called on for an explanation, he fell at the Postal Inspector's feet and begged to be saved. The Postal Inspector said that, if he—accused—told the truth, he would do his best to save him. This was in the evening. After recording his statement in the presence of P. W. 15, the Postal Inspector took accused to Mr. J. C. Basu, in whose presence the statement was read out to accused and signed by him as correct. The learned counsel for the defence contends that the accused was made to make this statement under inducement from a person in authority and hence its value is nil. The fact remains that in this statement we find a clear account of how these three letters were tampered with and money abstracted from them by the accused."

and later on he says :

" The defence further contends that, when placed before a Magistrate the very next morning, accused retracted his confession. He was kept in the police lock-up that night, and it is argued that no lawyer had access to him to prompt him to retract. Hence, it is urged, the confession has no value. In spite of that, I am convinced that the accused's confession was a true one and voluntarily made; when he found the net closing round him there was no way of escape except by making a clean breast and beseeching his official superior to save him. If under these circumstances, his official superior says he will try and save him, if he tells the truth, that, to my mind, does not constitute inducement or threat."

Now, we are of opinion that the learned Chief Presidency Magistrate has fallen into error in the way he has dealt with this confession. It is clear enough that if a superior officer holds out some inducement to a subordinate in the circumstances such as those in the present case and then any confessional statement is made by that subordinate it cannot be used against him in a subsequent prosecution. Upon the view that the version given by Mr. H. K. Mukherji in his cross examination is correct, it seems abundantly clear that the statement made by this man was made by him after he had ascertained from his superior officer that some kind of consideration or leniency would be shown to him.

Almost all the other evidence against the accused of any substance consists of

certain entries in his Savings Bank book which seem to indicate that at or about the time the moneys were alleged to have been abstracted by him from postal packages, he paid into his Savings Bank account certain sums which tally with the sums which are said to be missing. This is of course in addition to the evidence to which I have already alluded at the outset, namely, that these packages did pass through the hands of this particular man and therefore there was an opportunity for him to tamper with them, if he was so disposed.

Having regard to the way this matter has been dealt with by the learned Chief Presidency Magistrate as regards the matter of the confession, we are clearly of opinion that the present conviction cannot stand, but on the other hand having regard to the other evidence in the case, to which I have referred it seems right that there should be a fresh trial. We accordingly set aside the conviction and direct that the accused be retried before the Additional Chief Presidency Magistrate and in making that order directing that this matter be retried according to law, I would draw the attention of the learned Magistrate who deals with the case, to the provisions of S. 24, Evidence Act. The accused will continue on the same bail.

Rankin, C. J.—I agree.

K.S. *Retrial ordered.*

A. I. R. 1933 Calcutta 647 (1)

C. C. GHOSE, AG. C. J. AND MALLIK, J.
Jafar Ali and others—Petitioners.

v.

James Finlay & Co.—Opposite Party.

Criminal Revn. Petn. No. 446 of 1933,
Decided on 3rd July 1933.

Criminal P. C. (1898), S. 203—Complaint under Merchant Shipping Act cannot be dismissed under Criminal P. C. — Merchant Shipping Act (21 of 1923), S. 63.

A complaint under the Merchant Shipping Act has to be inquired into in accordance with the provisions of that Act and cannot be dismissed under the provisions of S. 203, Criminal P. C.

[P 647 C 2]

Kitish Chandra Chakravarty and Panchanan Ghosal—for Petitioners.

Suresh Chandra Talukdar—for Opposite Party.

Order.—We are of opinion that the order of the Magistrate must be set aside. The complaint was not under any provisions of the Penal Code or of the Crimi-

nal Procedure Code. The complaint, such as it was, assuming that the word "complaint" can rightfully be applied to the application made by the petitioners before the Magistrate, was under the provisions of the Merchant Shipping Act of 1923. It had to be inquired into in accordance with the provisions of that Act and it cannot be dismissed in the way in which it has been done under the provisions of S. 203, Criminal P. C. That section is not attracted at all to the application or the disposal thereof. In that view of the matter the case will go back in order that the Magistrate may inquire into the matter himself under the provisions of the Merchant Shipping Act and pass such orders as he may be advised.

K.S.

Case remanded.

*** A. I. R. 1933 Calcutta 647 (2)**

C.C. GHOSE, AG. C. J. AND COSTELLO, J.
Kumud Nath Chaudhuri and another—Accused—Petitioners.

v.

Brojendra Nath Roy—Complainant—Opposite Party.

Criminal Revn. Petn. No. 323 of 1933 and Criminal Ref. No. 50 of 1933, Decided on 26th May 1933.

*** (a) Criminal P. C. (1898), S. 439—Delay in filing revision — Sufficient explanation given by accused—High Court can interfere.**

Where the delay caused in filing a revision to quash the proceedings is sufficiently explained by the accused, the High Court can entertain the application and pass orders thereon.

[P 650 C 2]

(b) Criminal P. C. (1898), S. 439—Order of Subdivisional Officer that there is prima facie case against accused—Reasonable explanation put forward by accused—Proceeding should be quashed.

On a complaint against a company, after going through the several charges, the Subdivisional officer came to the conclusion that there was a prima facie case against the accused regarding a balance sheet for a particular year. The Sessions Judge went through the records and held that explanation given by the accused must be considered but that they should be tried:

Held: that whatever may be the ultimate view regarding this in the civil Court, the reasonable explanation offered by the accused was sufficient to quash the proceedings in revision.

[P 651 C 1]

N. K. Basu, Surajit Chandra Lahiri, Nirmal Kumar Sen, Naresh Chandra Sen Gupta and Suresh Chandra Talukdar—for Petitioners.

Probodh Chandra Chatterjee, Hiralal Ganguli and Satindra Nath Chatterjee—for Opposite Party.

Order.—In this case the facts are as follows: On 20th May 1932 the complainant Brojendra Nath Roy, who was a depositor in the Manikganj Loan Office to the extent of a single rupee, filed a petition against the Directors and the Secretary of the Manikganj Loan Office making allegations on twelve charges noted in the petition before the Subdivisional Officer of Manikganj. The Subdivisional Officer was pleased to direct a thorough investigation by the police and, under his orders, the case was examined by a Police Officer under the directions of the Superintendent of Police, Dacca. The police seized all the books of the Manikganj Loan Office, removed them to the police station and prepared a synopsis of evidence bearing on the said twelve charges which they submitted through the Superintendent of Police to the Public Prosecutor of Dacca for his considered opinion.

The Public Prosecutor gave his opinion after going through the materials and the books of the company which were produced before him, but his opinion was not favourable to the complainant. Thereupon the complainant filed a petition of objection or, as it is called in vernacular, a *naraji* petition. This was before the Public Prosecutor's opinion was made available to the complainant, and the *naraji* petition was put in anticipation of the Public Prosecutor's opinion not being in favour of the complainant. Be that as it may, the Superintendent of Police on getting the Public Prosecutor's opinion studied the case against the accused for himself and then referred the matter to the Senior Government Pleader of Dacca for opinion. The Senior Government Pleader of Dacca examined the whole matter and finally came to the conclusion that there was nothing in the case of the complainant.

There were as many as twelve charges. The first charge was that the Directors and the Secretary took an illegal gratification of Rs. 12,000 from the Sunny Valley Tea Estate in connexion with a loan given to the said tea company by the Manikganj Loan Office. This matter was examined and the second officer, who held an inquiry under the orders of the Subdivisional Officer, found that there was no foundation for the charge. The second charge was the low rate of interest charged for the loan to the

Sunny Valley Tea Estate. This charge was examined by the second officer and he came to the conclusion that there was no criminality whatsoever in the matter and that the directors were in a position to give a satisfactory explanation. The third charge was that the Manikganj Loan Office purchased 150 shares of Kedarpur Tea Estate at a premium of Rs. 20 per share. The second officer was of opinion on an investigation of the charge that the purchase in question was an investment which the directors thought was for the benefit of the Loan Office and that there was no substance whatsoever in the charge. The fourth charge was about certain loan to an institution called Lakhmi Bhandar. Here again (it is not necessary to go into details) the second officer was of opinion on an investigation that the Directors of Lakhmi Bhandar had no criminal intention whatsoever in the matter. The fifth charge was that the Manikganj Loan Office made a false balance sheet in the year 1923 inasmuch as the loss of Rs. 23,000 was not shown there. In this matter the charge was very carefully discussed by the Public Prosecutor and the Government Pleader with certified auditors who perused the balance sheets from 1914 to 1930 except that of 1926 which was not made available. The Government Pleader was of opinion that the charge of false balance sheet was wholly misconceived.

The second officer therefore came to the conclusion that there was nothing in the charge. The sixth charge was that the Kedarpur Tea Estate, in violation of the contract with the Comilla Banking Corporation Ltd., sold some tea already hypothecated to the Comilla Banking Corporation to some other parties direct. Here, on the facts, the second officer came to the conclusion that the allegation did not touch the Manikganj Loan Office at all and that the charge could not, in any view of the matter, be considered to have been substantiated. The seventh charge was that the Directors of the Manikganj Loan Office stopped payment to the depositors but the directors withdrew their deposits and took loan at low rates. The second officer examined the details of this charge and he came to the conclusion that there was no instance of low rate of interest being charged at all. He therefore held

that there was no substance whatsoever in the charge. With reference to the eighth charge relating to certain transactions with various other companies—such as the Industrial Bank, the Bazar Union Bank and so on—the investigations before the police and before the second officer showed that the facts stated in support of the charge were not true.

The ninth charge was about these accused persons repawning certain gold ornaments with the Bhowanipore Banking Corporation without notice to the pledgers. The second officer was of opinion that repawning was not illegal and he therefore held that there was no substance in the charge. The tenth charge was that in violation of the resolution of the directors these accused persons had invested the reserve fund on loans. With reference to this the second officer was of opinion that there might be a question of civil liability. With regard to the other two remaining charges the second officer had his doubts, but he said that his doubts were not sufficiently strong to enable him to express himself in language of positive dissent from the view taken by the Public Prosecutor; but, in any view of the matter, the Government Pleader was of opinion that there was no criminality as regards these two charges.

What happened was that the matter came before the Subdivisional Officer on the report of the second officer and he was definitely of opinion that only with respect to the charges based on the balance sheet of 1930 taken with the balance sheet of 1933 there could be some substance in the charges against the accused. He thereupon came to the conclusion that a *prima facie* case had been made out with reference to the balance sheets and that warrants should issue against various persons, namely, the present accused before us. Then it appears that the present accused surrendered; but meanwhile the accused persons had gone before the Sessions Judge and obtained a stay of proceedings. This was some time in December 1932. The Sessions Judge then went into the whole matter himself and he by his order dated 28th February 1933 was of opinion that except against two persons, Kumud Nath Choudhuri and

Naresh Chandra Roy, there was no case at all to be inquired into and he thereupon referred the cases of other accused, that is, the accused other than Kumud Nath Choudhuri and Naresh Chandra Roy to this Court with a recommendation that the proceedings initiated against the other accused might be quashed. That is the subject-matter of reference No. 50 of 1933.

The two other accused, namely, Kumud Nath Choudhuri and Naresh Chandra Roy have come up to this Court and obtained a rule from Pankridge and Paterson, JJ., why the proceedings started against them and not referred to in the letter of reference should not also be quashed on grounds Nos. 2 and 3 in their petition. Shortly stated, their case is this that the Subdivisional Officer having come to the conclusion that the only charge worth investigating against these two accused was the charge based on the balance sheet of 1930 and the Additional Sessions Judge having definitely come to the conclusion that the said charge was entirely misconceived based on misunderstanding and misapprehension of the true facts of the balance sheet of 1930, the proceedings so initiated against these two accused persons were and are not sustainable in law, and further that the allegations with regard to the charge relating to the Lakhmi Bhandar taken with the facts disclosed in the police investigation and Magisterial inquiry before the second officer do not disclose any criminal offence.

We have very anxiously considered as to what should be done—not only about the order prayed for both on behalf of the persons whose names are mentioned in the letter of reference but also on behalf of the persons who have obtained Rule No. 323 of 1933 from this Court wherein it is suggested that criminal proceedings instituted against these persons should be quashed. We have also to consider the submissions made to us by Mr. Chatterji on behalf of the complainant who, it may be remembered is a depositor to the extent of a rupee. It is not suggested that because he is a depositor to the extent of a rupee he is not entitled to ventilate his grievances or to ask the Magistracy to inquire into specific matters of complaint against the present accused if on proper investiga-

tion it turns out that there are substantial grounds for inquiry. As we have said, we have very anxiously considered and we have examined the whole of the record in this case. The letter of reference in certain places may seem to be a little obscure and may be considered to have not been properly worded. But after all said and done, the facts have got to be investigated and examined by us and with the letter of reference from the Additional Sessions Judge we have examined the facts; and, although Mr. Chatterji may be entitled to say that his client is not confined to the charge based on the balance sheet of 1930, but he is entitled to roam over the entirety of the twelve charges referred to above, the point made on behalf of the accused, namely, that the Subdivisional Officer himself came to, at any rate, a tentative conclusion that there was nothing else in the various other charges worth investigating except the charge based on the balance sheet of 1930 must be taken into our consideration and given due effect. It is by no means clear that so far as the proceedings have gone, the complainant has succeeded in substantiating the charge based on the balance sheet of 1930. A reasonable explanation was given on behalf of the accused which explanation was considered by the law officers of the Crown in the particular place where the prosecution was started, where it was examined by the police, where it was examined by the head of the police and where it was examined by the second officer under the direction of the Subdivisional Officer. All these persons came to the conclusion that there was no criminality whatsoever in the transaction relating to the balance sheet of 1930. The Additional Sessions Judge has examined the matter for himself and apparently was persuaded that there was something in the explanation given by the accused which had to be seriously considered and that it was impossible to say straightaway that a criminal intention was discoverable in what the accused had done and that the interest of justice imperatively required that these accused should be put on their trial in a criminal case. That being so, we are bound to pay considerable attention to the view of the learned Additional Sessions Judge.

It is true that the proceedings have gone on for a certain length of time and that the matter had not been brought to the notice of this Court as early as might have been desired. But the various proceedings which took place from the start of the complainant's case down to 28th February 1933 afford a sufficient explanation for the delay that has taken place. The police took considerable time in sifting the evidence against the accused. The second officer took considerable time in analysing for himself the evidence against the accused and coming to his own conclusion. The matter was then laid before the Subdivisional Officer who took considerable time. The matter then went before the Additional Sessions Judge and it is reasonable to conclude that having regard to the complicated nature of the charges levelled against the accused by the complainant the learned Additional Sessions Judge was, in the ordinary course of things, bound to take considerable time before he finally made up his mind one way or the other. Therefore in our view, in this particular case the accused are able to give a sufficient explanation of the delay that had taken place before this Court was moved or before the matter attracted the notice of this Court on a reference by the Additional Sessions Judge.

On these facts and on the findings arrived at by the Additional Sessions Judge it is proper and reasonable that the prosecution should be allowed to go on? So far as the persons referred to in the letter of reference are concerned, we think on a full consideration of the facts that this prosecution should at once be brought to a termination and the proceedings quashed against those persons. The same conclusion has been reached by us on a perusal of the petition filed in this Court by the two other accused, namely, Kumud Nath Choudhuri and Naresh Chandra Roy and in view of the grounds which have been urged by them. The whole basis of the continuance of the prosecution against these two last mentioned persons is the balance sheet of 1930, and if, as has been indicated above, a reasonable explanation can be put forward for the balance sheet of 1930, which balance sheet, by the way, was accepted by the Government Auditor, then it is reasonable to

conclude that whatever may be the ultimate view that might be taken if this question were agitated in a civil action the two accused have succeeded in giving a sufficient explanation which would entitle them to induce a Court of revision in saying that the prosecution against them should also be brought to a termination. We think that there is a good deal in what they have urged in petition to this Court and we are of opinion that they have succeeded in making good the grounds upon which they have obtained the Rule being Rule No. 323 of 1933 and we are therefore of opinion that in their case also the proceedings taken against them should be quashed. The result therefore is that the proceedings taken against all the accused persons should be quashed, and they should forthwith be released from their bail bonds.

K.S.

*Order accordingly.***A. I. R. 1933 Calcutta 651**

GUHA AND BARTLEY, JJ.

D. N. Chatterjee & Co.—Appellants.

v.

Raj Kumar Mandal and others—Respondents.

Appeal No. 91 of 1932, Decided on 15th July 1932, against original order of Dist. Judge, Hooghly, D/- 28th January 1932.

Provincial Insolvency Act (1920), S. 51—Assets realized in execution sale pending adjudication application—Application dismissed—Subsequent application for adjudication—Section has no application.

After the admission of a petition for adjudication and the appointment of a receiver in insolvency, an application for staying the sale in execution taken by another decree-holder was filed and the Court directed that the execution case was to proceed but that the money realized by the sale should be kept in deposit to the credit of the insolvency Court. Subsequent to this the application for adjudication was dismissed, and a fresh application was put in :

Held : that the money in Court deposit could not be deemed to be assets realized in execution sale before the application, that the proceedings could be considered to be in continuation of the first application that the petitioner could not ask the Court to withhold payment of the same and that S. 51 had no application. [P 652 C 1, 2]

Heramba Chandra Guha, Nand Lal Gopal Banerjee and Narendra Nath Banerjee—for Appellants.

Basak and Baidyanath Banerjee—for Respondents.

Guha, J.—The only question arising for consideration in this appeal is whe-

ther the restriction of the rights of creditors as contemplated by S. 51, Provincial Insolvency Act was applicable in favour of the appellant Akshoy Kumar Chatterjee, representing the firm of Messrs. D. N. Chatterjee and Co., who as a creditor, has applied for the adjudication of one Atul Kristo Nath as an insolvent. The facts leading up to the order made by the learned District Judge of Hooghly on 28th January 1932 against which this appeal is directed, may be briefly referred to, so far as they are relevant for the purpose of the appeal before us. The appellant applied to the Court for an order of adjudication on 26th February 1929. On the admission of the petition for adjudication and the appointment of a receiver in insolvency there was an application by the appellant, on 12th August 1929, for staying sale in Money Execution Case No. 94 of 1929 of the Second Subordinate Judge's Court at Hooghly. This was an execution case arising out of a decree passed against the insolvent, and the decree-holder was one Raj Kumar Hari Das Mandal, who was one of the creditors mentioned in the application for adjudication.

It appears that the Court directed, after hearing the pleader for the appellant as also the pleader for the creditors Raj Kumar Hari Das Mandal and others that the execution case was to proceed and a sale was to be held ; but that the money realized in the execution case was to be kept in deposit to the credit of the insolvency Court, until further orders. This order was made on 24th August 1929, and intimation was in due course sent to the executing Court. On 9th October 1931 the application for an order of adjudication, made by the appellant in this Court, was dismissed on the ground that there was violation of the provisions of S. 19 (3), Provincial Insolvency Act, relating to the service of notices, as also for the reason that the petition for adjudication was defective, as there was no compliance with the provisions of S. 13 (2) (a) of the Act. A fresh application was made by the appellant Akshoy Kumar Chatterjee representing the firm of Messrs. D. N. Chatterjee and Co., for an order of adjudication. This application was filed in Court on 25th November 1931, and it was followed by a petition to the Court

for withholding payment of the money lying to the credit of the Court, in Insolvency Case No. 91 of 1929. That was the insolvency case which was started on the application made by the appellant on 26th February 1929, and which was ultimately dismissed on 9th October 1931. The learned District Judge's order on the prayer made by the petitioners was that the amount in deposit was to be withheld for the present and the order as recorded on 15th December 1931 indicates that the other creditors might appear and move for having that order set aside.

Information was given of this order passed by the learned District Judge to the Subordinate Judge, Second Court, Hooghly. On 8th January 1932, creditor No. 1 appeared, and filed a petition praying for an order vacating the order withholding payment of money which was made by the learned Judge on 15th December 1931. On the prayer made on this petition filed on 8th January 1932, the learned District Judge made an order against which the appeal to this Court is directed. The objection of the creditor No. 1 was allowed, and the order withholding payment of the money lying in deposit was vacated by the learned District Judge. On a plain reading of the provisions contained in S. 51, Provincial Insolvency Act, it was incumbent upon the appellant to make out that the moneys which he asked the Court exercising jurisdiction under the Provincial Insolvency Act to withhold were assets realized in the course of execution by sale after the date of admission of the petition filed by him for adjudging Atul Kristo Nath as insolvent. This petition was admitted by the learned District Judge on 25th November 1931, and the assets were realized in course of an execution by sale long before that date. On this ground alone the appellant was altogether out of Court; and could not be heard to say that the provisions contained in S. 51, Provincial Insolvency Act, could come to his aid, and could be availed of by him in any way. It has been strenuously contended before us that the proceeding now pending before the District Judge is merely a continuation of the previous proceeding, started on the application of the appellant, filed in Court on 26th February 1929, and which application

came to be dismissed on 9th October 1931.

This position is taken up in spite of the fact that the previous application for adjudication was rejected. It is not possible to accept the contention of the appellant in this behalf; and we are clearly of opinion that the proceeding now pending before the learned District Judge was a fresh proceeding, started on the application of the appellant filed on 25th November 1931, and it could not be treated to be one in continuation of the proceeding which came to an end by the dismissal of the application for an order of adjudication made on 26th February 1928. The assets to which the order of the District Judge passed on 28th January 1932 relates were undoubtedly assets realized in the course of an execution by sale before the date of the said application. We are not further prepared to introduce complication in the matter of dealing with a simple question involved in the case before us, by adverting to the attitude of the creditor No. 1 who opposed the application of the appellant praying for withholding the money by the insolvency Court. We are further of opinion that the fact that the money was held in deposit to the credit of the insolvency Court did not improve the case of the appellant in any way, seeing that the material date was 25th November 1931 long before which the money was realized by sale in execution. The District Judge exercising jurisdiction under the Provincial Insolvency Act, by virtue of the application filed on 25th November 1931, was not under the law, competent to deal with the money in deposit, in any way other than one in which it has been dealt with by him. In the above view of the case, the appeal fails and it is dismissed. The order of the Court below is affirmed. The respondents are entitled to their costs in this appeal. The hearing fee is assessed at five gold mohurs. The Rule issued by this Court in connexion with this appeal stands discharged.

Bartley, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 653

RANKIN, C. J. AND MUKERJI, J.

Kinu Gazi and others—Appellants.

v.

Kiranbala Debi and others—Respondents.

Letters Patent Appeals Nos. 21 to 24 of 1932, Decided on 3rd March 1933, against judgment of Jack, J., D/- 23rd June 1932.

(a) Bengal Tenancy Act (1885), S. 46—Suit by landlord under S. 46 is suit for ejectment and not suit to settle fair rent—Acquisition by tenant of occupancy rights subsequent to institution of suit does not take away landlord's right to a decree for ejectment if tenant does not agree to pay rent settled by Court.

A suit by the landlord under S. 46 is an ejectment suit at the date of its institution and not a suit to settle a fair and equitable rent to be followed by proceedings equivalent to a new ejectment suit in case the tenant refuses to agree to pay the fair and equitable rent settled by the Court. By the subsequent acquisition of occupancy right prior to decree, suit does not become infructuous. Notwithstanding the acquisition of occupancy right subsequent to the institution of the suit the tenant who refuses to agree to pay the rent settled by the Court is still subject to the landlord's right which he had at the date of the institution of the suit, namely right to a decree for ejectment. [P 656 C 1]

(b) Bengal Tenancy Act (as amended by Act 1 of 1925), S. 20—S. 20 is not retrospective.

Per Jack, J.—S. 20 as amended by Act 1 of 1925 is not retrospective in operation. [P 653 C 2]

Hiralal Chakraborty—for Appellants.

Gunada Charan Sen and Parkash Chandra Mazumdar—for Respondents.

Jack, J.—These appeals have arisen out of suits under S. 46, Ben. Ten. Act, for determination of fair and equitable rent and for ejectment if the defendants do not agree to pay the rent so determined. In the trial Court the suits were dismissed as it was held that the defendants being occupancy raiyats, S. 46, Ben. Ten. Act, could not be applied. In the Court of appeal below the appeals have been decreed and it was held that the defendants were non-occupancy raiyats and the suits were remanded for a fresh trial on the footing that the defendants were non-occupancy raiyats. The lands in dispute appertain to Sundarban lots which were gradually reclaimed; it has been found that the area in which the lands lie was declared a "village" on 14th February 1912. The defendants accordingly became occupancy raiyats since they occupied lands in a village continuously for 12 years from

that date. The suits were instituted in January and February 1924. By Act 1 of 1925 there was an amendment of S. 20, Ben. Ten. Act, by insertion of sub-S. (1-a) which runs as follows:

"A person shall be deemed for the purpose of this section to have continuously held land in a village notwithstanding that such village was defined, surveyed or recorded as, or declared to constitute, a village at a date subsequent to the commencement of the said period of 12 years."

The trial Court held that this amendment had a retrospective effect and that therefore as regards two of the suits the raiyats had acquired occupancy rights before the institution of suits. As regards the other suits the Court found that occupancy rights were acquired during the pendency of the suits and therefore the Munsif held that in all these cases the raiyats could not be ejected. The appellate Court decreed the suits on the ground that (1) the position must be taken as at the time of the institution of the suits and what occurred subsequently cannot affect the position of parties with regard to each other, and (2) Act 1 of 1925 could have no retrospective effect. In this I think he was right. There is nothing in the Act to indicate that it is to have such effect as regards the rights of the parties and unless there is anything to show that its provisions are retrospective, they cannot be taken to have such effect.

Then as regards acquisition of occupancy rights subsequent to the institution of the suits, the learned Munsif has referred to various cases which are apparently exceptions to the rule that a decision is to be based on the cause of action as it existed at the time of the suit, and no doubt in the cases he referred to, for special reasons, subsequent events have been allowed to affect the decision of the Court. He finds that the original relief asked for by plaintiffs has by reason of acquisition of occupancy right by the defendants become impossible for the Court to grant. The cases have been referred to at a considerable length and it is not necessary to refer to them again, and it is sufficient to say that in all these cases there are special reasons for holding that subsequent events should be allowed to influence the decision of the Court. But in the present case there is no reason to suppose that, as the learned Munsif thinks, in order to do complete justice between

the parties and to shorten litigation, the decision of the Court must be based on the altered circumstances. Acquisition of occupancy right by tenant after 12 years is very similar to the acquisition of right by adverse possession by holding the land for a certain period adversely; and in that case a decree can be passed against a defendant though his period of adverse possession is completed during the suit. This is exactly a similar case. Here the period of 12 years required for acquisition of occupancy rights was not complete before the institution of the suits but became so during the pendency of the suits. It would be unreasonable that the suits should be barred as against the defendants simply because subsequent to the institution of the suits they have acquired occupancy rights, perhaps owing to delay in disposal of the suits. The appellate Court is quite right in these circumstances in setting aside the order of the trial Court. A reference has been made on behalf of the appellant to Cl. 7, S. 46, Ben. Ten. Act, under which the tenant is not liable to ejectment, if he has acquired a right of occupancy before the expiry of the period of 5 years for which a fair and equitable rent has been fixed. This does not help the appellant but may indicate that if the acquisition of a right of occupancy before a fair and equitable rent was fixed nullified the proceedings, this would have been noted in the section. The result is that these appeals are dismissed with costs.

(On Letters Patent appeals their Lordships delivered the following judgments).

Rankin, C. J.—We have before us four Letters Patent appeals from the decision of my learned brother Jack, J., sitting in second appeal. The suits out of which these appeals arise were brought under S. 46, Ben. Ten. Act, which deals on its face with suits for ejectment on the ground of refusal to agree to enhancement of rent. The particular history of the land in question need not detain us because the position with which we have to deal and which is admitted on both sides appears to be this: In all the cases the suits were brought in 1924. The judgment of the trial Court was given on 4th February 1929. An appeal being taken the lower appellate Court gave judgment on 9th November 1929.

The Munsif dismissed the suits and on the following ground, namely that at some period between the institution of the suits in January and February 1924 and the date of his judgment in February 1929, the defendants had become occupancy raiyats. They had acquired occupancy right subsequent to the institution of the suit. Now, before us it has been contended that if occupancy right is acquired before the decree in the suit in the Court of first instance, the proper course is for the suit to be dismissed. It is said that it is impossible and wrong to grant a decree of the character described in S. 46 against a person who at the time of the decree is an occupancy raiyat. The contention, on the other hand, is that if on the date of the suit the landlord is entitled to bring a suit for ejectment, nothing that can happen in the way of the acquisition of occupancy right should be entertained by the Court or acted upon by the Court and no answer to the right of ejectment can accrue to the defendant after the institution of the suit and before it is decreed. The matter was at one stage complicated by the circumstance that a question arose as to whether retrospective effect could be given to Bengal Act 1 of 1925 which came into force on 14th March 1925. No argument on that point has however been addressed to us in this case.

The contention on behalf of the appellant is that although it is quite true as a general rule that a circumstance arising after the institution of the suit will not be looked at by the Court or regarded as affording a defence or as taking away the right which the plaintiff had at the date of the institution of the suit, nevertheless that principle is subject to certain exceptions. In the case of pre-emption suit, for example, the plaintiff has to be in a position to pre-empt at the time of the decree. In the case of specific performance, the plaintiff has to be ready and willing to carry out his part of the contract right up to the time of the decree. It is said that there is no absolute or rigid rule that matters arising after the institution of the suit and before decree cannot be regarded by the Court at the time of the making of the decree. Now, for the purpose of deciding the question before us it is necessary to examine carefully the pro-

visions of S. 44 and 46, Ben. Tep. Act, so as to be certain that one has an accurate appreciation of what the cause of action is. If any argument from convenience is in point, it may be noticed that the present case affords a very strong illustration of the inconvenience that may, in some cases, attach to the view of the appellants being accepted. In this case it appears that though the suits were filed in 1924, the first thing that happened was that the suits were stayed till the final publication of the Record of Rights, the fact being that cadastral survey operations were in progress and it being pleaded that S. 111, Ben. Ten. Act. was a bar to the trial of the suits. This is the circumstance which accounts for the five years between the institution of the suits in 1924 and the judgment of the trial Court in February 1929.

Leaving aside however the mere question of convenience, we may look at the matter more closely upon the face of the section. Ss. 46 and 44 are not expressed absolutely in the same way, the language of S. 44 being more favourable to the appellant and the language of S. 46 being, in my judgment, more favourable to the respondent. S. 46 however is the section which deals substantively with the suits before us. They are suits under S. 46 and one sees from sub-S. (1) of that section and also sub-S. (6) that in certain circumstances the landlord is entitled to institute a suit for ejectment. If he tenders to the raiyat an agreement to pay enhanced rent the raiyat has a month after the service of the draft agreement upon him to execute it and give notice of his agreement. If he does not agree the landlord has a limited time, namely three months, within which he may institute a suit of the character dealt with in the section. It is a suit, curiously enough, for ejectment on the ground of refusal to agree to an enhancement of rent. It occurs to one that the landlord's proposed enhancement may be arbitrary and unfair and that it is perhaps somewhat curious that the mere refusal to agree to whatever agreement the landlord shall tender should be treated by the statute as a ground for a suit in ejectment. That however is the undoubted language of sub S. (1) and of sub-S. (6). It is contemplated that the landlord shall bring a suit for ejectment.

It is however true that apart from the exact language of S. 46 the law does not allow a non-occupancy raiyat to be ejected merely because he does not comply with his landlord's demand for enhancement of rent. The section provides that though the landlord's suit is a suit for ejectment the Court shall first fix a fair and equitable rent, that the tenant shall be given an opportunity to agree to pay that fair and equitable, and only in case he does not agree shall he be evicted; if he does agree he shall remain in occupation of his holding at the new rent for a term of five years. He shall be liable to ejectment *prima facie* at the end of the five years. S. 44 which is a section dealing with all the grounds upon which a non-occupancy raiyat is subject to ejectment, mentions in Cl. (d) as the last ground :

"On the ground that he has refused to agree to pay a fair and equitable rent determined under S. 46 * * *"

We have therefore to consider in the present case whether we are to treat the landlord at the time of filing the suit as a person who is given by the law a right to bring a suit for ejectment; and the provisions for settling a fair and equitable rent and for giving the tenant an opportunity to agree to pay as provisions modifying the right which existed in the landlord at the date of the institution of the suit; or whether on the other hand we are to put aside all technicalities and hold that the landlord's right at the date of the suit is not a right to ejectment, but only a right given to have the Court fix a fair and equitable rent, and to have the tenant put to his option whether he will agree to pay that rent or be evicted. There is much to be said on both sides of this controversy. But it appears to me that the language of S. 46 is inconsistent with the view that the landlord has not got the right to eject at the time the suit is brought. I think, on the whole, though the question is a difficult one that the provisions, whereby a fair and equitable rent is to be settled and the tenant is to be allowed to come to an agreement to pay, should be regarded as modifications of the right which the landlord had at the date he brought his suit. They are defences to the tenant. The landlord's right is not to be exercised until the tenant has had a chance to make such an agreement as

will prevent the Court in its discretion from permitting the landlord, merely on the ground of refusal to agree to his proposal, to have the tenant evicted from the land. The phrase "cause of action" is very difficult to apply in connexion with a suit of this character. Ordinarily, cause of action means every allegation which it is necessary to make in order to show that the plaintiff is entitled to the relief claimed. In this case it is clear enough that the plaintiff will never get relief by the way of an order for ejectment merely on the ground that the tenant has refused to agree to the plaintiff's proposals. But it is on that footing that the plaintiff has a right to bring a suit and the circumstance that the Court will refuse to allow ejectment so long as the tenant is willing to pay a fair and equitable rent and will give the tenant five years but no more is I think statutory defence to the prima facie cause of action upon which the plaintiff takes his stand. I think therefore that this suit must be regarded as an ejectment suit at the date of its institution and not as a suit to settle a fair and equitable rent to be followed by proceedings equivalent to a new ejectment suit in case the tenant refuses to agree to pay the fair and equitable rent settled by the Court. That being so, I am not prepared to accept the view that the acquisition of occupancy right prior to decree means that the suit becomes infructuous and must be dismissed.

It is necessary to refer to the language of sub-S. (7), S. 46. That does not deal with the case of acquisition of occupancy right prior to the decree but deals with occupancy right prior to the expiry of the five years further tenancy that ensues when the tenant agrees to pay a settled rent. I do not think that any argument the other way can be founded upon this clause. I do not regard it as justifying the conclusion that if prior to the decree occupancy right is acquired the suits come to an end. I think the better view is that notwithstanding the acquisition of occupancy right subsequent to the institution of the suit the tenant who refuses to agree to pay the rent settled by the Court is still subject to the landlord's right which he had at the date of the institution of the suit, namely is subject to a decree for ejectment. The matter is a difficult one.

But in my judgment the conclusion at which the learned Judge in second appeal arrived is, in the end, correct and these appeals should be dismissed with costs.

Mukerji, J.—I agree.

R.K.

Appeals dismissed.

A. I. R. 1933 Calcutta 656

JACK AND M. C. GHOSE, JJ.

Golap Ali and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 136 of 1932, Decided on 31st August 1932.

Criminal P. C. (1898), S. 297 — Defence not urged by defence pleader—Still it should be placed before jury if there is evidence.

The fact that the pleader for the accused does not urge any particular defence, is no reason why that defence should not go to the jury in the summing up by the Judge, if there is any evidence whatever in support of the defence.

[P 657 C 1]

Bijali Bhushan Sanyal—for Appellants.

Anil Chandra Roy Choudhury—for Crown.

Jack, J.—Of the nine appellants in this appeal, Keamaddi has been found guilty under S. 148, I. P. C., and sentenced to three years' rigorous imprisonment and also under S. 304 (part 2) and sentenced to seven years' rigorous imprisonment, the sentences to run concurrently; Mohan and Manik Sheikh were each sentenced to three years' rigorous imprisonment under S. 148, I. P. C., and to six years under S. 304, (part 2) 149, I. P. C., the sentences to run concurrently. Manik was further convicted under S. 324, I. P. C. The other appellants Golapdi, Bonomali, Hasenuddi, Gadu, Anasaraddi and Ahmad Ali were convicted under S. 147 and sentenced to two years' rigorous imprisonment; they were also convicted under S. 304 (part 2)/149 and sentenced to five years' rigorous imprisonment, the sentences to run concurrently. The verdict of the jury with which the learned Judge agreed was unanimous.

The prosecution case is that the complainant Kubi Matbar and his nephews Hamid and Imanaddi (deceased) went with their ploughs to plough Hamijaddi's khet which lies to the south of the khet of the appellant Golapdi. There had been ill-feeling between the two parties on various grounds amongst

others on account of a dispute over the 'ail' between Hamijuddi's khet and Golapdi's khet to the north. The prosecution allege that at the time of the occurrence the appellants and others came armed with kattras, shorkis and lathis and attacked the complainant and those who were with them while they were ploughing Hamijuddi's khet. Golapdi and his two sons Kuti Mea and Bonomali came first to the field. Kuti had a katra in his hand and Golapdi and Bonomali each had a lathi. Shortly afterwards some more men numbering about 20 arrived there. Of these men Manik had a san dao in his hand and Mobarak (who is not on trial) and Mohan each had a katra and the rest had lathis. Seeing the armed men coming the complainant Kuti Matbar and Hamid started running away towards the west and began to shout. Imanaddi was not quick in getting away, and was surrounded and assaulted by Golapdi's order to beat him. Ansaraddi gave him a lathi blow which Imanaddi warded off with his left hand, but afterwards Kuti Mea stabbed Imanaddi with a katra piercing the right side of his abdomen while Manik struck him on his left shoulder with a san dao. Imanaddi fell down and died immediately. Then there was a cry of murder and the accused's party went away to the north. Subsequently, the accused were arrested and put on their trial on the charges with which they have been convicted.

The principal point urged in this appeal is that the learned Judge misdirected the jury inasmuch as he told them that as no right of private defence of property is claimed on behalf of the accused the jury need not consider if such a right existed at all. He also said:

"I think in the circumstances appearing in the evidence right of private defence of property could not be claimed in the case and the defence pleader has rightly disclaimed it on behalf of the accused."

Previous to that he had said:

"The question in this case therefore is whether the fatal stab on Imanaddi's abdomen was given in the exercise of the right of private defence of his body or the bodies of Golapdi and Bonomali or that of the property the ail of which is alleged on the defence side to have been demolished and upon which some mischief was done in the shape of destroying a few til plants. Now, the learned pleader for the accused in course of his arguments contended that the act complained of was done in the exercise of the right of private defence of the bodies of Golapdi

and his two sons and not in retaliation of any such demolition of ail or mischief to the til khet."

The learned advocate for the defence has argued strenuously that whatever the evidence was, if there was any evidence at all tending to show that the appellants were acting in exercise of the right of private defence of their property, this evidence, whatever it was, ought to have been pointed out to the jury and in telling the jury that they were not to consider the right of private defence of property, the learned Judge misdirected them. Various portions of the evidence were pointed out to us as going to show that the appellants were acting in the exercise of the right of private defence of property. We have considered these portions of the evidence; we are inclined to agree with the learned Judge that they do not show that at the time of the occurrence the appellants were in fact acting in exercise of the right of private defence of their property. It is true that in his statement one of the appellants, viz. Golapdi, says that the complainant and his party were breaking the ail and that it was upon this that he and his son went to the ail and asked them why they broke the ail and uprooted the til. Then they abused him whereupon 8 or 10 persons came with lathis and surrounded him and began to beat him. This may indicate that at the time he went up they were actually engaged in breaking the ail. But when we consider the evidence we find that there is no evidence either appearing from the cross-examination of the prosecution witnesses or from the statement of the defence witnesses to show that any damage was being done to the ail when the accused came up. The defence witness 3, Dhaliluddi says that he saw five men, viz. Imanuddi, Hamijuddi, Kuti Matbar, Mominuddi and Sonamuddi who were ploughing Hamijuddi's khet with five ploughs. Then he saw Golap Ali and his son Kuti Mea came there and Golap Ali addressing Imanuddi said: "Why do you demolish my ail." The ail which existed between Golap Ali's khet and Hamijuddi's khet had been demolished at places by Imanuddi and others on the same day. Imanuddi was at that time was holding the plough on the south side of that ail."

The land to the south of the ail belonged to the complainant and his party and the fact that they protested

that the ail had been broken on the same day does not indicate that it was broken at the time of the occurrence; they were protesting because of the damage done on the morning of that day previous to the occurrence. Some of the other witnesses say that this damage had been done some weeks before. Other witnesses again say while a small portion of the damages had been done before, at the time of the occurrence they noticed that further damage to the extent of 50 cubits had been done apparently in the morning previous to the occurrence. So that although the learned Judge was ill advised in directing the jury that they were not to consider the right of private defence of property it is clear that in fact there was (although appellant 1, Golapdi, and two of the other appellants in their statements claimed the right of private defence of property), no evidence showing that they were at the time of the occurrence acting in exercise of the right of private defence of property. So that inasmuch as there is no evidence in support of the statement of the appellants on this point, even if the direction of the learned Judge can be said to be misdirection, we do not think that it is sufficiently material to justify us in sending back the case for retrial. The learned advocate for the appellants has rightly contended that the fact that the learned pleader for the accused does not urge any particular defence, is no reason why that defence should not go to the jury in the summing up by the Judge if there is any evidence whatever in support of the defence.

We think that on the evidence there can be no doubt that the appellants and others came out with weapons expressly for the purpose of attacking the complainant's party and not for the purpose of preventing any continuation of or any additional damage to the ail. The damage to the ail had taken place before this and at the time of the occurrence no damage was being done to the ail and the attack was really made on account of previous ill-feeling between the parties. It is true that three of the accused received a number of slight injuries, but the evidence does not indicate that the complainant's party were in any sense the aggressors and the evidence seems clearly to indicate that

the appellants were the aggressors and they were determined beforehand to attack the complainant's party. The common object in this case was, as stated in the charge, to attack the complainant's party. We think therefore that the appellants have been rightly convicted. (His Lordship then considered the question of sentence and reduced the sentences of some accused).

M. C. Ghose, J.—I agree.

R K.

Sentences reduced.

A. I. R. 1933 Calcutta 658

BUCKLAND, J.

Satyakel Dutt—Plaintiff.

v.

Romesh Chunder Sen—Defendant.

Civil Suit No. 2078 of 1931, Decided on 24th November 1932.

Limitation Act (1908), S. 19—Acknowledgment of time-barred debt— Implied promise inferred from such acknowledgment is not cause of action for suit unless there is express promise to pay debt — Contract Act (1872), S. 25 (3).

An acknowledgment in writing signed by a debtor provides a fresh period of limitation only if it is made before the period expires. After the period expires nothing short of a fresh contract will revive the debt and provide a fresh period of limitation. If there is an express promise to pay made in writing and signed by the person to be charged therewith to pay a time barred debt it may be made the basis of a suit but an implied promise to pay to be inferred from an acknowledgment which contains no express promise to pay a time-barred debt cannot be made the basis of a suit.

After the promissory note had become time barred defendant wrote to the plaintiff a letter in the following terms : " . . . I have been expecting you for some time. I am quite willing to renew the note : come and see me with it either tomorrow evening or on Monday : "

Held : that there was no contract to pay within the meaning of S. 25 (8). *Case law reviewed.*

[P 659 C 2]

L. P. E. Pugh and S. N. Banerji (Jr.)—for Plaintiff.

H. D. Bose, A. N. Chowdhury and S. R. Das—for Defendant.

Judgment.— This is a suit to recover the sum of Rs. 6,895 for principal and interest upon a time-barred promissory note. On 22nd June 1927 the plaintiff lent Rs. 5,000 to the defendant who by his promissory note in the usual form promised to pay that sum with interest at 9 per cent per annum to one S. C. Dutt, the plaintiff's brother, who endorsed the note over to the plaintiff. On 10th January 1931 after the promissory note

had become time-barred defendant wrote to the plaintiff a letter in the following terms :

"My dear Kalu,

I have been expecting you for some time. I am quite willing to renew the note come and see me with it either tomorrow evening or on Monday, I phone me beforehand.

Yours sincerely,
(Sd). R. C. Sen."

The only question that arises in this case is whether the suit is barred by limitation. To determine this it has to be considered not whether this letter is an acknowledgment in writing within the meaning of S. 19, Limitation Act, for such an acknowledgment must be made before the expiration of the period of time prescribed for a suit but whether as has been submitted on behalf of the plaintiff there was a promise to pay the debt made without consideration but nevertheless valid, by virtue of S. 25, sub-S. (3), Contract Act. By that section it is provided that an agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. Mr. Pugh on behalf of the plaintiff has drawn my attention to *Spencer v. Hemmerde* (1) where the English law on the subject of acknowledgments sufficient to take a case out of the statute of limitations was discussed at length. For reasons which will appear it suffices to say with the utmost brevity that the rule applied in that case is :

"if there is an acknowledgment in writing which satisfies the Act (9 Geo. 4, C. 14) there arises by implication of law a promise by the debtor to pay the debt (Per Lord Wrenbury at p. 537)."

Such acknowledgment may be made either before or after the debt has become time-barred and consequently though it may be that the authority cited would be of assistance in considering the sufficiency of an acknowledgment under S. 19, different considerations arise in determining whether or not there was a promise within the meaning of S. 25 (3), Contract Act. I have been referred to the decisions of other Indian High Courts for the purpose of establishing the proposition that no such promise may be inferred from a mere acknowledgment a point on which I am informed there is

no reported decision by this Court. In *Ganga Prasad v. Ram Dayal* (2) the learned Judges observed with reference to cases cited in their judgment :

"Thus it seems that there is a consensus of opinion that a mere acknowledgment does not amount to a new contract. In all these cases the question for decision is really one of limitation, but if an acknowledgment does not amount to a new contract for the purpose of giving a fresh period of limitation it does not amount to a contract which can be sued upon. No doubt, as pointed out in the *Bombay case* in England an acknowledgment, if unconditional, is held to be sufficient evidence of a new contract which can be sued upon but there no difficulty arises with reference to the law of limitation because an unconditional acknowledgment takes the case out of the statute of limitation whether it is made before or after the period of limitation expires. In India it is otherwise. An acknowledgment in writing signed by a debtor provides a fresh period of limitation only if it is made before the period of limitation expires. After the period expires nothing short of a fresh contract will revive the debt and provide a fresh period of limitation."

In *Gobind Das v. Sarju Das* (3) the learned Judges referring to an expression in a judgment of their Lordships of the Privy Council observed :

"If we were to give to this passage the wide meaning contended for and hold that whenever there is a clear acknowledgment of a debt whether time-barred or not that is equivalent to a promise upon which a suit may be maintained the result would be that the effect of the opening words of S. 19 would be nullified. That section renders it necessary that the acknowledgment referred to therein must be made before the expiration of the period prescribed for the suit. . . Under S. 25, sub-S. 3, Contract Act, a promise made in writing and signed by a person to be charged therewith to pay a barred debt is a good consideration ; but there must be a distinct promise and not a mere acknowledgment."

The only other case cited upon the point is *Manganlal Harjibhai v. Amirchand Gulabji* (4), where Patkar, J., observed :

"If there is an express promise to pay made in writing and signed by the person to be charged therewith to pay a time-barred debt it may be made the basis of a suit but we think that an implied promise to pay to be inferred from an acknowledgment which contains no express promise to pay a time barred debt cannot be made the basis of a suit."

If that passage correctly expresses the law in this country application of the principles of English law is excluded. In considering the question independently of the authorities I must confess to difficulty in appreciating, why, if a promise to pay may be inferred from an ac-

2. (1901) 23 All 502=(1901) A W N 150.

3. (1908) 30 All 268=5 A L J 274=(1908) A W N 139.

4. AIR 1928 Bom 319=112 I C 24=52 Bom 521.

1. (1922) 2 A C 507=91 L J K B 941=128 L T 33=88 T L R 689=66 S J 692.

knowledge according to the principles of England law, a promise sufficient to satisfy S. 25 (3), which does not in terms state that the promise should be express may not equally well be inferred from an acknowledgment. In cases of acknowledgments under 9 Geo. 4, C. 14 and S. 19, Limitation Act, and under S. 25 (3) a writing signed by the debtor is an essential requirement and furnishes no ground for making a distinction. I agree however that to adopt such a rule would be to ignore the opening words of S. 19 and would apart from the terms of Expl. 1 to S. 19 bring all cases within the scope of S. 25 (3) which cannot have been the intention of the legislature. The point is one of very great interest and had it not been for the decisions of the other High Courts I should have been disposed to take the view as stated by Sir Frederick Pollock in his well-known work (Indian Contract Act, Edn. 5, p. 197) that S. 25 (3) reproduces modern English law and that the English rule should be applied. But sitting singly as a Judge of first instance though I am not bound by such decisions I should not feel justified in preferring such a view to one which is so amply supported by authority.

There is a further point to be considered. The section requires that there should be a promise to pay the debt made by the person to be charged. If such a promise cannot be inferred from an acknowledgment the precise effect of the language used becomes important and the question arises whether the letter of 10th January 1931 expresses a promise on the part of the defendant to pay the debt. The words relied upon are the words: "I am quite willing to renew the note." I will assume that the words: "I am quite willing" are words of promise. But what does he then say? He promises to execute another document which will give the plaintiff the right to claim payment by him. This in my judgment cannot be held to be a promise to pay the debt which is what the section requires and therefore there was no contract within the meaning of S. 25 and the suit must fail and will be dismissed with costs on Scale No. 2.

K.S.

*Suit dismissed.***A. I. R. 1933 Calcutta 660**

BUCKLAND, J.

Dhirendra Nath Mukherjee—Plaintiff.

v.

Nutbehary Munshi and others—Defendants.

Suit No. 783 of 1932, Decided on 8th December 1932.

Negotiable Instruments Act (1882), S. 28
—Executant describing himself as agent—
Words are only descriptive—He must sign
for or on behalf of his principal if he is act-
ing as an agent—Principal and agent.

Where a person purports to be an agent or to hold a power-of-attorney from some other person on whose behalf he signs, it is insufficient merely to add those words after his signature; he should state that he signs the note for and on behalf of the person for whom he is acting. Where that has not been done, the words are only descriptive of the executant: *A I R 1918 P C 146 and Elliott v. Bar-Ironside, (1925) 2 K B 301, Rel on.* [P 661 C 2]

S. B. Sinha—for Plaintiff.*Arun Sen*—for Defendants.

Judgment.—The point to be decided in this is one which is by no means complex but generally presents a certain amount of difficulty. On 19th April 1929 the defendant Nutbehary Munshi delivered to his co-defendant Banerjee a promissory note for Rs. 3,000 in the usual form signed "N. Munshi, agent and attorney to Dr. O. L. Munshi." On 11th January 1932 the note was endorsed over by the payee to the plaintiff who now seeks to recover the amount due upon the note from the defendant N. B. Munshi, the heirs and legal representatives of Dr. O. L. Munshi who died on 1st November 1930, and from the endorser Nitya Ranjan Banerjee. As against the parties who have not appeared the necessary proof has been given. The suit is contested on behalf of the heirs and legal representatives of Dr. O. L. Munshi on the ground that his estate is not bound by a signature in this form. It is submitted in order to make the estate of Dr. Munshi liable that N. B. Munshi signed as agent and not intending to incur personal responsibility. This is not consistent with the case made in the plaint as Nutbehary Munshi and the legal representatives of Dr. Munshi are both made parties, and they cannot all be liable and in this connexion I may observe that N. B. Munshi has not defended the suit. On behalf of the legal representatives of Dr. O. L. Munshi it

is contended that the liability is that of N. B. Munshi alone. The authorities cited by learned counsel for the plaintiff for the purpose of distinguishing them are against him. He has cited *Sadusuk Jankidas v. Kishan Pershad* (1) which was a case in which one Mohanlal signed a promissory note, his name being followed by the words:

"Acting Superintendent of the Private Treasury of His Excellency Sri Maharaja, the Prime Minister of H. E. The Nizam."

It is true that he did not use the word "agent" but whether he used the word "agent" or "superintendent" does not affect the matter. Their Lordships of the Privy Council took the view that the words which I have quoted are nothing but a description of Mohanlal's position and that there was no signature in the form necessary for an agent signing on his principal's behalf. The case of *Fillicott v. Bax-Ironside* (2) was one in which a bill of exchange was signed by two persons followed by the words "Directors, Fashion Fair Exhibition Ltd." The ratio decidendi in that case was that the word "director" was word of description only and that there was nothing to show that the signatories to the document signed for and on behalf of the company. *Universal Steam Navigation Co. Ltd. v. James McKelvie & Co.* (3), has also been referred to, and was a case of a charter party. The respondent signed as agent. Lord Shaw of Denhamline in his speech observed: "the appending of the word agent to the signature of a party to a mercantile contract is in all cases the dominating factor in the solution of the problem of principal or agent."

I do not know whether His Lordship intended thereby to make any distinction between mercantile contracts and negotiable instruments, but conceivably that may be so and I rather base myself upon the authorities in which negotiable instruments were under consideration. In *R. P. Koneti Naiker v. J. Gopala Ayyar* (4) the promissory note was in the following form:

"12th August 1907 corresponding to 28th Audi Plavanga, promissory note executed to you, both:

(1) Gopalaiyar and (2) Nagasamier, sons of

(1) A I R 1918 P C 148=50 I O 216=46 I A 33=46 Cal 668 (P C).

(2) (1925) 2 K B 301=94 L J K B 807=183 L T 624=41 T L R 681.

(3) (1923) A C 492=92 L J K B 647=199 L T 395=39 T L R 480=67 S J 593=16 Asp M C 184=23 Com Cas 853.

(4) (1915) 21 I C 417=35 Mad 482.

Soothi Seshaiyar, residing in No. 1, Police Station Lane, Madras town, by R. P. Monati Nayudu Garu, son of Nanjundappa Nayudu Garu, agent holding power of attorney from the zamindar Doral Raja Avargal and residing in Vellikurichi village, Mana madura taluk, Madura District. Amount due to you including principal and interest up to date upon settlement of account of dealings which was standing against the name of Rani Chakkani Ammal on cloths, etc., having been purchased ere this for the Vellikurichi palace, is Rs. 694-6-0. On demand I promise to you this sum of rupees six hundred and ninety four and annas six with interest at Rs. 5-8-0 per cent per mensem from this date either to you or order and shall take this back with endorsement of payment thereon.

(Signed) P. B. Konathi Nayudu."

The learned Judges held that there was no indication on the note that the maker signed as agent or that he did not intend to incur personal responsibility and looking at the signature alone that is the case. They continued:

"He is described as holding a power-of-attorney from the zamindar. It is not stated that the power of attorney included a power to sign promissory notes, or that the note was signed in pursuance of the power. There are no words added to the signature indicating that the maker signed in the capacity of agent."

It has been suggested that the judgment implies that the words "agent holding a power-of-attorney" added to the signature would have sufficed. But having regard to the authorities it appears to me that when a person purports to be an agent or to hold a power-of-attorney from some other person on whose behalf he signs it is insufficient merely to add those words after his signature; words such as we find in the promissory note in suit; and he should state such that he signs the note for and on behalf of the person for whom he is acting. Where that has not been done the view adopted is that the words are only descriptive of the executant and that in my judgment is the correct view to take of this promissory note. The suit must be dismissed with costs as against the legal representatives of Dr. Munshi. There will be judgment for the amount claimed with costs and interest on judgment at 6 per cent against the defendants N. B. Munshi and Nitya Ranjan Bannerjee.

R.K.

Order accordingly.

A. I. R. 1933 Calcutta 662

MITTER AND M. C. GHOSE, JJ.

Krishna Mohan Kundu—Appellant.

v.

Nripendra Nath Nandi and others—Respondents.

Appeal No. 227 of 1930, Decided on 15th February 1933, against original order of Second Court Sub-Judge, 24-Parganas, D/- 22nd March 1930.

(a) Civil P. C. (1908), O. 21, R. 66—Two properties amalgamated into one property—Property not described as one lot but as two properties—Boundaries of both properties given—Misdescription is not material irregularity.

Where two properties, which have been amalgamated into one premises, are stated in the sale proclamation not as one lot but as two premises, such a misdescription is not a material irregularity when no one has been misled if the boundaries of two lots are given in the sale proclamation. [P 668 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Advertisement in newspaper—One property fully described and for description of others reference to sale proclamation given—Bidders not misled—Irregularity does not vitiate sale.

Where an advertisement for sale in a local newspaper gives a full description of only one lot and for the other lots it states that the particulars of those lots would be found in the original sale proclamation as usual with the newspaper, and this irregularity has not misled any bidder nor has it prevented any intending bidder from bidding at the sale, the sale is not vitiated by such irregularity. [P 668 C 1]

(c) Civil P. C. (1908), O. 21, R. 90—Omission to determine value is gross irregularity but sale will not be set aside unless substantial injury is caused.

No doubt the omission by the Judge to investigate and determine the value of the property sought to be sold is a gross irregularity, but the sale will not be set aside unless it is established that as a result of such irregularity, substantial injury has been caused: *AIR 1933 Cal 611, Rel on*. [P 668 C 2]

(d) Civil P. C. (1908), O. 21, R. 69—Hour of sale not specified—Irregularity does not vitiate sale unless inadequacy of price is the result.

No doubt a non-specification of the hour would have a material effect in deterring intending bidders from attending the sale and that it is of the utmost importance that the hour of sale should be stated, still in the absence of any evidence from which it can be legitimately inferred that the inadequacy of price was the result of this irregularity, the sale will not be set aside. [P 669 C 2]

(e) Civil P. C. (1908), O. 21, R. 90—In determining adequacy of price considerations, are whether property is undivided share, whether claims are set up and the fact that Court sales always fetch less.

The value of a property, determined on the basis of the annual income minus deductions for repairs and for taxes, instead of the muni-

cipal valuation is not improper. Whether the price fetched is inadequate, should be determined after considering: (1) that Court sales always fetch less than the actual price; (2) that whether the property is an undivided share and (3) that claims are set up by others, and want of tenants for some considerable time and paucity of customers for properties of such size.

[P 664 C 2; P 665 C 1]

(f) Civil P. C. (1908), O. 21, R. 90—Refusal by judgment-debtor to take back property at sale price is test of adequacy of price.

Per *M. C. Ghose, J.*—Refusal by the judgment-debtors to take back the property sold at the sale price would be a consideration for determining that the sale price was not inadequate.

[P 665 C 1]

Narendra Chandra Bose and Profulla Chandra Chakravarty—for Appellant.

Gour Mohan Dutt—for Respondents.

Mitter, J.—This is an appeal against an order of the Subordinate Judge of 24-Parganas dated 22nd March 1930 by which he refused to set aside a sale held in execution of a mortgage decree. The appeal is on behalf of Krishna Mohan Kundu who is one of the several judgment-debtors in the case. It appears that the respondents who will be described as the Nandys in this proceeding obtained a mortgage decree for a sum of about Rs. 88,800 against the appellant and several other persons on 26th March 1929. The Nandys applied to execute the said decree on 15th April 1929 and in execution of the said decree purchased some of the mortgaged properties on 23rd August 1929 for the sum of Rs. 69,000. On 19th September Krishna Mohan who is judgment-debtor 3 applied to set aside the sale held on 23rd August 1929. The properties were sold in four lots, i. e., lots Nos. 1, 2, 3 and 4 on 21st and 22nd August for Rs. 69,000 and the decree-holder purchased all the properties. The petition to set aside the sale complained of several irregularities: (1) misdescription of the properties; (2) irregularities in the advertisement in the vernacular local paper; (3) objection to the settlement of the terms of the sale proclamation under O. 21, R. 66, Civil P. C., was not determined before the sale; (4) the hour of holding the sale on 21st August was not stated as is required by the provisions of O. 21, R. 69, Civil P. C.; (5) and there was inadequacy of price as a result of these irregularities. All these objections were overruled by the Subordinate Judge who dismissed the application of the appellant and confirmed the sale.

Against this order confirming the sale the present appeal has been brought and the same objections to the legality of the sale which were pressed before the lower Court have been repeated before us by Mr. Bose who has appeared for the appellant. I will deal with the objections in the order in which they were discussed before us. With regard to the irregularity about the misdescription of the properties it is said that lots Nos. 1 and 2 were amalgamated into one premises No. 6, Bhowanipur Road. This was not stated in the sale proclamation, but two premises No. 6, Bhowanipur Road and No. 14, Goaltuli Road were shown separately. In answer to this contention it is said on behalf of the respondent that the properties were described in two lots as the mortgage decree directed the sale of these two lots and that no one could have been misled as the boundaries of two lots were given in the sale proclamation. I think there is considerable force in the contention of the respondent and I do not regard this irregularity as a material one.

With regard to the second irregularity it is said that no full particulars were given in Bhowanipur Bartabaha, a local newspaper, and what was done was that a description of only one lot was given and for the other lots, Nos. 2 to 5, it was stated that the particulars of those lots would be found in the original sale proclamation. It is pointed out by the Subordinate Judge that it is usual for the Bartabaha to publish the first property in all its details and refer for the description of the rest to the sale proclamation. I do not think that this irregularity has misled any bidder or has prevented any intending bidder from bidding at the sale.

Next objection is that there has been a material irregularity inasmuch as the Court did not settle the price of the property before the sale. The Subordinate Judge did not investigate into the value of the property as the sale was fixed for 14th August and he considered that the objection to valuation filed on 9th July 1929 could not be entertained. The Subordinate Judge passed a somewhat curious order on 26th July 1929. He said that if on the sale day bidders did not turn up by reason of the alleged wrong valuation of the properties he would consider if there was any reason for fresh

sale proclamation. It is in accordance with the general trend of authorities that the Court should determine the value of the properties sought to be sold: See the case of *Ban Behari Chatterji v. Bhukhan Lal Choudhury* (1). This is a gross irregularity and there was no justification for the Subordinate Judge to proceed to sell without determining the value of the properties sought to be sold and I would have had no hesitation in setting aside the sale if I was satisfied on the question that there was substantial injury.

Next point taken is that as no hour was stated for holding the sale on the adjourned date there was material irregularity. It cannot be doubted now that a non-specification of the hour would have a material effect in deterring intending bidders from attending the sale and that it is of the utmost importance that the hour of sale should be stated: See *Bhikari Misra v. Suryya Moni* (2). But it is said on behalf of the respondents that it has not been shown that the alleged inadequacy of price at the sale was the result of this irregularity. It is pointed out that there is no suggestion that other bidders would have come if the hour had been specified. It is not even suggested in evidence that anyone was likely to be prevented or was in fact prevented from coming to bid on account of non-specification of the hour. The learned Subordinate Judge has said:

"It is beyond dream that such an omission could or did prejudice any bidder or any party interested."

There is no justification for this comment, but at the same time it is clear that there is no evidence in this case from which it can be legitimately inferred that the inadequacy of price was the result of this irregularity. On the other hand the bid sheet at p. 41 shows that there were two bidders from Ultadangi and Cossipore; one of them Jahari Lal bid up to Rs. 41,200, and the other Hari Gopal did bid up to Rs. 38,600, and they were present at the sale notwithstanding the non-specification of the hour of sale. The price fetched at the sale is not so grossly low that the necessary inference arises that the low price was the result of non-specification of the

1. AIR 1938 Cal 511 = CO Cal 581.

2. (1902) 6 C W N 48.

hour. There must be either direct evidence or evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy of price at the sale was the result of this irregularity: see *Mahabir v. Dhanuk Dhari* (3). The finding of the Subordinate Judge on the question of value has been challenged on both sides.

The appellant argues that the Court should have accepted the value given in the assessment register of the Calcutta Corporation which shows the present Municipal valuation to be Rs. 86,400 + Rs. 15,540 = Rs. 1,01,940. Mr. Dutt on behalf of the respondent has contended strenuously that the new assessment register has been got up for the purposes of this case. I am not prepared to accept this contention as no foundation was laid for it in the evidence in the Court below. The certified copy was produced in the Court below and it was accepted without objection. It is too late now to contend that the new re-valuation register should not be relied on and Mr. Dutt would ask us to proceed on the old valuation and sought to show that if the old valuation is accepted, allowing for deduction of Rs. 2,700 due to the Municipality for arrears of taxes, the value would come to about Rs. 72,186 and in this view there would be a difference of Rs. 3,000, which cannot be regarded as substantial injury. It seems to me that the Subordinate Judge has proceeded on the right basis in basing the valuation on a more practical basis. He has taken the monthly rent of all the properties sold to be Rs. 593, and has allowed a deduction of 1/7th on account of repairs, etc. and has valued the annual income of the 6/7th shares to be Rs. 4,896, and following the recent rule of the Improvement Trust he has valued the properties sold at Rs. 81,600. Mr. Dutt has sought to argue that this does not take into account the deduction of 19½% for taxes. Mr. Bose for the appellant points out that the occupiers' share of the taxes is half of the 19½% and is paid by the occupier. As no foundation was laid for this deduction on account of the taxes in the evidence I am not prepared to allow Mr. Dutt to raise this point, but taking the valuation of Rs. 81,600, as found by the Subordinate Judge one has to consider as to whether having regard to

circumstances referred to by the Subordinate Judge the sum of Rs. 69,000 can be regarded as a fair price.

These circumstances are: (1) a Court sale always brings in something less than the actual price; (2) that the purchase was of an undivided share of the properties and the purchaser must keep a margin for the possible cost of the partition; (3) the mother of the appellant had set up a will of her husband and claimed the properties as Brahmottar properties. It is true that the mother's application for probate has been dismissed, but it was at any rate pending at the time of the sale; (4) the most valuable of the properties sold No. 6, Bhowanipur Road, had been vacant for three or four years. At the first blush it appeared to me that this was an accidental circumstance which could not be relied on for the purpose of appraising the value of the properties sold, but on a due consideration I think that it is a factor which cannot altogether be neglected; (5) very big houses in Calcutta hardly find suitable buyers and No. 6, Bhowanipur Road, is a big one. It may be that if all these factors are taken into account the price may come down not exactly to Rs. 69,000, but about Rupees 74,000 or Rs 75,000. It is difficult in these circumstances to say that there has been substantial injury, due regard being had to the fact that Court sales do not always fetch the actual price. For the grounds above mentioned I am of opinion that on the whole the Subordinate Judge has come to a correct conclusion and that this appeal must be dismissed. I would however allow no cost to the respondents as in my opinion there was at least one irregularity namely, in proceeding to the sale without the settlement of price in the sale proclamation. If the Subordinate Judge had not committed this irregularity it was possible that all these protracted proceedings would not have taken place.

M. C. Ghose, J.—I agree that this appeal should be dismissed. The learned advocate for the appellant has argued that there are certain irregularities in the sale complained of and in consequence the properties had been sold at an inadequate price. Upon hearing the learned advocates on both sides at great length I am clearly of opinion that the properties in this case have not been

sold at an inadequate price. The price fetched at the sale was Rs. 69,000. The learned Subordinate Judge accepted the plaintiff's story that the monthly rental of the properties comes up to Rs. 593 and has calculated that the value would be about Rs. 81,600. I am of opinion that there is much force in the argument of the learned advocate for the respondents that the judgment-debtors' story about the monthly rental realised cannot be accepted as a true statement. Even however assuming it to be true the five factors dealt with by the learned Subordinate Judge in his judgment must be taken into account and further a reasonable purchaser would take into account the costs of repairs, the municipal rates, the costs of collection and deductions for vacancy and bad debts in purchasing a property for profit.

A substantial amount must be deducted on account of these items from the gross rent before a reasonable buyer can come to the net profits derivable from the property. Taking all these factors into account I am of opinion that Rs. 69,000, was not an inadequate price. I may also mention another factor in this connexion. While the appeal was being heard in this Court on the 10th instant it was suggested to the learned advocates on both sides that the parties should give up a ruinous litigation and settle the matters amicably whereupon the respondents decree-holders offered to give back the properties to the judgment-debtors if they would pay them Rs. 69,000, within a reasonable time say within two or three months. This offer was considered by the learned advocate for the appellant judgment-debtor and after four days' consideration the learned advocate had to admit that the judgment-debtors could not agree among themselves about the acceptance of this offer. This goes to show that the sum of Rs. 69,000 is not an inadequate price and there is no reasonable chance that if the sale be set aside or if the properties be sold by private treaty a greater sum will be obtained. I agree with the order proposed by my learned brother that the appeal should be dismissed. Having regard to the great irregularities in the sale there will be no orders as to costs.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 665

Special Bench

LORT-WILLIAMS, M. C. GHOSE, AND
MCNAIR, JJ.*Emperor*

v.

Bisnoo Chandra Das—Accused.

Criminal Jury Ref. 29 of 1933, Decided on 29th June 1933, from order of Sess. Judge, Howrah.

(a) Criminal P. C. (1898), S. 307(1), (2)—Judge making reference under sub S. (1) should not record judgment of acquittal or of conviction in respect of any of charges.

If a Judge wants to make reference under S. 307(1), he should not record an order of acquittal or conviction in respect of any of the charges even though he agrees with the verdict of the jury in respect of some of the charges but disagrees in respect of other charges.

[P 666 C 1; P 667 C 2]

(b) Criminal P. C. (1898), S. 307 — Interference with verdict of jury, except in cases of flagrant and patent miscarriage of justice, is dangerous.

Interference with the verdict of a jury, except in the case of a flagrant and patent miscarriage of justice, is dangerous and liable to lead to the condemnation of innocent people. [P 668 C 2]

*Khundkar and Nirmal Chandra Chakraborty—for the Crown.**Manindra Nath Banerjee — for Accused.*

M. C. Ghose, J.—In this case, four men, Dulapada, Purna, Charu, and Bishnu were tried by the learned Additional Sessions Judge of Howrah and a jury of nine persons. Each of them was charged under S. 364 (abduction with intent to murder), S. 394 (causing hurt in committing robbery) and S. 302 (murder) and also criminal conspiracy to commit each of the above three offences. The jury unanimously found Dulapada Mal "not guilty" of all the six charges. They by a majority returned a verdict of "not guilty" as against Purna Chandra Kanrar and Charu Chandra Palain in respect of all the charges. With regard to Bishnu Chandra Das, in respect of abduction and conspiracy for abduction, they unanimously found him "not guilty," in respect of murder and conspiracy to murder they found him "not guilty," by a divided verdict of 6 against 3. In respect of conspiracy for robbery, they found him "not guilty" by a divided verdict of 7 against 2. In respect of S. 394, they found him "not guilty" by a divided verdict of 5 against 4. The learned Sessions Judge accepting the verdict of the jury acquitted the first three men of all the charges. He also ac-

cepted the verdict of the jury in respect of five of the charges against Bishnu and acquitted him of those charges. This was on 28th April 1933. He did not then pass any order against Bishnu in respect of S. 394, I. P. C. About ten days later, on 8th May, he wrote the following order:

"I have given very careful thought to the case against the accused Bishnu Chandra Das under S. 394, I. P. C., and am unable to agree with the jury's majority verdict of "not guilty." I consider the verdict to be perverse and absolutely against the weight of evidence and in the interests of justice I decide to refer this part of the case under S. 307, Criminal P. C., to the Hon'ble High Court for orders."

Before we consider the evidence, it should be noted that the learned Sessions Judge acted illegally in making this imperfect reference. He acted under sub-S. (1), S. 307, Criminal P. C., which states:

"When the Judge disagrees with the verdict of the jurors or of a majority of the jurors on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly."

The learned Judge apparently omitted to peruse sub-S. (2) of S. 307 which states:

"Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried."

In this case, if it was his intention to refer the case of Bishnu to this Court, he should not have recorded an order of acquittal in respect of any of the charges against him. If on the other hand, he intended to accept the verdict of the jury in respect of five of the charges then he thereby precluded himself from making a reference to this Court in respect of the sixth charge. The case was that the deceased Pulin Chandra Santra was a youngman of village Dulley, P. S. Sankrail in the District of Howrah. Accused Bishnu and one other accused were men of the same village. Two other accused were men of the neighbouring villages. The case is that the four men enticed the deceased on false pretences to a certain empty hut near the village Railway Station in the evening of Thursday, 1st September, 1932, and there they murdered and robbed him. Some witnesses were examined, who saw the deceased between 4 and 6 p. m. at the level crossing near the rail-

way station. Some witnesses had also deposed as to seeing one or more of the accused in the same neighbourhood. Pulin was not seen alive after that Thursday afternoon. On the following Saturday evening 3rd September a dead body was seen floating in a ditch. Information was given at the local Thana on the same night. A police officer arrived on the morning of Sunday 4th September. The body was recovered and an inquest was held and the relations recognized the body as that of Pulin.

The post mortem examination showed, that there were two penetrating wounds on the neck which had cut the jugular vein and carotid artery and the subclavian artery. The four accused men were arrested on different dates in October. We are concerned only with Bishnu who was arrested on 15th October. There appears to be no doubt on the evidence that Pulin was murdered by some persons. His widow P. W. 3 and his father P. W. 31 deposed that he had been slightly ailing and on Thursday he left home at 4.30 p. m. and was not seen by them afterwards. P. W. 29, a clerk and P. W. 30 a neighbour deposed that they saw Pulin that afternoon near the railway station. Some other witnesses deposed that they saw some or all the accused men at or about the same place. Against accused Dalapado, there was no evidence at all, except that he was seen in the afternoon at or about the railway station in company with one or more of the accused. In respect of him, the learned Sessions Judge stated:

"The question is whether the slender circumstances are at all sufficient to establish any of the six charges as against the accused Dalapado."

As stated above, the jury unanimously acquitted him. The most important evidence against the other three men was their confessions which they made before a Deputy Magistrate shortly after arrest and which they afterwards retracted in the Court of the Committing Magistrate. These confessions differ in detail but are otherwise more or less of the same kind and there appears to be no good reason to imagine that one was induced by any hopes of pardon and another was voluntary. Against the accused Bishnu whose case under S. 394 the learned Judge has referred the most important evidence in his own retracted confession. The jury apparently by a major-

rity declined to act upon that confession. Purna and Charu made confessions and the jury did not also act upon those confessions and the learned Sessions Judge acquitted him. There appears no more reason for accepting the confession made by Bishnu than for accepting the confessions of Purna and Charu. They all seem to stand on the same level. If the learned Judge thought that the confessions were voluntary and true, then in my opinion he should have referred the case of all three accused and not the case of one man only, or in the alternative he should have accepted the verdict of the jury in respect of all of them. The learned Judge has pointed out that against Bishnu there was independent corroboration of the statement in his confession that three gold studs with a chain and a piece of gold which had been on the person of the deceased and also Rs. 45 were his share of the robbery and with part of that money he bought a shirt, a cloth and a pair of shoes. On search of the house where he and his mother and his brother lived jointly, a Sub-Inspector of Police found three gold studs with a chain and a piece of gold. These were identified by the widow and the brother of the deceased as his property. The Sub-Inspector also took into his custody a new cloth, shirt and pair of shoes which the accused had bought. The tailor who made the shirt and the shopkeeper who sold the pair of shoes were examined in support of the prosecution. In respect of the gold studs, the goldsmith P.W. 17 who made them was examined. He stated that he made the studs for the father of the deceased. In cross-examination, he stated: "I have made many gold studs besides these, I made similar studs for other customers also."

"It has been argued that the jury were probably not quite unreasonable in rejecting the story of the identity of the studs. I am of opinion that it would be futile to consider the evidence in detail, seeing that the reference itself is misconceived and illegal. The evidence against accused Bishnu is mainly that of his confession which if accepted, would make him guilty both of murder and robbery. The Sessions Judge has chosen to acquit him of the charge of murder. Having done so it was not

proper to refer the case for conviction on the charge of robbery. In the circumstances, I would reject this reference and acquit the accused."

Lort-Williams, J.—I agree. Trial by jury is the main foundation of that great system of freedom, of which the English people are so justly proud, which they won for themselves after many centuries of bitter struggle and the benefit of which they have extended to far distant regions of the earth under their administration or dominion. For good or evil the Indian legislature has decided that in certain circumstances no man shall be criminally condemned, except upon the verdict of a jury of his fellowmen. They have provided however under S. 307, Criminal P. C., that if the Judge disagrees with the verdict of the jury and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly. Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried.

In this case, the Judge agreed with the verdicts of the jury in favour of all the accused other than Bishnu and in favour of Bishnu on all the charges but one, and acquitted them and him of all those offences. On the single charge against Bishnu under S. 394, he says that he considers that it was perverse and absolutely against the weight of evidence, and that, in his opinion, it was necessary to refer that part of the case against the accused Bishnu in the interests of justice. My learned brother has already pointed out the illegality of this procedure. Apart from the illegality of such an order, it places this Court in a most inconvenient, if not an absurd, position. All that is left to us to decide is whether Bishnu shall be convicted of an offence under S. 394. We have either to do that or to reject the reference altogether. The learned Judge has successfully deprived us of any opportunity of remedying the bungling of which he himself has been guilty. The Judge agreed with the jury and thought that they were right and reasonable in rejecting two of the confessions of the accused, which had been retracted, but thought that they were wholly and absolutely

wrong in rejecting the confession of Bishnu which also had been retracted.

Having read the case and listened to the arguments with care, I am at a loss to understand what distinction the learned Judge was able to make between the cases of the three principal accused. He gave the jury a most elaborate warning about the danger of acting upon retracted confessions unless corroborated, yet he expresses himself to be surprised when they listened to what he said, took his advice and followed his directions. Some distinction is sought to be drawn on the ground that there is corroborative evidence in Bishnu's case. It consists of the fact that there was some evidence to show that the murdered man possessed some gold studs, and that some gold studs were found in a box in the house of Giri who was Bishnu's brother and with whom Bishnu lived. The box was kept on a shelf in Giri's own room and there is no evidence to show that Bishnu had access to it. It was said that in answer to a question by the Police Inspector, the mother of these youths produced the key of the box. There is no evidence other than this to connect Bishnu with these articles. Further, the evidence of identification is not at all satisfactory. The studs belonging to the deceased were said to be all of a common pattern without any distinguishing mark upon them other than an alleged dent.

As a further instance of the way in which the case has been mismanaged and bungled, the question was never put to any witness whether the studs discovered in Bishnu's house had any mark upon them corresponding to that which was said to be on one of the studs belonging to the deceased man. Weak as this corroboration is, what is its corroboration of? The corroboration must be corroboration implicating the accused in the offence with which he is charged. The most that can be said is, that this was corroboration of the fact that somebody in Bishnu's house was in possession of articles which probably had belonged to the deceased man. A mere accurate statement of what the so-called corroborative evidence consisted of, is sufficient to show the absurdity of pretending that there was real distinction to be drawn between the case of Bishnu and those of the other prisoners.

In view of the charge of the learned Judge, overloaded as it was with warnings about the alleged danger of acting upon the kind of evidence which was before the jury in this case, I cannot conceive how anyone can say that the verdict of the jury was unreasonable or against the weight of evidence. If this man Bishnu was guilty, all the accused were guilty, and of murder. The evidence, broadly and practically speaking, is the same against each. The differences are of minor importance. All have been acquitted by the jury after a careful trial. Yet it is suggested that out of these three, one ought to be condemned by this Court. To my mind, such a result would be liable to bring the administration of justice into derision and contempt. Moreover, speaking with the knowledge gained by nearly a quarter of a century of constant practice in criminal trials in England, I consider that interference with the verdict of a jury, except in the case of a flagrant and patent miscarriage of justice, is dangerous and liable to lead to the condemnation of innocent people. This danger is greater in a country in which the administration of justice has not yet reached the highest standard of efficiency. I agree that this reference must be rejected and the appellant acquitted, not only for the reasons stated, but because it has not been made in accordance with law.

McNair, J.—I agree that the learned Sessions Judge has disabled himself from making a valid reference under S. 307, Criminal P. C., by accepting the verdict of the jury against the accused Bishnu on some of the charges, and I agree that the reference should be rejected.

K.S.

Reference rejected.

A. I. R. 1933 Calcutta 668

AMEER ALI, J.

Mackintosh Burn Ltd.—Plaintiff.

v.

Shivakali Kumar—Defendant.

Original Suit No. 1296 of 1928, Decided on 6th February 1933.

(a) *Trusts*—Right of creditor of trustee against trustee and trust property stated.

The rights of a creditor of trustee are as follows:

A decree may be passed against the trustee who has made the contract or borrowed the money enforceable against the trustee personally. It may also be enforced against his beneficial interest in the estate. But the creditor has no

right to obtain a decree executable against the estate. The creditor is not debarred from a right of subrogation to obtain the benefit of the trustee's right of indemnity by reason of the fact that he was not at the date of the transaction aware that he was dealing with a trustee. But the creditor may be impeded by obstacles which the estate could raise against the trustee or executor: *Case law referred.* [P 671 C 1, 2]

(b) **Trusts—Creditor of trustee—Right of subrogation to trustee's right of indemnity can be decided in suit by creditor against trustee but not in execution—Trusts Act (1882), S. 32 and Civil P. C. (1908), S. 47.**

Provided the suit be appropriately framed, the matter of subrogation of the creditor to the trustee's right of indemnity and question of trustee's indemnity may be determined in the suit by the creditor against the trustee. But it is not open to the creditor to ask the Court to investigate the matter of indemnity and subrogation in execution, for it is not a matter within the scope of S. 47, Civil P. C. [P 672 C 1, 2]

(c) **Trusts Act (1882), S. 32—Enforcement of trustee's right of indemnity—It is doubtful that trust property will be sold.**

It is more than doubtful, whether a Court, in enforcing the right of indemnity against any trustee, will allow actual sale of the trust property in execution. [P 673 C 1]

(d) **Trusts—Debt incurred by one of trustees for estate—Such trustee sued personally and decree obtained—Attachment and order for sale of trust property—Only beneficial interest of such trustee can be sold.**

Where a debt is incurred by a trustee for the benefit of the estate and the creditor sues such trustee personally and obtains a decree and in execution of the decree attaches the trust property and obtains an order for sale of the property, only the beneficial interest of such trustee in the trust property can be sold and the question of indemnity and subrogation cannot be gone into in execution but such relief must be sought by independent proceedings. [P 673 C 1]

(e) **Trusts Act (1882), S. 32—When creditor can claim right of subrogation to trustee's right of indemnity pointed out.**

In order that a creditor may obtain the relief of subrogation to the trustee's right of indemnity (1) the plaintiff should sue the trustee as a trustee; (2) under O. 31 and O. 2, Civil P. C. all the trustees should be represented; (3) the parties beneficially interested should be represented; (4) indemnity and subrogation to that right should be claimed. [P 673 C 1]

(f) **Civil P. C. (1908), O. 6, R. 17—Amendment of pleadings.**

The Court should whenever possible assist the plaintiff by adding parties and amending pleadings but not at the stage of execution when it would be wrong to do so. [P 673 C 1]

R. Westmacott—for Plaintiff.

P. C. Basu—for Defendant.

B. C. Ghose—for Sureshwari Dasee.

Judgment.—The application was first made to me on 29th August 1932. It is, in substance, an appeal from an order of the Master setting a proclamation of sale of two premises—40, Taltala Lane and 102, Corporation Street. The

Master provided for the sale only of the defendant's beneficial interest in these properties. The plaintiff contended that he was entitled to have the entire interest in the properties sold in execution of his decree against the defendant. The facts that were presented to me on the application were these: In 1926 the plaintiff-company, at the request of the defendant, carried out extensive repairs to the properties in question. On 10th February 1930 the defendant made part payment. On 18th June 1928 the plaintiff company filed a suit for the balance against the defendant described as a land owner residing at 102, Corporation Street. The defendant was apparently living in these premises. On 10th February 1930 the plaintiff-company obtained a decree for Rs. 19,020.

In August 1931 the plaintiff-company having failed on its attempt to obtain personal execution against the defendant proceeded to attach the two premises in question, the order for attachment being made on 25th August 1931. On 26th January 1932, there was a petition for sale. On 9th March 1932 the order for sale was made by the Master. Subsequently proceedings to settle the proclamation of sale under O. 21, R. 66 were had before the Master, who settled the proclamation of sale in the form which is now challenged. The application before me was taken out on 4th August 1932. The affidavit in support on behalf of the plaintiff-company mentions in para. 2 that

"after the completion of the work, the plaintiff-company came to know that the premises in question were trust property."

It does not state when the plaintiff-company became aware of that fact, i.e., whether before or after suit. An affidavit in opposition was put in by the defendant alleging (para. 3) that the plaintiff-company was aware that the premises were trust property "before the institution of the suit and at all material times." The defendant challenged the liability to attachment of these properties, setting out in para. (5) the portions of the will by which the trusts were created and the defendant as well as two other persons, Sureshwari Dasee and Arunohandra Basu, were appointed trustees, the beneficiary being the family deity Sree Sree Janardan Jiu. On 29th

August 1932, counsel appeared on the defendant's behalf and refused to claim an indemnity against the trust estate, implying that his client had been guilty of misconduct and was in default to the estate.

Mr. Westmacott, who appeared for the creditor, contended that the matter was settled by the authority of *Bridge v. Madden* (1) and that he was entitled to proceed against the property by way of subrogation, as was done in that case. I was more than doubtful, having regard to the frame of the present suit, of the correctness of this contention. I was however anxious to bring the matter to a head and it appeared to me that a practicable way of so doing was to regard this property as the property of the defendant, until he should establish by way of claim under O. 21, R. 58, that it was trust property. I therefore directed the application to be renewed upon notice to the other trustees, so that this matter might be gone into. I hoped that when all the trustees were before me, should fiduciary ownership be established, the matter of indemnity could then be discussed and arrangements be made on behalf of the estate to pay off this debt.

Before the adjourned hearing however I looked into the original papers in the execution proceedings and found that in the original tabular statement, the property was definitely stated by the applicant to be trust property. That being the case, it did not appear to me that I could possibly call upon the defendant and the other two respondents to establish this fact. I was compelled therefore to deal with the application in its original form. Mr. B. C. Ghose appeared for two trustees other than the defendant. He contended that they were not proper parties to the application, that the suit was not a suit against a trustee or trustees properly framed, that the decree was not a decree which was binding on the estate but was merely a personal decree against the defendant, and he asked that his clients should be dismissed from the application with costs. Mr. Basu again appeared for the defendant. He refused to claim an indemnity and stated that his client had got no right to an indemnity.

Mr. Westmacott desired to refer me

1. (1904) 31 Cal 1034=9 Q W N 9.

to the will, which contains the clause specifically providing for an indemnity to the trustees. He contended that he was right in suing the trustee who had made the contract, without joining the other trustees. He contended further that, having regard to the decision in *Bridge v. Madden* (1), he was entitled to proceed with the question of subrogation, on notice to the other trustees in execution, or at a subsequent hearing of the suit. The questions of law and of procedure which arise upon these facts may be stated as follows: 1. What are the rights of a creditor of a trustee: (a) against the trustee; (b) against the trust estate? 2. If the creditor has rights against the trust estate, what is the procedure by which these rights may be enforced? 3. Assuming that such rights can be enforced, what is the relief which the creditor can obtain?

I will first deal with these questions in the abstract and then apply the result to the facts of the present case. 1. In considering the rights of a creditor, I shall in the first place, make no distinction between a man who has lent money to a trustee for the preservation of the estate that money having been admittedly applied for that purpose, and a contractor who has carried out repairs under a contract with the trustee. Secondly, I propose to disregard any possible distinction between the case of a trustee under English law and the head of a religious trust in India. It has frequently been suggested that the right to proceed against the trust estate in the latter case is more extensive. Having regard to the ruling of the Judicial Committee in *Niladri Sahu v. Chaturbhuj Das* (2) and the form of the decree approved by the Board (p. 154 of 6 Pat.), I am not so certain. But, in this case, no point has been made of the beneficiary being the family deity and the matter has not been argued upon the basis that the defendant is other than a trustee in the ordinary sense. In my opinion, the three rules applicable to the first question are:

(1) A decree may be passed against the trustee who has made the contract (or borrowed the money) enforceable against the trustee personally. It may also be enforced against his beneficial interest in the estate. For examples of

2. AIR 1926 P C 112=98 I C 576=53 I A 253
=6 Pat 139 (P C).

such an order, see *In re Evans, Evans v. Evans* (3) and the decree already referred to in *Niladri Sahu v. Chaturbhuj Das* (2).

(2) The second principle is that the creditor has no right to obtain a decree executable against the estate: see *In re Morgan, Pillgrem v. Pillgrem* (4):

"The argument in support of the summons has almost gone the length of suggesting that trust property in the hands of a trustee may be seized by his execution creditor. In my judgment nothing is plainer than this, that the property which can be taken under an execution is only that property to which the execution debtor is beneficially entitled, and that no property of which he is only a trustee can be taken."

In another place, Fry, J., remarks:

"In making these observations I say nothing about the right which the executor undoubtedly has to come against the assets of the testator."

With that proposition and its consequence I will deal next: See also *Strickland v. Symons* (5). As to Indian authorities, see *In the matter of Shard* (6), *Sudhir Chandra Das v. Gobinda Chandra Roy* (7) and *Swaminatha Aiyar v. Srinivasa Aiyar* (8). With regard however to the last quoted case, the observations at p. 261 must not be read as laying down that a trustee or executor is only entitled to an indemnity in the circumstances there mentioned. If it was intended to lay down any such proposition, I respectfully dissent.

(3) There remains the right of the executor or trustee "to come against" the assets of the testator or trust estate. That is to say, of the trustees' right of indemnity, and the right of the creditor by subrogation to obtain the benefit of that indemnity. I shall assume, for the purpose of this case, notwithstanding certain expressions in *In re Evans, Evans v. Evans* (3) and in *Strickland v. Symons* (5), and, so far as I am concerned, I think it to be the law, that the creditor is not debarred from a right of subrogation by reason of the fact that he was not at the date of the transaction aware that he was dealing with a trustee. The nature of the creditor's right of subrogation and its limitations were finally stated, so far as English law is concerned,

in: *In re Johnson, Shearman v. Robinson* (9). The principles there laid down were applied to India by Sale, J., in *Shard's case* (6) and have been explained in detail by Mukerji, J., in *Manindra Chandra Nandi v. Sudhirkrishna Banerji* (10), where all the more important English authorities are set out. It will be seen from the abovementioned cases that subrogation is a circuitous and uncertain route. The creditor may be impeded by any obstacle which the estate could raise against the trustee or executor. To use another metaphor, the creditor has the right to step into the shoes of the trustee, but these shoes may be too small, or may not be there at all. However, adequate or not, such is the only right which the law allows the creditor vis à vis the estate.

The next question is the question of procedure. Assuming that the creditor has a right of subrogation to the trustee's indemnity, how is that right to be enforced? In England three courses appear to be open to the creditor: (1) To take out a summons in an administration suit. This may perhaps be described as the normal procedure: See as an example: *Re Kidd, Kidd v. Kidd* (11). (2) To take independent proceedings for administration, by action or by originating summons: See example of originating summons: *In re Bach Walker v. Bach* (12), of action: *Re John Shorey, Smith v. Shorey* (13). (3) To claim the right in the same suit, i. e., the suit filed by the creditor against the trustee for recovery of the debt: See *Raybould v. Turner* (14). In that case, the trustee, being a normal and honest trustee, was himself claiming his right of indemnity. It further appears that the parties necessary to determine the trustee's claim to indemnity were before the Court. Owing to unfamiliarity with English procedure, I am not clear from the report whether "the parties, interested in defending the estate," were original parties to the suit or were added on the summons, or whether the matter

3. (1887) 34 Ch D 597=56 L T 768=35 W R 586

4. (1881) 18 Ch D 98=50 L J Ch 884=45 L T 188.

5. (1884) 26 Ch D 245=53 L J Ch 582=51 L T 406.

6. (1901) 28 Cal 574.

7. AIR 1918 Cal 668=41 I C 503=45 Cal 538.

8. (1917) 39 I C 172.

9. (1880) 15 Ch D 548=19 L J Ch 745=48 L T 872=39 W R 169.

10. AIR 1932 Cal 182=136 I C 893=59 Cal 216.

11. (1894) 70 L T 648=42 W R 571.

12. (1892) W N 108.

13. (1898) 79 L T 340.

14. (1900) 1 Ch 199=69 L J Ch 240=18 W R 301=82 L T 46.

was investigated merely upon a summons or upon a further hearing.

In India, there is no doubt that the first form of procedure is available. The second form of procedure, that is to say, by way of an independent suit, is again, in my opinion open to the parties, and in a proper case I presume that such proceedings could be taken under Ch. 13 of the rules and orders by way of originating summons: See *Shard's case* (6), *Swaminatha Aiyar v. Srinivasa Aiyar* (8) and *Ammalu Ammal v. Namagiri Ammal* (15). The difficulty is as to proceedings to enforce the right of subrogation in the same suit. In *Bridge v. Madden* (1) this course was taken, and no doubt the pleadings in *Bridge v. Madden* (1) were framed with a view to avoiding the difficulty created by the decision of Sale, J., in *Shard's case* (6). In *Bridge v. Madden* (1) the trustee was sued as a trustee; the beneficiaries were parties, a declaration was claimed in the plaint that the trustee sued was entitled to an indemnity and that the plaintiffs were entitled to be subrogated thereto. On a further hearing of the suit, under the liberty to apply (as I read the case) the matter of subrogation and indemnity was gone into. In *Sudhir Chandra Das v. Gobinda Chandra Roy* (7), the Judges on the appellate side clearly considered that this matter could have been gone into in the suit, but ultimately referred the creditors to a claim in the administration action which was then pending. In *Ammalu Ammal v. Namagiri Ammal* (15), the matter of procedure was discussed at considerable length, and the two Judges differed. I prefer the view of Kumaraswami Sastri, J., to the effect that, provided the suit be appropriately framed, the matter of subrogation and indemnity may be determined in the suit by the creditor against the trustee. This, I think, clearly appears from *Manindra Chandra Nandi v. Sudhir-krishna Banerji* (10), the case to which I have already referred, where the Court on appeal expressly remanded the case for the lower Court to go into this question.

(4) Yet another method of proceeding has been suggested. It is contended on behalf of the creditor that it is open to the creditor to ask the Court to investigate the matter of indemnity and

subrogation in execution, that the Court will add such parties as may be necessary and direct an inquiry. In my opinion, this is not correct. It is not a matter within the scope of S. 47, Civil P. C., Code, and I am unable to see that there is any room for an investigation which may involve a trial of serious issues between trustee and cestui qui trust, and the taking of accounts, in execution.

There remains the question of the form of relief. I desire to say something about this. Assuming everything in favour of the plaintiff-company, it is by no means clear that it necessarily follows that the plaintiff-company would be entitled to have the properties in question put up for sale. On this point, there has I believe been in this Court a certain amount of misconception. In *Stott v. Milne* (16), the right of the trustee was stated to be a charge upon the corpus and income of the estate. The matter is explained fully in the notes to Brett's Equity Cases, 4th Edn., 207. In *Peary Mohun Mukerjee v. Narendra Nath* (17), a ruling of the Board, the proposition is laid down as applying to India. The question is what is the nature of that charge and how is it to be enforced? It appears to me that, subject to certain qualifications, that charge can rarely be made effective by way of sale: *Drake v. Williamson* (18) and the order made by Lord Romilly in that case, also *Bowman v. Hill* (19). In both these cases, which happen to be cases of chapel trusts no sale was allowed, a charge was declared with a right to recover against any income and liberty to apply if the chapel was ever sold by the trustees. In the Trusts Act, 1882, which does not specifically apply to the trust in question, the right of the trustee is described in S. 32. This section provides in para. 1 for a general right of indemnity and in para. 2 that:

"Such indemnity shall be a first charge upon the trust property for such expenses and interest thereon, but such charge unless the expenses have been incurred with the sanction of a principal civil Court with original jurisdiction shall be enforced only by prohibiting any disposition of the trust property without previous payment of such expenses and interest."

16. (1884) 25 Ch D 710=50 L T 742.

17. (1903) 37 Cal 229=5 I C 404=37 I A 27 (P C).

18. (1858) 25 Beav 622=6 W R 824=4 Jur N S 1009.

19. (1907) 1 Ir 451.

It is more than doubtful therefore whether a Court, in enforcing the right of indemnity against any trustee, will allow actual sale of the trust property in execution: see *Narayanan v. Lakshmanan* (20), where this view is taken. I do not say that in some cases for instance in the case of family trusts, or where the trustees are substantially the persons beneficially interested, the Court might not, in certain circumstances allow sale; but I draw attention to the general rule of law. Again I would refer as appropriate to the form of decree in *Niladri Sahu v. Chaturbhuj Das* (2), whereby a receiver was appointed of the whole estate, to get in the trustees' beneficial interest in the income and apply this in satisfaction of the debt. It remains to apply the principles above discussed to the facts of the present case. (1) In the first it follows that the form in which the master settled the proclamation of sale was perfectly correct. It was only the beneficial interest of the defendants in the estate which could be sold. (2) In the second place, on the application as made I could not possibly have gone into the question of indemnity and subrogation. (3) The last matter for consideration is whether having regard to the frame of suit in this case, it is possible for me to order a further hearing of the suit so as to afford the plaintiff an opportunity of establishing his rights against the estate.

In my opinion the suit is not properly framed for this purpose. I do not propose to hold that a creditor cannot sue the trustee with whom he contracted as has been done in this case and not ultimately proceed against the estate by way of subrogation, but that, if this course is taken, relief against the estate must be sought by independent proceedings. In my opinion to enable the plaintiff to obtain this relief in one suit: (a) the plaintiff should sue the trustee as a trustee; (b) under O. 31 and O. 2, Civil P. C., all the trustees should be joined; (c) the parties beneficially interested should be represented; (d) indemnity and subrogations to that right should be claimed.

I am the first to agree that the Court should, whenever possible, assist the plaintiff by adding parties and amend-

20. (1916) 39 Mad 456=29 I C 1.

ing pleadings, but in this case and at this stage, I am quite clear that it would be wrong to do so. The result is that the application is dismissed. I have been asked to give costs to the trustees who have been added, but, for reasons which I think are apparent from my judgment, I make no order as to costs. Although I have made no order as to costs, this will not preclude the trustee Sureshwari Dassee, should any administration proceedings be taken, from asking the Court to allow her to be indemnified in respect of such costs out of the estate as between attorney and client.

Since giving judgment I have been fortunate enough to obtain the views of the Chief Justice on the matter of practice involved in *Raybould v. Turner* (14). What took place in that case is as follows: There was a suit for damages on the ground of tort against a trustee in the King's Bench Division. There was then a completely separate proceeding (the proceeding reported) on the Chancery side upon summons, probably originating summons to which the persons interested in protecting the estate against the claim to indemnity were parties. It is therefore no authority for an argument that the question of indemnity and subrogation can be gone into upon a summons in the suit.

K.S.

Application dismissed.

* A. I. R. 1933 Calcutta 673

BUCKLAND, J.

Beni Madhab Khetry—Plaintiff.

v.

Abdul Razak—Defendant.

Civil Suit No. 1510 of 1932, Decided on 12th December 1932.

* Civil P. C. (1908), S. 11—Decision in insolvency proceedings does not operate as res judicata in subsequent suit—Insolvency.

As insolvency proceedings are not suits within the meaning of S. 11 and a decision in the course of such proceedings on a certain point does not operate as res judicata in a subsequent suit: 21 Cal 900, Dist; AIR 1919 All 229 and AIR 1918 All 846, Ref. [P. 674 C 1, 2]

L. P. E. Pugh and *H. Banerjee*—Plaintiff.

Fazul Haq and *J. C. Hazra*—for Defendant.

Judgment.—This is a suit to recover the sum of Rs. 11,019-8-0 from the defendant as money lent and advanced. The plaintiff alleges that on certain days in the months of September and October

1930 he lent Rs. 10,000 in all to the defendants. Defendant 1 did not deny the loan, and his defence to the suit has already been disposed of, and a decree has been made against him in circumstances which I stated at the time. The defendant Abdul Sovan has appeared at the hearing and contested the suit on two grounds: (1) that he was not a party to the loan, which means that he was not in partnership with Abdul Razak, and that the suit is barred by *res judicata* by virtue of the judgment by Ameer Ali, J., when exercising the Insolvency Jurisdiction of the Court. I will deal with the last point first.

The matter in which my learned brother delivered his judgment just referred to was an application by six creditors to adjudicate the present defendants as insolvents. My learned brother held that there was no act of insolvency. Abdul Sovan on that occasion denied that he was a partner with Abdul Razak, and Ameer Ali, J., held that he was not a partner. S. 11, Civil P. C., provides that no Court shall try any suit or issue in which the matter in issue has been in issue in a former suit. It does not refer to a cause application, matter or other proceedings, but to a suit, and it is unquestionable that the proceedings before my learned brother in which he delivered his judgment were not a suit, and in my opinion this point is conclusive. I have however been referred on behalf of the defendant to two decisions of the Allahabad High Court in the earlier one of which, *Pitaram v. Jujhar Singh* (1), the learned Judges took a contrary view, but I find that in so doing they observed:

"Though it is not necessary for the decision of this case to determine the point, we are further of opinion that an application heard and determined in the way this application was disposed of is in fact a suit."

The case cannot therefore be taken as an authority for the proposition in support of which it is cited, for it would appear that according to the learned Judges themselves the opinion expressed was *obiter dictum*. However in *Irshad Hussain v. Gopi Nath* (2) when a similar point came before the same High Court, the learned Judges expressed great doubt on the point:

"If we had to consider the matter in the absence of authority we doubt very much whether the order of the insolvency Court and the Court

of appeal from that order can operate as *res judicata*."

After pointing out that there was no previous suit between the parties, they referred to *Pitaram v. Tajhar Singh* (1) which they said they were bound to follow or refer the appeal then before them to a larger Bench for reconsideration of the question involved; but having come to the conclusion that no injustice had been done they refrained from doing so. There is no authority for construing S. 11 in relation to a judgment delivered in insolvency proceedings otherwise than strictly, but reference has also been made to the general principles of *res judicata* on the ground that the Code is not exhaustive, but if that is so, it is contended that the question of partnership never arose and the judgment on this point was superfluous because until it was held that there had been an act of insolvency the question of partnership was immaterial. This differentiates the present case from *Peary Mohun Mukerjee v. Ambika Churn* (3), the only other authority cited for the defendant, in which an earlier suit was bound to fail for want of notice required by the Bengal Municipal Act, but there had been a decision upon the merits. Nevertheless it was held that such earlier decision barred a subsequent suit upon the merits, and that the plea of *res judicata* must prevail. Where there are two or more issues, any one of which would dispose of the suit, it may well be that a decision on any one of them will be *res judicata*, but that is by no means the case here, and in my judgment this suit is not barred by the principles of *res judicata*.

I now turn to the facts and the only issue to be decided is whether or not Abdul Sovan was a partner with his father, Abdul Razak, in the business for which the money was borrowed. A considerable body of evidence has been adduced on behalf of the plaintiff, and I do not propose to examine it in very great detail for the reason that evidence must be closely scrutinized and compared where it is sought to prove that a particular fact happened on a particular day at a particular place, but where it is sought by evidence to establish facts proving a continuous legal relation, the matter takes on a somewhat different

1. AIR 1918 All 346=48 I C 573=39 All 626.

2. AIR 1919 All 229=49 I C 590=41 All 878.

3 (1900) 24 Cal 900.

rent aspect. (After discussing the evidence, the judgment concluded.) In my judgment the defendant was a partner at all material times with his father Abdul Razak, and must be held liable with him for the moneys claimed in this suit. There will be judgment against him for the amount claimed, costs and interest on judgment at 6 per cent. Reserved costs, if any.

K.S.

*Suit decreed.***A. I. R. 1933 Calcutta 675**

GUHA, J.

On difference between

S. K. GHOSE AND M. C. GHOSE, JJ.

Nirmala Bala Devi—Complainant.

v.

Bejay Pada Ganguly—Defendant.

Criminal Ref. No. 259 of 1932, Decided on 21st February 1933, from order of Dist. Magistrate, Howrah.

Criminal P. C. (1898), S. 488 (4)—Order based on compromise that parties would live apart as before, is legal—But wife must submit to other terms of compromise before maintenance order can be enforced.

Per Guha and S. K. Ghose, JJ.—An order under S. 488 (4) for maintenance based on a compromise between the husband and the wife that they would continue to live apart as they had been doing is not illegal because based on such a compromise. The wife however if she wants to enforce the order as to maintenance, must submit to other terms of the compromise. (*M. C. Ghose, J., Contra.*) [P 675 O 2; P 676 O 1]

Probodh Chandra Chatterji—for Petitioner.

Sures Chandra Talukdar, Dharendra Nath Ghose and Jyotish Chandra Guha—for Opposite Party.

Facts—An application for maintenance instituted by one Nirmala Bala Devi under S. 488, Criminal P. C., against her husband Bejoy Pada Ganguly was compromised. The first term of the compromise was that the parties should continue to live separate from each other as they were doing. The wife was to get a monthly allowance of Rs. 15 so long as the husband was in receipt of his present income, and the wife was not to have any title to a certain house (subject to the result of a title appeal then pending) and there was an order in terms of the compromise. An order was accordingly made.

S. K. Ghose J.—The order of maintenance by the learned Magistrate, Mr. Fell did not become illegal merely because it was based on a compromise one of the terms of which was that the wife

should live separate from the husband. The order was in fact given effect to and in the circumstances of the case, the aforesaid term of the compromise cannot be taken as a ground for reversal of the order of maintenance. The reference is rejected.

M. C. Ghose, J.—I regret to differ. S. 488 (4) says that no wife shall be entitled to receive an allowance from her husband under this section if she . . . without any sufficient reason refuses to live with him or if they are living separately by mutual consent. I think therefore in this case S. 488 has no application and the Magistrate acted without jurisdiction in ordering Rs. 15 a month to be paid under this section. The compromise is an agreement which may possibly be enforced in a civil Court; an order under this section does not appear to me to be legal. I would accept the reference, or if you like, we may issue a notice to the parties and the Magistrate, and if they appear, transfer this to the Division Bench.

(The matter then came before Guha, J. who delivered the following judgment.)

Guha, J.—This is a reference made by the learned District Magistrate of Howrah, recommending that certain orders purported to have been made under S. 488, Criminal P. C. be set aside for reasons stated by the learned Magistrate. The facts of the case leading up to the reference to this Court, have been placed before me by the learned advocates for the parties, and the orders which in the learned District Magistrate's opinion require revision by this Court, have been commented upon in detail.

On a very careful consideration of the materials placed before me, I am unable to agree with the learned District Magistrate that the original order passed by Mr. Fell, on 29th January 1932, fixing the maintenance allowance at Rs. 15 in pursuance of a settlement arrived at by the parties concerned, the husband and the wife, should be interfered with, in any way. The order was no doubt based on a compromise, but it could not on that account be held to be illegal. The order as made by Mr. Fell was subsequently given effect to by the husband against whom the order for maintenance was made. The parties it appears have for sometime now been litigating in the

civil Courts, over a matter arising out of a clause contained in the compromise by which the amount of maintenance allowance was fixed; but the wife if she chooses to get the benefit of the order passed in her favour so far as the maintenance payable by the husband was concerned, must abide by the terms of the settlement by which the maintenance allowance was fixed and given effect to by Mr. Fell on 29th January 1932, by his order made under S. 488, Criminal P. C.

The order of 29th January 1932, must be treated as the final order binding the parties, and the subsequent orders to which reference has been made by the learned District Magistrate in his letter of reference to this Court, appear to be in the nature of consequential orders, which must be allowed to stand. It must be distinctly understood that the wife would not be entitled to any amount in excess of the amount of Rs. 15 mentioned in the order of Mr. Fell, based upon a compromise. In the above view of the case regard being specially had to the position taken up by the learned advocate for the wife, Nirmala Bala Debi, that his client would not lay any claim to the premises No. 44 Chatterjipara Road, North Bantra, that she would not be entitled to the rents collected from tenants on the said premises, and that her maintenance allowance from her husband is limited to Rs. 15 as fixed by compromise, the reference is rejected. The orders for the revision and cancellation of which the reference was made are allowed to stand.

R K.

Reference rejected.

*A. I. R. 1933 Calcutta 676

LORT-WILLIAMS AND MCNAIR, JJ.

Rajabuddin Mondal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1030 of 1932,

Decided on 30th June 1933.

(a) Criminal P. C. (1898), S. 236—Married girl seized, taken away and raped—Charge under S. 366, I. P. C., for kidnapping or abduction—S. 236 has no application—Penal Code (1860), S. 366.

A married woman aged 15 had gone outside her husband's hut at night in order to make water, and had been seized, taken away and raped by the two accused. Charge was framed under S. 366, I. P. C., for kidnapping or abduction of the woman:

Held: that the case did not come within

the provisions of S. 236, Criminal P. C.: *A I R 1931 Cal 414, Ref.* [P 677 C 1]

(b) Criminal P. C. (1898), Ss. 222 and 537—Particulars should be given in charge.

It is not sufficient merely to charge the accused in the bare words of a section of the Code. Particulars must always be given sufficient to give him notice of the matter with which he is charged, but omission to give such particulars is no ground for setting aside conviction if such omission had occasioned no failure of justice.

[P 677 C 2]

* (c) Criminal P. C. (1898), Ss. 233, 236 and 537—Two distinct offences included in charge in alternative—Case not coming under S. 236—Defect is mere irregularity and not illegality—Penal Code (1860), Ss. 359 and 362.

Kidnapping and abduction are two distinct offences. Where in a charge two such distinct offences are included in the alternative and the case does not come under S. 236, the defect is only an irregularity and not an illegality and is cured by S. 537 unless a failure of justice has been occasioned to the accused: *Case law reviewed.* [P 677 C 2]

(d) Criminal P. C. (1898), S. 235 (2) — Accused separately charged with kidnapping and abduction can be tried for each of such offences at one trial — Penal Code (1860), Ss. 359 and 362.

If the accused is charged separately with kidnapping and with abduction he can be tried at one trial for each of such offences: *A I R 1922 Cal 573, Ref.* [P 678 C 2; P 679 C 1]

Sures Chandra Talukdar and Surajit Chandra Lahiri—for Appellant.

Bireswar Chatterji—for the Crown.

Lort-Williams, J. — The appellant and another accused were charged with offences under Ss. 366, 376, 497 and 498, I. P. C., and were convicted of offences under Ss. 366 and 376 and sentenced each to five and seven years respectively, to run concurrently. The only point of substance raised on this appeal is, that the charge under S. 366 was in form illegal, and that the appellant was prejudiced thereby. The charge read as follows:

"That you on or about 29th May 1932, at Makharpur, Nowgaon P. S., kidnapped or abducted a woman, to wit, Bela Bibi, in order that the said woman may be forced or seduced to illicit intercourse and thereby committed an offence punishable under S. 366, I. P. C."

The contention on behalf of the appellant is that S. 233, Criminal P. C., provides that for every distinct offence there shall be a separate charge, and that kidnapping and abducting are distinct offences. S. 236, Criminal P. C., provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged in the

alternative with having committed some one of the said offences. According to the Indian Penal Code, kidnapping is of two kinds: kidnapping from British India and kidnapping from lawful guardianship S. 359, I. P. C.

"Whoever conveys any person beyond the limits of British India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India." S. 360, I.P.C.

"Whoever takes or entices any minor under 14 years of age, if a male, or under 16 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardianship of such minor or person of unsound mind without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship." S. 361, I. P. C.

"Abduction" is described in S. 362 as follows:

"Whoever by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person."

Section 363 provides the punishment for kidnapping, S. 364 for kidnapping or abducting in order to murder, and S. 365 for kidnapping or abducting with intent to confine. S. 366 provides that

"whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. And whoever, by means of criminal intimidation, as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

Bela Bibi was married, and was 15 years old at the time when the alleged offence was committed. She had gone outside her husband's hut at night in order to make water, and had been seized, taken away and raped by the two accused. Having regard to the decision in *Meher Sheikh v. Emperor* (1), it is clear that the case did not come within the provisions of S. 236, Criminal P. C. It is equally clear that the ingredients of the two offences of kidnapping and abduction are different. The charge not only referred to each of these distinct offences in the alternative, but failed to give any particulars to show which kind of kidnapping was alleged, or the age of the woman, or alternatively

whether unsoundness of mind was alleged. Such a charge leaves the accused without any sufficient indication of the case which he will have to meet. Whether he must come prepared with evidence to show that the girl was over 16, or not in the keeping of her lawful guardian, or that she was taken with the guardian's consent, or whether he must direct his efforts to proving that she came away of her own free will and without the use of force or deceit. It is not sufficient merely to charge the accused in the bare words of a section of the Code. Particulars must always be given sufficient to give him notice of the matter with which he is charged (S. 222, Criminal P. C.). The charge in the present case was defective in these respects, but I cannot say that the omissions have occasioned a failure of justice. Consequently, S. 537, Criminal P. C., applies, and the conviction cannot be set aside on this ground alone.

But the charge also offends against the provisions of S. 233, Criminal P. C., two distinct offences in the alternative having been included within it, in circumstances to which S. 236, Criminal P. C., does not apply, and on this point I agree with the decision in *Mafizaddin v. Emperor* (2). It is argued however on behalf of the Crown that this also is a mere irregularity and is cured by S. 537, Criminal P. C. On the point whether, and in what circumstances, this section is applicable, there has been much divergence of opinion. Prior to 1900, a number of differing decisions had been given in the Indian Courts, Calcutta, and some of the other Courts being at variance. In that year, in the case of *Abdur Rahman* (3) it was decided by a Full Bench of this Court, contrary to previous decisions of the Court, that without any doubt the section could be applied to any case of misjoinder under S. 234, Criminal P. C., subject of course to the proviso that no failure of justice had been occasioned thereby. Sir Francis Maclean, C. J., and his brother Judges disagreed with the opinion of Sir Comer Petheram in *Queen-Empress v. Chandi Singh* (4) at p. 396 that the "trial was illegal, it having been a trial which is prohibited by the terms of the law as contained in S. 233, and we do not think that S. 537, which cures errors, omissions, or irregularities,

1. AIR 1931 Cal 414 = 1931 Cr C 510 = 1932 I C 254 = 82 Cr L J 892 = 53 Cal 8.

2. AIR 1927 Cal 644 = 104 I C 245.

3. (1900) 27 Cal 839 = 4 C W N 656 (F B)

4. (1887) 14 Cal 395.

is intended to cure or does cure an absolute illegality."

Sir Francis Maclean considered that if this view were well-founded, S. 537 might as well be struck out of the Code for every error or irregularity in so far as it contravened the provisions of the Code, was in a sense illegal. These opinions however were expressly dissented from by the Privy Council in *Subramania Iyer v. Emperor* (5). Their Lordships were unable to regard disobedience to an express provision as to a mode of trial as a mere irregularity, which could be cured by S. 537. The trial was conducted in contravention of the Code of Criminal Procedure, S. 234, and was plainly illegal. When the Code positively enacts that such a trial shall not be permitted, such contravention does not come within the description of error, omission or irregularity. Such a phrase as irregularity is not appropriate to the illegality of doing something not permitted by law. This decision was followed in *Gul Mahomed v. Cheharu Mandal* (6) and *Johan Subarna v. Emperor* (7) both cases arising out of S. 233, Criminal P. C. These were followed in *Tilakdhari Das v. Emperor* (8) and *Asgar Ali Biswas v. Emperor* (9) though Caspersz, J., in the former case thought that they carried the "rule laid down in *Subramania's* case (5) to an extreme length." On the other hand in *Moharuddi Malita v. Jadu Nath Mandal* (10) where three similar offences on the same date and forming part of the same transaction were committed against three different persons, and included in the same charge, but distinguished as (a), (b) and (c), the Court held that, in the circumstances, this was only an irregularity and cured by S. 537. And in *Musai Singh v. Emperor* (11) it was decided that such a procedure amounted to duplicity and not misjoinder. It was not the mode of trial that was wrong, but merely the form of the charge.

In *Ram Subheg Singh v. Emperor* (12) the whole subject was ably and exhaustively

1. (1901) 25 Mad 61=28 I A 257=8 Sar 160 (P. C.).

6. (1906) 10 C W N 53=3 Cr L J 141.

7. (1906) 10 C W N 520=2 C L J 618=3 Cr L J 111.

8. (1907) 6 C L J 757=6 Cr L J 442.

9. (1913) 40 Cal 846=20 I C 609.

10. (1907) 11 C W N 54=4 Cr L J 415.

11. AIR 1914 Cal 288=22 I C 1008=15 Cr L J 224=41 Cal 66.

12. (1915) 16 Cr L J 641=20 I C 465.

tively considered. By a majority it was decided that where the prisoner had been accused in one charge of causing hurt to two persons, arising out of the same transaction, this was an irregularity which could be cured by S. 537; that the words "subject to the provisions hereinbefore contained" in that section have reference only to Ss. 529 to 536; that *Subramania's* case (5) is not an authority for the proposition that failure to observe the first part of S. 233 is fatal to the trial. Their Lordships' observations are limited to cases where charges are tried together which the law expressly says shall not be tried together in the same trial, and "mode of trial" therein mentioned refers to the constitution of the trial and not to the formal defect of drawing up one charge instead of two in a trial which is properly constituted. This decision was followed in *Tamez Khan v. Rajjalahi Mir* (13), *Subramania's* case (5) was distinguished by the Privy Council in *Abdul Rahaman v. Emperor* (14), a case in which the High Court had decided that omission to observe exactly the mandatory provisions of S. 360, Criminal P. C., was merely an irregularity and not an illegality. In this judgment *Subramania's* case (5) and the application of S. 537 were carefully explained "for the guidance of the Courts" and this decision now governs the interpretation of that section. This may render necessary the revision of some previous decisions, as circumstances occur: *Emperor v. Erman Ali* (15) per Rankin, C. J., at p. 1241 (of 57 Cal.)

I am in complete agreement with the observations in *Ram Subheg Singh's* case (12), to which I have referred, and it is unnecessary for me to enlarge further upon the subject in the present case except to point out that if the appellant had been charged separately with kidnapping and with abduction he could have been tried at one trial for each of such offences: S. 235, sub-S. (2), Criminal P. C., *Radhanath Karmakar v. Emperor* (16). The result is that, in my opinion,

13. AIR 1927 Cal 330=100 I C 827=28 Cr L J 847.

14. AIR 1927 PC 44=100 I C 227=28 Cr L J 259=54 I A 96=5 Rang 53 (P. C.).

15. AIR 1930 Cal 212=128 I C 664=31 Cr L J 536=57 Cal 1223 (F B).

16. AIR 1923 Cal 573=71 I C 120=24 Cr L J 72=50 Cal 94.

nion, the joinder of the two offences' in the alternative in the one charge 'was an irregularity and not an illegality, and as I do not consider that any failure of justice has been occasioned, S. 537 applies. If I had thought that the appellant had been misled in his defence by this error in the charge, it would have been necessary to direct a new trial under S. 232, Criminal P. C., but I am satisfied that he has not been prejudiced. Therefore the appeal is dismissed.

McNair, J.—I agree that the appeal must be dismissed for the reasons which have been given by my learned brother.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 679

RANKIN, C. J. AND AMEER ALI, J.
Ananta Kumar Mukherji—Appellant.
v.

Emperor—Opposite Party.

Criminal Admitted Appeal No. 948 of 1932, Decided on 19th January 1933, from order of Chief Presidency Magistrate, Calcutta.

Ordinance (10 of 1932), Ss. 80 and 36—Notification under Ordinance 2 of 1932 vesting powers of Special Magistrate operates as notification under Ordinance 10 of 1932.

By means of S. 80, Ordinance 10 of 1932, the notification under the Ordinance 2 of 1932 operates as a notification under the corresponding provision of Ordinance 10 of 1932 and by the new Ordinance the powers of a Special Magistrate vested under the older Ordinance are given to the officer in question. It is not necessary for the Government to issue another notification under the later Ordinance. [P 679 C 2]

Jitendra Chandra Banerji—for Appellant.

Khondkar—for the Crown.

Rankin, C. J.—This is an appeal from a decision of the learned Chief Presidency Magistrate purporting to act as a Special Magistrate under Ordinance 10 of 1932, whereby he found the appellant Ananta Kumar Mukherji guilty of an offence under S. 20, Arms Act, and sentenced him to five years' rigorous imprisonment. In this appeal various points have been argued on the merits. It appears that certain officers of police were watching out with an informer and saw the accused accompanied by another man. The police officers challenged the accused who tried to run away. They seized him and the evidence was that he had tucked up in the top part of the dhoti where the folds

were, the kocha of the dhoti, a heavy revolver which was not in perfect working order as the trigger did not engage the hammer but it was quite capable of being used by the well-known method of pressing back the hammer and then letting it go again without the assistance of the trigger. It appears that he had a cap of a 12 bore cartridge which would not in the least fit in with this revolver in one of his pockets. The suggestion of the defence was that the other man had the revolver and had managed to throw it into the dhoti of this accused.

It appears to me that the learned Chief Presidency Magistrate on this evidence has very rightly scouted that suggestion. There can be no doubt that the revolver was carefully tucked up inside this man's dhoti and was being carried in such a way that it might not come to the notice of the police. On the merits therefore in my judgment there is nothing to be said. At the trial it does not appear that any such point was raised but by the notice of appeal it was suggested that under S. 36, Ordinance 10 of 1932, Mr. Sinha had not been invested with the powers of a Special Magistrate. We have had that matter looked into and it appears to stand thus, Ss. 36 and 37, Ordinance 10 of 1932 are repetitions of Ss. 35 and 36, Ordinance 2 of the same year. Under S. 35, Ordinance 2, there was a notification of 6th January 1932 investing the Chief Presidency Magistrate with the powers of a Special Magistrate. By S. 80 of the later Ordinance, which has been extended to Bengal, it is provided that:

"Anything done in pursuance of any provision of the Emergency Powers Ordinance, 1932, shall, where the corresponding provision of this Ordinance has come into force before 4th July 1932, be deemed on the expiry of the said Ordinance to have been done in pursuance of the corresponding provision of this Ordinance, and shall have effect, and the provisions of this Ordinance shall have effect accordingly."

In my judgment that means that it is not necessary for the Government to issue another notification under the later Ordinance. The notification under the earlier Ordinance operates as a notification under the corresponding provision of the later Ordinance and by the new Ordinance the powers vested under the older Ordinance are given to the officer in question. That point fails. It has been suggested that the point under S. 36 of the Ordinance may be bad but

no inquiry having been made on the subject, there may be a possible defect as regards S. 37 of the Ordinance. As regards that, before we come to any conclusion as to whether this matter should be allowed to be introduced or not we propose to adjourn the case but subject to our allowing it to be introduced, (the Crown having laid before us no document relating to the matter) this appeal is disposed of. For that purpose it is adjourned till Monday next. (The appeal was then dismissed.).

Ameer Ali, J.—I agree.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 680

MITTER AND M. C. GHOSE, JJ.

Kedar Nath Ojha — Decree-holder — Appellant.

v.

Kshiroda Dassya—Judgment-debtor—Respondent.

Appeal No. 125 of 1932, Decided on 7th February 1933, against appellate order Dist. Judge Bankura, D/- 21st December 1931.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 100 — Order under R. 100 comes under S. 47.

An order under O. 21, R. 100, comes under S. 47 and hence second appeal lies from such order : *A I R 1926 Cal 798, Foll.* [P 680 C 2]

(b) Civil P. C. (1908), S. 11—Mortgage suit — Out of four sons, three joining in the mortgage—Suit by mortgagees—Mother of mortgagors made party—No plea raised by mother that she inherited the share of the fourth son and that should be excluded—Application under O. 21, R. 100 by mother is barred on ground of defence not taken.

Three persons mortgaged their property. The mortgagee brought a suit to enforce the mortgage making the mother of the mortgagors a party defendant as holding a lease under the mortgagors. A specific issue was raised at the instance of a stranger defendant that the three mortgagors had another brother who did not join in the mortgage and who died leaving his mother as his heir. That issue was decided in the negative. The mother did not take any plea in defence that her right, as the heir of her alleged fourth son, could not be affected by the mortgage. A mortgage decree was passed and the mortgaged properties were purchased by the mortgagees. When the mortgagees purchaser tried to take possession, the mother of the mortgagors made an application under O. 21, R. 100 that her right to the one fourth share of her alleged fourth son which she had inherited was not affected by the mortgage sale and therefore she could not be dispossessed of the same :

Held : that the matter ought to have been made a ground of attack in the suit itself and the plea having not been taken could not be raised subsequently in the proceedings under O. 21,

R. 100 : *A I R 1924 Cal 188, Foll.*; *A I R 1920 P C 81, Expl. and Dist. 5 C L J 95, Ref.*

[P 682 C 2]

Bejoy Kumar Bhattacharjee and *Gopendra Chandra Das*—for Appellant.

Bankim Chandra Mukerjee and *Muktipada Chatterjee*—for Respondent.

Mitter, J.—This is an appeal on behalf of the decree-holder auction-purchaser and arises out of certain proceedings purported to have been made under O. 21, R. 100, Civil P. C. A preliminary objection has been taken to the hearing of this appeal on the ground that no second appeal lies to this Court as this is not a matter which comes under S. 47, Civil P. C. The answer to this preliminary objection is furnished by a recent decision of this Court in the Full Bench case of *Kailash Ch. Tarafdar v. Gopal Chandra* (1) in which it has been laid down that where a question of delivery of possession is raised between the parties to the suit, the auction-purchaser decree-holder on the one hand and the judgment-debtor on the other, the matter comes under S. 47. The preliminary objection must therefore be overruled. In order to appreciate the points in controversy in the present appeal it is necessary to state a few facts. Defendants 1, 2 and 3 had mortgaged the disputed properties which form a portion of a tenure to the present appellant. The appellant brought a suit on the footing of the mortgage; in that suit there were impleaded as parties, mortgagors defendants 1 to 3, defendants 4 to 7 who were purchasers of a portion of the mortgaged properties, defendants 8 and 9 on the ground that the mortgagors have set up a tenancy in their favour, and defendant 10 who is a mortgagee of a different portion of the same tenure.

The decree was passed on the footing of the mortgage. It appears that, subsequent to the mortgage the landlord of the tenure in question obtained a decree for rent against the recorded tenants and he claimed that he acquired a charge on the entire tenure under the provision of S. 171, Ben. Ten. Act, as against all the defendants. The defendant 8 happens to be the mother of defendants 1, 2 and 3, the mortgagors in the suit, and defendant 9 is their brother-in-law. The mortgage suit was

1. *A I R 1926 Cal 798=95 I C 494=58 Cal 781 (FB).*

contested by defendant 10 alone. The defence of this defendant was that the decree obtained by the landlord was not a decree for rent inasmuch as defendants 1, 2 and 3 did not represent the tenancy. His contention further was that they (defendant 1 to 3) had another brother who died and that neither he nor his mother who succeeded to his estate on his death was made a party to the rent suit. The decree was not a rent decree and therefore there can be no charge in respect of the entire tenure under the provision of S. 171, Ben. Ten. Act. An express issue was raised on this question which formed Issue 2 in the suit. With reference to that issue it was decided that it was not satisfactorily proved that Hriday left four sons on his death, and that the evidence given for the defence was contradictory on this point and no reliance could be placed on it. In this view there was not only a mortgage decree against the defendant in respect of the mortgaged properties but the defendant was further directed to pay a sum of Rs. 126-3-3 and other debts Rs. 201-6-0 with proportionate costs and interests within a week and in default the sum was declared to be first charge on properties of schedule Kha which is included in the tenure. This decree for sale of the mortgaged properties against all the defendants including defendant 8 who is the respondent before us was apparently not appealed from.

When the appellant proceeded to take delivery of possession proceedings were started at the instance of defendant 8 purported to be under O. 21, R. 100, Civil P. C. She contended that as there was a fourth son of Hriday and as she as his mother succeeded to the inheritance of the fourth son and as the fourth son was no party to the mortgage suit or did not join in the mortgage, she was claiming possession of 1/4th of the mortgaged properties of her own account and therefore to the extent of her possession in the 1/4th share she ought not to be dispossessed. It has been argued on behalf of the decree holder that this contention could not be raised in these proceedings seeing that defendant 8 who was a party in the mortgage suit did not raise this contention which she ought to have raised. The contention really was that this was a matter which ought to have

been made a ground of attack in the suit itself and it not having been raised on principles analogous to the principle of *res judicata* the question ought not to be allowed to be raised in the present proceedings. This contention of the decree-holder however did not prevail with the Munsif who tried the matter in the first instance and the application under O. 21, R. 100, Civil P. C., was allowed. An appeal was taken to the Court of the District Judge of Bankura who took the same view as the Munsif and he confirmed the decision of the Munsif. The present appeal is directed against the concurrent judgments of the Courts below.

It is contended on behalf of the appellant that both the Courts below committed an error of law in allowing this question, namely, as to whether Hriday had a fourth son and whether such a son was interested in the mortgaged properties to be raised in these proceedings on the principle analogous to *res judicata* as has already been stated, and that this contention is barred by reason of the circumstance that the plea was not taken as it should have been taken in the mortgage suit. In support of this contention reliance has been placed on a decision of Asutosh Mookerjee, J., and Chotzner, J., reported in *Srimanta Seal v. Bindubashini Dasi* (2). Looking to the facts of that case it seems to us that it is very difficult to say that the principle laid down there, does not apply here, for there is no substantial difference between the facts of the case before Mookerjee, J., and the facts of the present case. Mr. Mukherjee who appears for the respondent has sought to distinguish that case on the ground that there the defendant who was held to be barred was the purchaser of the equity of redemption whereas in the present case she (defendant 8) was a lessee either from the mortgagor or from a purchaser of the equity of redemption. That fact however does not make any difference in principle. The question is whether the defendant 8 who was filling two capacities viz: (1) her capacity as a lessee in which capacity she was entitled to redeem the mortgage and (2) the capacity as heiress of her alleged fourth son, could contend in the latter capacity that the entire mortgaged properties could,

not be sold as the alleged fourth son did not join in the mortgage. Mr. Mukherjee argues with great force that she could not raise this contention because that was a question of paramount title and could not be investigated in a mortgage suit. But, as has been pointed out by Mookerjee, J., in the decision in *Srimanta Seal v. Bindubashini Dasi* (2) which has been referred to, it is clear that the rule that a question of paramount title cannot be investigated in a mortgage suit is subject to exception and reference is made to an early case namely the case of *Bhaja v. Chunilal Marwari* (3). Mookerjee, J., proceeds to point out this :

"One of the exceptional cases is furnished by the litigation before us. Here, the plaintiff was a defendant in the mortgage suit. He had a two-fold character. As purchaser of the equity of redemption, he was properly before the Court; as settlement-holder from the superior landlord, he could set up a defence that the mortgage could not be enforced against the property in his hands. He did not take that defence and the result was that a decree was made for sale of the mortgaged property in his presence. The decree is operative against him and he will be bound by the result of the sale in execution. In the present litigation, he seems to avoid the decree and to make it inoperative, though it was passed in his presence and is obligatory upon him. Clearly such a course is not permissible; if this suit were allowed to be maintained, the only possible result would be a multiplicity of litigation."

Here the facts stand on a somewhat stronger footing. For it appears that the issue regarding the existence of the fourth son of Hriday was raised at the instance of one of the defendants in the suit namely, defendant 10, and although it was decided against him and against other contending defendants it appears that the present respondent did not appear in the suit, took no steps to prefer any appeal against that decree which really directed a sale of the entire mortgaged property including the 1/4th share which is now in the subject-matter of controversy. Reliance has been placed by Mr. Mukherjee for the respondent on a decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Radha Kishun v. Khurshed Hossein* (4). An examination of that case will show that there the person against whom the plea of res judicata was sought to be raised was in the position of a prior mortgagee with paramount

'claim outside the controversy in suit unless' his mortgage was impugned. Notwithstanding the fact that the mortgage was not attacked the High Court came to the conclusion that the plea of res judicata would be available to the plaintiff in the earlier suit who sued on the foot of an earlier mortgage. It was pointed out thus by Sir Lawrence Jenkins who delivered the judgment of the Judicial Committee :

"To sustain the plea of res judicata it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority. But from the records of this suit it does not appear that anything of the kind was done."

Consequently, the plea of res judicata was not accepted by the Judicial Committee. Mr. Mukherjee argues consequently that in this case it ought to have been distinctly stated in the plaint that defendants 1, 2 and 3 were entitled to the properties and the case ought to have been specifically raised that no other person was entitled to the sale. We have been taken to two paragraphs of the plaint. We have no doubt that it was distinctly alleged in the plaint that the mortgagors were the only persons who are specific owners in respect of the mortgage property. In this view we think that the judgment of the Court below cannot be sustained, the appeal must be allowed and the application of defendant 8 under O. 21, R. 100, Civil P. C., must be dismissed. The appellants are entitled to costs of this appeal, we assess the hearing fee at 2 gold mohurs. There will be no order as to costs in the Courts below. No orders are necessary on the application.

M. C. Ghose, J.—I agree.

R.K.

Appeal allowed.

A. I. R. 1933 Calcutta 682

RANKIN, C. J. AND PEARSON, J.

Sm. Sarada Sundari—Appellant.

v.

Rajani Kanta Mondal and others—Respondents.

Letters Patent Appeal No. 13 of 1932, Decided on 9th March 1933, against judgment of Jack, J., D/- 3rd May 1932, in A. D. No 2917 of 1929.

(a) Landlord and Tenant—Kaemi jote.

The word "kaemi jote" is applicable to a raiyat or a tenure-holder. [P 683 C 1]

3. (1907) 5 C L J 95=11 C W N 284.

4. A I R 1920 P C 81=55 I C 959=47 I A 11=47 Cal 662 (PC).

(b) Bengal Tenancy Act (1885), S. 85.—**Estoppel—Essentials are that representation must be believed by tenants and it must be consistent with document creating tenancy—Landlord and Tenant.**

Section 85 cannot be allowed to be defeated by a case of estoppel which is contrary to the terms of the document. In a suit for ejectment by the landlord, in order that estoppel might be allowed to prevail, it must be first of all, really a case of representation believed in by the tenants and in the second place, it must be a case consistent with the document under which the tenancy was created. [P 684 C 2]

Bijan Kumar Mukherjee—for Appellant.

Jatindra Nath Sanyal and Arun Prasad Roy Choudhury—for Respondents.

Rankin, C. J.—In this case the plaintiff's predecessors granted a potta to the defendants in 1316. Before we consider what that potta says we have first of all to consider what was the status of these lessors. They were recorded in the Record of Rights as ordinary occupancy raiyats. There is nothing to suggest that they were raiyats at fixed rate or that they were tenure-holders. The Munsif found that they were ordinary occupancy raiyats and the learned Subordinate Judge did not in terms purport to interfere with that finding and indeed he could not have done so without purporting to find on evidence that the Record of Rights had been rebutted. So it must be taken that the learned Subordinate Judge had to deal with this case upon the footing that the lessors were occupancy raiyats.

We now come to the effect and the meaning of the potta. The document so far as it purports to describe the interest of the lessors calls it a "kaemi jote," that is to say, a holding with the quality of permanency. It does not profess to say that it is a mokarari interest and it does not state explicitly that the interest is that of a raiyat or that of a tenure-holder. So much if we look to the description of the lessors by itself. When we come to look at the interest which the potta purports to grant we find it described more than once as an "ordinary raiyati jote" at an annual rental to be held from generation to generation. It goes on to say: "Besides the right to receive the rent neither myself, nor my heirs and successors will have any other right with regard to the said jote lands;" and this potta is described as an "ordinary raiyati jote potta."

Now, shortly after the patta had been granted the lessors assigned to the plain-

tiffs and the plaintiffs bring a suit in ejectment. The Munsif takes the view that this is an ordinary case of parties flouting S. 85, Ben. Ten. Act. The lessors are ordinary occupancy raiyats. They purport to give an under-raiyati lease of a permanent character contrary to the section. Therefore in order to deceive the registering officer they use the phrase "ordinary raiyati jote" by way of description of the interest granted. In these circumstances, he says that it must be taken that the defendants are in a position to be ejected after a proper notice under S. 49. He has also held that though in the Record of Rights a very short time after this potta was granted the defendants are described as under-raiyats with a right of occupancy by custom that cannot be right. He says that it is very probable that with this potta giving them a permanent interest the Settlement Officer recorded them as under-raiyats with a right of occupancy, but he disbelieves, upon the evidence given of decrees in ejectment and otherwise, that there is any local custom of this character in this neighbourhood, and in any case it would be a very extraordinary custom under which the defendants within a few months would acquire a right of occupancy on the footing that they were mere under-raiyats. Consequently he has held that the plaintiff's suit must succeed.

The learned Subordinate Judge not coming to any firm finding as to the status of the plaintiffs has come to a finding that the plaintiffs are estopped from denying that the defendants have occupancy right. He finds that the plaintiffs' predecessors represented at the time of the potta that they were raiyats at fixed rate and on that footing he says that the plaintiffs' successors cannot now proceed to eject the defendants. He does not appear to me to have come to a firm decision upon the question of the right of occupancy as under-raiyats. He observes that the decrees do not show that there was no such right of occupancy. He makes no reference to the other evidence and he does not say in terms that he finds one way or the other. He says:

"Be that as it may, the facts and circumstances of the present case are clear enough to show that the defendant has right of occupancy in the lands in suit."

On appeal to this Court the learned Judge, Jack, J., has restored the judgment of the Munsiff. He says, first of all, that this document does not operate as estoppel so as to prevent the defendants from being ejected and, in the second place, apparently on the footing that the learned Subordinate Judge did not come to a definite finding of fact, he says that the proper finding of fact on the question of the right of occupancy as an under-raiyat is that the Record of Rights has been rebutted. After a careful consideration of both the points I am of opinion that the learned Judge is right and that this appeal should be dismissed.

The case of the defendants at first was not that this potta gave them a mere under-raiyati interest, but their case was that they had a raiyati interest, that if the plaintiffs had misdescribed their own interest that was another matter and they would be estopped from asserting as against the defendants that they had not the right to grant a raiyati jote. I quite appreciate that the word "kaomi jote" is applicable to a raiyat or a tenure-holder, but the evidence which the defendants adduced was that they believed all the time that their lessors were raiyats at fixed rate. Can they in this suit on that allegation be held to succeed on the ground of estoppel? In my judgment, they cannot. The phrase "ordinary raiyati jote" for which by the way the defendants have paid a selami of no less than Rs. 400 is not, in my opinion, to be regarded as anything except reference to a raiyati interest. If the defendants thought that they were to get a raiyati interest and if they were in a position to say that they thought that the plaintiffs were tenure-holders then a case of estoppel might be made. But this document is inconsistent with the lessors being raiyats at fixed rate and as the defendant's case is that that was their belief it seems to me that they are setting up a case of estoppel that is inconsistent with their own document. It will not do to say that they were getting a permanent interest although it was not a raiyati interest and that therefore the lessors were estopped from denying that they had given a permanent interest. The position here is that under the document they took a raiyati interest

although they cannot claim to have been under the belief that their lessors were tenure-holders at all. I do not think that there is any case in the books where S. 85 has been allowed to be defeated by a case of estoppel which is contrary to the terms of the document. In order that estoppel might be allowed to prevail I think it must be, first of all really a case of representation believed in by the tenants and, in the second place, it must be a case consistent with the document under which the tenancy was created. I am not prepared to apply the doctrine of estoppel in this case. On that point therefore I think the Letters Patent Appeal must fail.

On the question of the right of occupancy by custom as under-raiyats, that as I have said, was rejected by the Munsif and I take the same view as the learned Judge that the very casual reference to this matter by the learned Subordinate Judge is not to be taken as a firm finding of fact rejecting the opinion of the Munsif. Accordingly it was open to the learned Judge in this Court, though it was perhaps not obligatory upon him, to decide that question of fact for himself. I have no doubt at all that he came to a right decision and I think that he was entitled to act upon his own opinion in the matter by way of agreement with the Munsif. I think the appeal fails on this point also. The result is that this appeal is dismissed with costs.

Peerson, J.—I agree.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 684

MITTER AND M. C. GHOSE, JJ.

Abdus Sattar—Appellant.

Mohini Mohan Das and others—Respondents.

Appeal No. 203 of 1932, Decided on 23rd February 1933, against appellate order of second Court Sub Judge, Sylhet, D/- 20th February 1932.

(a) Civil P. C. (1908), S. 37—Court passing decree can execute it although its pecuniary jurisdiction is subsequently altered.

The Court which passes the decree has power to execute the decree notwithstanding the provisions of S. 37 and the Court which passed the decree does not cease to exist merely because the pecuniary jurisdiction of the said Court has been altered: *AIR 1920 Mad 427* and *2 Pat L J 113, Rel on.* [P 687 O 1]

(b) Execution—Validity—Execution against dead judgment-debtor in ignorance of his death is not bad if legal representatives are brought on record subsequently—Limitation Act (1908), Art. 182—Civil P. C. (1908), O. 22, Rr. 3 and 4.

The rule, that when a suit is filed against a dead person it is a nullity, does not apply to execution proceedings and therefore an application for execution presented against a judgment-debtor, dead at the time, in ignorance of his death is not bad if the heirs are brought on record subsequently. [P 6:7 C 1]

Priya Nath Dutt—for Appellant.

Gopal Chandra Das and Panchanan Ghosal for Bhuban Mohan Shaha—for Respondents.

Mitter, J.—This is an appeal by the judgment-debtor and arises out of an application made in the course of the execution of a mortgage decree. It appears that on 19th June 1908 appellant's father one Mohammad Abru borrowed a sum of Rs. 200 by executing a mortgage bond, from the respondents' father Madon Mohan Das. On 21st November 1914 a decree was passed for a sum of Rs. 1,083-9-3 and on 5th June 1917 the mortgaged property were directed to be sold. An application was made for a personal decree under the provisions O. 31, R. 5, Civil P. C., and on 29th November 1919 a personal decree for a sum of Rs. 997-11-4 was passed by a Munsif who it is found had no jurisdiction to pass such decree. On 21st November 1922 an execution case was started by the decree holder but it was ultimately dismissed. A further application for execution was made on 19th November 1925 before the second Munsif's Court at Sylhet, the said Munsif's Court being at this time presided over by a Munsif who had pecuniary jurisdiction only up to Rs. 1,000. On 31st January 1928 the appellant's father Mohammad Abru died; and on 15th November 1928 a petition for execution was filed by one of the respondents—respondent 3 against Abru who was then dead and thereafter an execution case was started.

On 27th November 1928 the heirs of the deceased judgment-debtor Mahammad Abru were substituted but it is said that no notice of the execution case was served on all the heirs. The execution case was ultimately dismissed. On 1st July 1931 the present execution case was launched by the decree-holder. To this execution the judgment-debtors objected on the ground that it was barred by the

statute of limitation. The argument on this head is based on the contention that the previous application for execution, which was filed on 19th November 1925 having been made before the second Munsif's Court of Sylhet, the Court which passed decree but the pecuniary limits of whose jurisdiction had in the meantime been altered from Rs. 2,000 to Rs. 1,000, cannot be regarded as having been made in the proper Court and therefore this application cannot be availed of for the purposes of limitation. This contention has been overruled by the Courts below which have held that the execution application was not barred.

This second appeal has been preferred to this Court against this order allowing the execution to proceed; and it is contended that, having regard to the language of S. 37, Civil P. C., the Courts below should have held that the application for execution of November 1925 was an application which was not made before the proper Court, because, it is said, the Court which passed the decree has ceased to have jurisdiction to execute the decree for the Court which passed the decree, although it was the second Court of Sylhet yet at the time the decree was passed was presided over by an officer who had jurisdiction to entertain the suit, namely, a Munsif who was invested with powers to try suits up to the value of Rs. 2,000. It is contended that in view of the plain language of S. 37 the Courts below were wrong in not giving effect to the contention of the judgment-debtor. The question is no doubt of some difficulty and speaking for myself I do not know what view I might have taken of the matter if it has been *res integra*. The thing that matters is as has been already stated, that it seems to me to be decided in one direction and I can see nothing which would justify me in deciding this in a way inconsistent with what has been determined by the decision to which I shall presently refer.

The case which is directly in point and which has been cited by the learned advocate for the respondents is a decision of Sir Edward Chamier the Chief Justice of the Patna High Court and reported in the case of *Iswari Prasad Singh v. Faruk Hussin* (1). There the facts were almost similar to the facts of the present case. (1. (1917) 2 Pat L J 113=39 I O 68.

sent case. A decree was passed in that case by the first Munsif of Gaya who was invested with jurisdiction to try suits up to Rs. 2,000 on 25th February 1911. An application for execution was made on 28th June 1913, to his successor who was not invested with jurisdiction to try cases over Rs. 1,000. A second application for execution was made to the Court on 9th June 1915. It was held that the first application was made to the proper Court and therefore the second application was not barred by limitation.

The learned Chief Justice with whom Jwala Prasad, J., agreed was of opinion that notwithstanding the provisions of the Civil Procedure Code it appeared that there had been two previous decisions of the Calcutta High Court in the case of *Lutchman Pandeh v. Maddan Mohan* (2) and *Kartick Nath v. Tilukdhari Lal* (3) which seemed to take the view that the Court which passed the decree does not cease to exist merely because some of the properties in respect of which execution was intended to be levied had been transferred to a place outside the local limits of the Court which passed the decree. In other words it does not cease to exist merely because it has lost territorial jurisdiction over the immovable properties which formed the subject-matter of execution after the decree. The Chief Justice points out thus :

"The District Judge has taken the view that the first application for execution was not made to the proper Court apparently because at the time of the application the presiding officer would not have had jurisdiction to try the suit in which the decree was passed. This view is untenable if the decisions in *Lutchman Pandeh v. Maddan Mohan* (2) and *Kartick Nath v. Tilukdhari Lal* (3) are correct. The Civil Procedure Code has been amended frequently since these decisions were pronounced and a new Code has been passed in place of the Code of 1882, but the provision which was construed in the decisions referred to has never been touched nor have either of the decisions so far as we are aware been overruled though there are cases in which have been distinguished in the Calcutta High Court. In my opinion, we ought to follow those two decisions and if we follow them we must hold that the first application for execution made on 28th June 1913, was made to the proper Court and that the present application for execution which was made on 9th June 1915, was made within time. The decision to which we have referred do not appear to have been brought to the notice of the learned District Judge."

In effect the learned Chief Justice held that the Court which passed the decree did not cease to exist merely because the pecuniary limits of its jurisdiction were altered. It is argued for the appellant that the cases on which the learned Chief Justice of Patna relied were cases which dealt with want of or absence of territorial jurisdiction in the executing Court and not in the absence of pecuniary jurisdiction in the said Court. It is difficult to draw a distinction of this kind between these cases. Question has also been raised with reference to the absence of pecuniary jurisdiction by Sir John Wallis, Chief Justice of Madras, in the case of *Seeni Nadan v. Muthusamy Pillai* (4) and the learned Chief Justice has given cogent reasons for holding that Ss. 37 and 38, Civil P. C., must be read in the sense that S. 37 by the use of the word 'include' does not take away from the jurisdiction of the Court which passed the decree the power to execute the decree. As the learned Justice points out :

"Section 37 provides that the words 'Court which passed a decree' shall be deemed to include: (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction the Court of first instance, and an argument has been based on this clause. Now it may well be that under Ss. 37 and 38 the appellate Court has no jurisdiction to execute its own decree, but that is not because it has no such jurisdiction is excluded by the use of the word 'include' as has been argued, but because it had no such jurisdiction under S. 362 of the Code of 1859, and it may well be questioned, having regard to the presumption already referred to, whether when that section was eliminated in re-drafting and the matter was dealt with in Ss. 649 and 123 (now 37 and 38), there was any intention to confer on the appellate Court jurisdiction which it had not till then possessed. We have however to deal with Cl. (b), and where the decree holder had a valuable right under the Code of 1859 to apply to the Court which passed the decree at least for execution by way of transmission, and where the present Code provides expressly that a decree may be executed by the Court which passed it, the contention that this important right must be held to have been taken away because of the provision in S. 37 that these words shall be deemed to 'include' another Court appears to me to be altogether untenable. It may be that in some rare and exceptional instances the category of things 'included' in a definition may be held to be exhaustive, but ordinarily as observed in Stroud's Dictionary, it is 'a phrase of extensive and not of restrictive jurisdiction,' and it cannot, in my opinion, be used here to deprive the decree-holder of the important right which he had till then of applying in all cases in the first instance to the Court which passed

2. (1861) 6 Cal 518=7 C L R 521.

3. (1888) 15 Cal 667.

4. AIR 1920 Mad 427=42 Mad 821=53 L J 213 (F B).

the decree, especially having regard to the fact that the section itself was inserted when the Code was in process of re-drafting and re arrangement, when, as I have already said, there in presumption, against alterations by implication only."

Therefore it has been held on these authorities that the Court which had passed the decree had power to execute the decree notwithstanding the provisions of S. 37 and we are of opinion that the Court which passed the decree does not cease to exist merely because the pecuniary jurisdiction of the said Court has altered. It seems to us that the Court below was correct in taking the view that the application of 1925 was made to the proper Court and it was sufficient to save limitation. Another point that was argued is that even if that is so the application of 1928 was not an application in accordance with law because it was filed against a dead person Mahammad Abru. The rule, that when a suit is filed against a dead person it is a nullity, does not apply to execution proceedings. The decree was rightly obtained against Mahammad Abru and the application for execution was presented against him at the time in ignorance of his death. The decree was a good decree against Abru and as soon as it was brought to the notice of the decree-holder that Abru was dead he made an application for substitution of the heirs of the deceased in the execution proceedings. We do not see anything irregular in the application of 15th November 1928. These two applications are in order and there is no question that the applications of the decree-holder were in time. The result is that this appeal fails and must be dismissed. There will be no orders as to costs.

M. C. Ghose, J.—I agree.

R.K.

Appeal dismissed.

* A. I. R. 1933 Calcutta 687

MUKERJI, J.

Sarat Chandra Saha and another—
Defendants—Appellants.

v.

Bepin Behari Chakraborty and others
—Plaintiffs—Respondents.

Appeal No. 1964 of 1930, Decided on 28th November 1932, against appellate decree of 3rd Court Sub-Judge, Dacca, D/- 5th April 1930.

(a) Cosharer—Purchase by, of non-transferable occupancy—Other cosharer in exclusive possession of other lands suing for

joint possession—Whether claim can be resisted—(*Quere*).

Quere—Whether a cosharer landlord who has purchased a non-transferable occupancy holding cannot resist the claim for joint possession on the ground that the plaintiffs themselves are in sole occupation of other lands to their exclusion.

[P 688 C 2]

* (b) Cosharer—One cosharer in exclusive possession—Non-transferable holding purchased by stranger—Latter subsequently becoming cosharer landlord—He cannot resist former's claim for joint possession.

A cosharer landlord in exclusive possession of certain lands can, in the absence of acquiescence, claim joint possession of a non-transferable occupancy holding with a person who purchased it from the previous tenant as a stranger and then acquired a fractional share of the superior interest thus becoming a cosharer landlord: *A I R 1927 Cal 462, Expl. and Dist.; Case law referred* [P 687 C 2; P 689 C 1]

Gopal Chandra Das and Bhagirath Chandra Das—for Appellants.

Phanbhusan Chakraborty—for Respondents.

Judgment.—This case stands free from those considerations which might perhaps arise in a case where a cosharer landlord purchases a non-transferable occupancy holding held jointly under him and his cosharers and then seeks to resist the claim of his cosharers on the ground that they too are in exclusive possession of a portion or portions of other joint properties. In this case the defendants who were complete strangers purchased a non-transferable occupancy holding from the previous tenant and thereafter, though within a short time of the purchase, acquired a small share in the superior interest, thus becoming a cosharer landlord. The other landlords then instituted the present suit to recover joint possession with the defendants to the extent of their share. The suit has been resisted on the ground that the said cosharers themselves are in exclusive possession of other joint lands.

That a cosharer landlord making a purchase of a non-transferable occupancy holding would ordinarily be liable to eviction is a proposition that cannot be denied, because the other cosharers are entitled to treat the holding as abandoned and abandonment would ordinarily justify a claim for khas possession. *Dayamoyee v. Ananda Mohan Roy* (1). In *Dilbar v. Hossein Ali* (2) a two-third cosharer of a taluk had, without the consent of his cosharers, forcibly

1. AIR 1915 Cal 242=27 I C 61=42 Cal 172 (F B).

2. (1899) 26 Cal 553.

turned out the common tenants of a non-transferable occupancy holding and possessed himself of the lands of the holding to the exclusion of his cosharers and then relied upon the equitable considerations noticed in *Robert Watson & Co. v. Ramchand* (3) and *Luchmeswar Singh v. Marwar Hussein* (4) and this Court held that in the circumstances of the case no such considerations arose. In *Girish Chandra v. Kedar Chandra* (5) a cosharer landlord had purchased a non-transferable occupancy holding in execution of a money decree against the tenant, and the cosharers of such purchaser were allowed a decree for joint possession with him, it being held that he had no right to retain possession of the holding to the exclusion of his cosharers. In circumstances similar to those in the last mentioned case similar decrees were passed in *Lakkhikant v. Bulabhadra* (6), *Kanchan Mondal v. Kamala Prasad* (7), *Dwarkanath Roy v. Mathuranath Roy* (8). In all these cases the reasons for the decision were that the cosharer landlords by the purchases they made acquired no interest as against their cosharers and there was abandonment which entitled the latter to re-enter. A similar view has been taken in *Golbar Bibi v. Aswini Kumar* (9) and *Durgasunker Roy v. Kamin Kumar Sarma* (10). In none of these cases was any plea raised that by reason of the fact that the plaintiffs themselves had been in sole occupation of certain lands, the defendants as cosharers could resist a claim for joint possession.

The case of *Basanta Kumari v. Mahesh* (11), where such a defence was taken and given effect to, the question whether the holding which had been purchased by the cosharer landlords was a transferable one or not was not gone into and the case was fought out on the footing of the rights of one set of cosharers who themselves were in sole possession of certain Khamar lands in a Mehal to restrain another set who had made purchase from erecting structures on the

lands so purchased. In *Ram Chandra v. Lakshmi Kanta* (12), *Basanta Kumari v. Mohesh* (11) was applied to a case in which the finding of the lower appellate Court was read as meaning that the holding was transferable. This equitable defence however was not upheld in the case of *Jagabandhu v. Rajmohan Pal*, A. I. R. 1925 Cal. 538, which was the case of a purchase by some cosharer landlords of an occupancy holding which was not transferable. Notwithstanding the case last mentioned, were this case one of a purchase made by a cosharer landlord who has sought to resist the claim for joint possession on the ground that the plaintiffs themselves are in sole occupation of other lands to their exclusion, I should have hesitated to rule out their defence but should have been prepared to consider the matter further.

But the special fact in the present case, namely, that the defendants were strangers when they made the purchase and then came to acquire an interest in the Maliki right is, in my opinion a fact which deprives them of an equitable defence of this character which is open only to a cosharer. In *Nabadwip Chandra v. Bhagwan Chandra* (13) the facts were that one of the defendants, namely, defendant 4 in that suit had purchased a non-transferable occupancy holding and four years after such purchase sold it to a person, viz, defendant 1 who just a month before the sale became a cosharer by purchase of a share in the Maliki interest. In that case to resist the suit of the other cosharer for joint possession it was contended that the equitable principle referred to in *Basanta Kumari v. Mohesh* (11) was not applicable because whereas in the last mentioned case the parties were cosharers from before the purchase, in the case then before the Court defendant 4 had made the purchase first, then defendant 1 acquired a Maliki interest and then purchased the holding from defendant 4. In that case it was said :

"This distinction that exists between the facts of the two cases is not one which may be said to be at all material and in any event it is proper that on a question as to whether the equitable principle laid down in *Basanta Kumari v. Mohesh* (11) should be applied or not, one has got to see the state of facts as they existed at the time when the suit was instituted."

3. (1891) 18 Cal 10=17 I A 110 (P C).

4. (1892) 19 Cal 258=19 I A 48 (P C).

5. (1900) 27 Cal 473=4 C W N 569.

6. AIR 1915 Cal 100=25 I C 546.

7. (1915) 29 I C 734.

8. (1917) 34 I C 833.

9. AIR 1929 Cal 253=117 I C 536.

10. AIR 1928 Cal 535=111 I C 74=55 Cal 653.

11. AIR 1914 Cal 283=21 I C 621.

12. AIR 1929 Cal 574=111 I C 19.

13. AIR 1927 Cal 462=101 I C 27.

These observations as far as I can gather were made in view of the facts of that particular case. In the first place the very fact that reliance was placed on *Basanta Kumari v. Mohesh* (11) would seem to suggest that there was no particular finding on the question of transferability of the holding. Next, it would appear from the judgment of this Court that the character of the holding did not play any part in the decision. Thirdly, it would also seem that defendant 4 was himself a cosharer, when he made the purchase because the appellant's argument was that the purchase made by defendant 4 on 5th Magh 1324 was a purchase on behalf of all the cosharers. And fourthly, the said purchase was condoned or acquiesced in for a period of 4 years before any suit was instituted. What was said in that case therefore cannot be taken as implying that where a purchase is made by a stranger who subsequently becomes a cosharer landlord, his claim to remain in possession is not to be judged on a different footing. On the other hand I think the position becomes completely different in such circumstances. For then it can be said, as was said in the case of *Bhairabendra Narain Ray v. Rajendra Narayan Roy* (14) (at p. 489 of 50 Cal) :

"It cannot be said that when the defendant took possession by virtue of the purchase which he set up he took possession in the exercise of his right as a cosharer of the Mohal and that there was no ouster of the plaintiff with regard to the possession of the land."

It is quite clear that when the defendants in the present case took possession of the land they came in as trespassers with no right which could avail against the plaintiffs. The plaintiffs had at that time the right to evict them, and no acquiescence on their part having been established, they are entitled to joint possession to the extent of the share in their own. The appeal must be dismissed with costs.

R.K.

Appeal dismissed.

14. AIR 1921 Cal 46=74 I C 193=50 Cal 487.

A. I. R. 1933 Calcutta 689

MITTER AND M. C. GHOSE, JJ.

Susarmoy Sen and another—Appellants.

v.

Bibhuti Bhushan Jana—Respondent.

Appeal No. 506 of 1931, Decided on 23rd January 1933, against order of Addl. Dist. Judge, Howrah, D/- 6th October 1931.

(a) Provincial Insolvency Act (1920), S. 53
—Burden of proving want of good faith is on receiver.

The onus is on the Official Receiver of showing that the transaction was not made in good faith and for valuable consideration: AIR 1930 PC 265 and AIR 1931, PC 75, *Rel on*,

[P 690 C 1]

(b) Practice—Judgment—Suspicion is no ground.

Mere suspicion is no ground on which to rest a judicial decision and in fact is a treacherous ground for legal decision. [P 692 C 1]

Rupendra Kumar Mitter, Bijan Behari Mitter and Khitindra Kumar Mitter—for Appellants.

Ananta Kumar Banerji—for Respondent.

Mitter, J.—This appeal is directed against an order of the Additional District Judge of Howrah dated 6th October 1931 passed under S. 53, Provincial Insolvency Act (1930) by which he annulled a certain transfer in favour of the appellants in the present case. The learned Additional District Judge has come to the conclusion that so far as the passing of the consideration is concerned it has been established in this case. He has further found that deeds were executed for the purpose of paying certain previous mortgages executed so far back as the year 1922 which transactions the learned Judge found to be genuine and for consideration. The reason given by the learned Judge for annulling the transfer is that he is satisfied on the circumstances of this case that the transfer was not made in good faith and the only question which has been debated before us in this appeal is as to whether the circumstances which have been established in this case lead to the necessary inference that the transaction, entered into by the appellants was bad for want of good faith. It is necessary to premise at the outset that the burden of proving the want of good faith of the transaction and the passing of consideration is on the receiver. The view which prevailed in India before, namely that the burden

of proving the consideration and good faith lay on the purchaser of the encumbrances can no longer be regarded as a sound view of law in the face of the two decisions of their Lordships of the Privy Council to which reference has been made in the course of the argument. The first of these decisions was given in an appeal from the Straits Settlements. That was in the case of *Official Assignee of the Estate of Cheah Soo Tuan v. Khoo Saw Cheow* (1) where their Lordships were construing the provisions of Bankruptcy Ordinance 50 of the Straits Settlements the provisions of which are somewhat analogous to the provisions of S. 53, Provincial Insolvency Act. The second case is the case of *Official Receiver v. P. L. K. M. R. M. Chettyar Firm* (2). It was laid down by their Lordships in this case that where the receiver is seeking to set aside a mortgage under the provisions of S. 53, Provincial Insolvency Act (1920) the onus is upon him to prove that it was not made in good faith and for valuable consideration: vide *Official Receiver v. P. L. K. M. R. M. Chettyar Firm* (2). The learned Additional District Judge has kept these decisions in view and he has rightly cast the onus on the Official Receiver of showing that the transaction was not made in good faith and for valuable consideration.

The only question which we have to consider is whether the receiver who is the respondent in the present case has discharged that burden. It becomes necessary therefore to state the circumstances which have led to the transfer which is now the subject-matter of controversy. It appears that one Kalidas Mondal and his mother executed a mortgage of a half share of their dwelling house on 16th January 1922 in favour of the present appellants. The appellants had advanced a sum of Rs. 2,000 which was secured by the said mortgage. A portion of the consideration money from this sum was applied by Kalidas to the liquidation of the debts of his creditors. This transaction has been proved and has been marked as Ex. B in the case. On 11th July 1922 Kalidas's mother executed a further mortgage in favour of the appellants for a sum of Rs. 2,000.

1. AIR 1930 PC 265=(1931) AC 67=100 LJPC 45=144 LT 180.

2. AIR 1931 PC 75=181 IC 767=58 IA 115=9 Rang 170 (PC).

This document is marked as Ex. R and the evidence is that Kalidas paid a sum of Rs. 1,800 out of the consideration of Rs. 2,000 in favour of one Provabati Devi who was an earlier mortgagee and the release executed by the said Provabati Devi has been proved in this case and has been marked as Ex. U. On 17th November 1922 Kalidas and his mother executed a further mortgage in respect of this dwelling house for another sum of Rs. 2,000 which was paid before the Registrar at the time of registration in Cossipore Registration Office. Then it appears that he borrowed from the appellants from time to time some money on hatchitas. These hatchita debts amounted to about Rs. 800. The learned Additional District Judge has found all these loans to be genuine. On 20th January 1926 Kalidas and his mother executed a conveyance of the mortgaged property for a consideration of Rs. 11,350 the consideration being made up of a sum of Rs. 10,473 due on the three mortgages which have already been mentioned and the balance in respect of the sum due on the hatchitas. On 1st February 1926 shortly after the execution of this conveyance, proceedings in insolvency were commenced at the instance of the debtor Kalidas. In the application for insolvency small debts due to some Kabulis amounting to Rs. 800 odd were mentioned as due from the applicant. The adjudication order was made on 8th March 1926.

After the adjudication order it appears that the receiver in insolvency took proceedings for annulment of the deed of sale and proceeded under the provisions of S. 54, Insolvency Act. On 14th May 1926 the learned Judge took the view that as it was a fraudulent preference in favour of the appellants who were two of the several creditors the transfer should be annulled. Against that decision the present appellants preferred an appeal to this Court and my learned brothers B. B. Ghose and N. K. Bose, JJ., said that the learned Additional District Judge entirely misconceived the case and set aside his order which was made under the provisions of S. 54 of the Act; and suggested that the proper course to take in the matter was that he should proceed under S. 53 of the Act. That was accordingly done on remand. On remand the appel-

lants had adduced evidence in the case and both the appellants stated in their evidence that they had no knowledge of the intention of Kalidas to make an application to be adjudged an insolvent so soon after the transfer in their favour by the deed of sale. Reference has been made to a portion of this evidence by Mr. Mitter who appears for the appellants. Both of them have distinctly stated, as I have already indicated, that although they were, on intimate terms with Kalidas they had no apprehension in their minds that the said Kalidas intended to make an application to be adjudicated an insolvent. They have been subjected to cross examination on behalf of the receiver and I do not see that they have been in any way shaken in the cross-examination in so far as their date of knowledge is concerned. It has been argued on behalf of the respondent that they were not telling the truth, that they came to know of the order of adjudication four months after the date of the kobala in their favour. As a matter of fact they came to know of it on 8th March 1926 when the order of adjudication was made. It is no doubt true that there was a slight discrepancy and we cannot on the basis of that discrepancy reject the testimony of the appellants. On one occasion when they said that they had no knowledge of the insolvency their testimony was accepted.

The Receiver the only witness who has been called for the mother of Kalidas has said that she has made statements which would go to show that she knew nothing about the mortgage. She knew nothing about the deed of sale although it appears from the endorsement that she went to the Registration Office, was identified by Kalidas and put her hand in the instrument. The circumstances from which the learned Judge infers that the present applicants were aware of the insolvent position of Kalidas are these: (1) that the application to be adjudged an insolvent was made shortly after the execution of the deed of sale (2) that the sale saved a lot of trouble and ensured payment of their unsecured dues also in full; (3) no serious attempt was made by the creditors to take possession of Kalidas's share in the house; (4) the kobala does not seem to have been properly explained to

Haridasi and (5) there was no particular reason for effecting the sale just at that moment unless it was the awareness of Kalidas's intention to apply for insolvency. From these facts the learned Judge was of opinion that the necessary inference flows that the appellants were cognisant of the insolvent circumstances of Kalidas. We are of opinion that even conceding that these facts were established the necessary inference does not flow from this that they had knowledge of the insolvent condition of Kalidas in the face of their testimony in this case. In order to appreciate this position it is necessary to realize the position of the creditors appellants. According to the finding they had already advanced a sum of Rs. 10,473 on the three mortgages and so they were secured creditors to that extent and there remains also the question of Kalidas's borrowing a sum of Rs. 800 odd which was an unsecured debt. There does not seem to be any reason to infer from this circumstance that they were intending to leave a margin to the debtor and in considering the question of good faith of the transaction one has to consider whether this transaction was either entered into secretly or one by which the debtor was benefitted to a certain extent. The half share of Kalidas was sold for the sum which was due to the appellants on the mortgage and on the hatchittas both of which sums have been found due.

The appellants have established according to the learned Judge the passing of consideration, the genuineness of the previous mortgage debts and further the adequacy of the consideration. Question has been raised in this case that a mere preference of one creditor is not sufficient to justify the inference that the transfer was not in good faith and reference has been made to the provisions of S. 53, T. P. Act and the decisions on that section. It does appear that a distinction has been drawn in the cases between the effect of undue preference of one creditor in a transaction where there is no question of bankruptcy and the effect of such preference with reference to a transaction where the transaction can be challenged in bankruptcy proceedings. Reference may be made to the decision of their Lordships of the Judicial Committee in

the case of *Musahar Sahu v. Hakim Lal* (3) where this distinction is pointed out. It appears however from the present case that the circumstances which have been mentioned, namely the unawareness of the position of the insolvent at the date of the sale, the fact that no possession was taken of the half share of Kalidas by the present creditors having regard to the circumstances to which I shall advert presently do not lead to the necessary inference of want of good faith. It may raise suspicion but as has been pointed out in the decisions of the Judicial Committee mere suspicion is no ground on which to rest a judicial decision and in fact it has been held to be a treacherous ground for legal decision. The fact that the appellants had not taken possession of the half share of the house cannot throw suspicion on the transaction for a partition suit had been pending and a stranger could not have been wise if he would have proceeded to take joint possession of the half share till the disposal of the partition proceedings by the Court. Besides in the meantime, shortly after the transfer, these proceedings in insolvency were started and the receiver who had been appointed commenced proceedings for annulling the transaction under S. 54, Provincial Insolvency Act; and as a matter of fact the sale had been annulled some time in December 1926. The final decree in the partition suit was made in 1929 and the present proceedings are still pending. In these circumstances no inference can be drawn from the circumstance that although possession had not been taken this transaction was in reality a benami transaction. Then there is the question as to whether the transfer deed was explained to Haridasi. This question is not relevant to the determination of the present case. It was a matter between Haridasi and the appellants; she has not impeached this deed by taking any proceeding in Court. Having regard to all these circumstances we are of opinion that this appeal should be allowed and the order of the Additional District Judge set aside. We declare that the transaction effected on 20th January 1926, namely the conveyance of half share of Kalidas's house is a transaction-

3. AIR 1915 PC 116=92 I C 349=43 I A 104=43 Cal 531 (PG).

which has been entered into in good faith and for consideration. There will be no order as to costs.

M. C. Ghose, J.—I agree.

R.K.

Appeal allowed.

* A. I. R. 1933 Calcutta 692

LORT-WILLIAMS AND MCNAIR, JJ.

Sachindra Kar Gupta—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 375 of 1933, Decided on 7th July 1933.

* (a) Arms Act (1878), S. 20—S. 20 is not restricted to export or import of arms in bulk but applies to cases of personal arms.

Section 20 applies also to ordinary cases of carrying or possessing personal arms, and is not restricted to cases of exportation and importation of arms in bulk. But for S. 20 to apply, there must be some special indication of an intention to conceal possession of the arms from a public servant, railway official or public carrier: *A I R 1926 Lah 262, Appr; 27 Cal 692; 1 S L R 18; 9 P R 1912 Cr and A I R 1914 Lah 280, Dist from.* [P 694 C 1]

(b) Arms Act (1878), S. 20—Accused an escaped convict—Police having special instructions to picket road for accused—Accused aware of this—Revolver stolen and found in holster round waist under coat and shirt—Evidence held sufficient under S. 20.

A revolver was stolen a few weeks before it was discovered in the possession of accused, who himself was an escaped convict. The police had received special instructions to picket the roads and look out for him. This fact had been communicated to the accused. The revolver was found in a holster, tied with a cloth round his waist, and underneath his coat and shirt. When asked, he failed to account for it:

Held: that in these circumstances, there was ample evidence of the intention required by S. 20. [P 694 C 2]

* (c) Arms Act (1878), Ss. 20, 19 (e), 13, 14 and 12—Distinction between the sections explained—Unlicensed person going armed with revolver—His case comes under S. 13 or S. 14 and he can be convicted under S. 20.

The real distinction between the sections is, that S. 14 prohibits an unlicensed person from going armed with any kind of arms, that is to say, a person going armed with either a knife or a revolver comes within the provisions of the section. But with regard to fire-arms, a further offence may be committed, namely, of having them in possession or under control, without a license. S. 14 covers this offence, and if this offence is committed with the intention referred to in S. 20, then a heavier punishment may be inflicted than for the simple offence under S. 14, the penalty for which is provided in S. 19 (f). To be in possession or control of arms other than those mentioned in S. 14 is not an offence, though it is an offence to go armed with them, as provided in S. 13. An unlicensed person going armed with a revolver, may be convicted

under either S. 13 or S. 14 and consequently may be convicted under S. 20. [P 694 O 2]

J. C. Gupta, Bhagirath Chandra Das and Jnana Nath Borah—for Appellant.
Kundkar and Anilendra Nath Rai Chaudhuri—for the Crown.

Lort-Williams, J.—The appellant was charged as follows :

First.—"That you, on or about 17th December 1932, at the crossing of Grand Trunk Road and Boral Lane at Hooghly, Bally, P. S. Chinsura, were going armed in contravention of S. 13, Arms Act, 1878 and thereby committed an offence punishable under S. 19 (e), Arms Act, 1878 and within my cognizance."

Secondly.—"That you, on or about 17th December 1932, at the same place had in your possession a fully loaded six chambered Revolver No. 78141 and four additional live cartridges in contravention of Ss. 14 and 15, Arms Act, in such manner as to indicate an intention that the possession might not be known to any public servant as defined in the Indian Penal Code and thereby committed an offence punishable under S. 20, Arms Act, 1878 and within my cognizance."

He was convicted by the Special Magistrate of Chinsura under both Ss. 19 (e) and 20, Arms Act, 1878 and sentenced to six years' rigorous imprisonment under the latter section, no separate sentence being passed under S. 19 (e). Since the accused was already undergoing a sentence of imprisonment, the sentence was to take effect at the expiry of the sentence which he was then undergoing. S. 13, Arms Act, provides that

"no person shall go armed with any arms except under a license."

Section 14 provides that

"no person shall have in his possession or under his control any cannon or fire-arms or any ammunition or military stores except under a license."

Section 19 provides the penalties for breaches of Ss. 5, 6, 10 and 13 to 17. Thus, sub-S. (a) provides the penalty for manufacturing or selling arms in contravention of S. 5, sub-S. (c) for importing exporting arms in contravention of S. 6, sub-S. (d) for transporting any arms in contravention of S. 10, sub-S. (e) for going armed in contravention of S. 13, sub-S. (f) for having in possession or control any arms in contravention of S. 14 or S. 15. S. 20 provides that

"whoever does any act mentioned in Cls. (a), (c), (d) or (f), S. 19 in such manner as to indicate an intention that such act may not be known to any public servant as defined in the Indian Penal Code or to any person employed upon a railway or to the servant of any public carrier, and whoever, on any search being made under S. 25, conceals or attempts to conceal any

arms, may be punished with imprisonment for a longer term than is provided in S. 19."

The appellant was arrested on 17th December 1932 at about 9.30 p. m., at the junction of the Boral Lane with the Grand Trunk Road when cycling in company with another man. The police had had special instructions to picket this road and be on the look-out for the appellant and other "declared absconders." They saw two men approaching the Grand Trunk Road, who slackened their speed near the crossing and appeared confused. This attracted the attention of the police who seized the handle of the appellant's cycle and forced him to dismount. They then challenged the appellant who was shivering, and he gave his name as Sachindra Nath Kar Gupta. On searching him, the police found a six-chambered revolver fully loaded, in a holster tied round his waist with a cloth under his shirt and coat. In the inner pocket of his coat they found a handkerchief in which were tied four live cartridges, and two manuscript seditious leaflets written in pencil, one in English and the other in Bengali. The revolver bore the number 78141 and was subsequently identified as the property of Mr. B. K. Roy, I. F. S., Divisional Forest Officer, Salem, Madras. At the end of October, 1932 he discovered that his revolver was missing, while he was at Bogra, and reported the loss to the police immediately. Mr. Roy's native district is Barisal, and he had been staying there during the middle part of October 1932. He had left for Bogra about the 21st of the month.

The defence was that no revolver or ammunition had been found on the appellant when he was searched. But there is no doubt, from the evidence of the witnesses, including the search witnesses, that the articles mentioned were found in the possession of the appellant. The place where the search was made was brightly lighted, and the witnesses had a good opportunity of seeing what was discovered in the possession of the appellant. The appellant is an escaped convict, having escaped from the Midnapore Jail on the night of 7th February 1932, where he was undergoing seven years' rigorous imprisonment for an offence arising out of the Machuabazar Conspiracy Case. He had been at large for over ten months when re-arrested on

17th December. His native place is Barisal. The appellant possessed no license to carry arms. It has been argued on his behalf that upon the facts he ought to have been convicted under S. 19 (e) and not under S. 20, because S. 13 alone, deals with the offence of carrying arms, without a license, and S. 14 is intended to be restricted to the offence of unlicensed possession of arms, and that this case clearly comes within the provisions of the former section. Consequently, as S. 19 (e) is not mentioned in S. 20, the longest term of imprisonment which can be inflicted on the appellant is three years.

Further, it has been contended that S. 20 is not intended to be applied to ordinary cases of carrying or possessing personal arms, but is restricted to cases of exportation and importation of arms in bulk. This contention is founded on a number of cases in this and other High Courts. Thus, in *Ahmed Hossein v. Queen-Empress* (1), Sir Francis Maclean, C. J., doubted whether S. 20 was intended to apply to cases where there was possession of personal fire-arms. In *Crown v. Azu* (2), it was stated that cases under S. 20 generally occur where arms are illicitly imported or transported, and this view was followed in *Ibrahim v. Emperor* (3) and in *Gahna v. Emperor* (4). However, in *Chet Singh v. Emperor* (5) this view of the sections was decided to be unsatisfactory and was expressly dissented from. It was held that each case of concealment of arms must be decided on its own facts, as to whether it falls under S. 19 or S. 20, Arms Act, but for S. 20 to apply, there must be some special indication of an intention to conceal possession of the arms from a public servant, railway official or public carrier. I have no doubt that this decision was right, and that the contention raised by the learned counsel for the appellant cannot be supported.

It is true that S. 20 requires that there shall be evidence such as to indicate an intention that the "going armed" or

possession of arms should not be known either to some public servant as defined in the Indian Penal Code, e. g., the police, or to some person employed by a railway or a public carrier. In this case, the revolver was stolen from Mr. Roy a few weeks before it was discovered in the possession of the appellant. The appellant himself was an escaped convict, and the police had received special instructions to picket the roads and look out for him. I have little doubt that this fact had been communicated to the appellant. The revolver was found in a holster tied with a cloth round his waist, and underneath his coat and shirt. When asked, he failed to account for it. In these circumstances, there was ample evidence of the intention required by S. 20.

The real distinction between the sections is, that S. 13 prohibits an unlicensed person from going armed with any kind of arms, that is to say, a person going armed with either a knife or a revolver comes within the provisions of the section. But with regard to fire-arms, a further offence may be committed, namely, having them in possession or under control, without a license. S. 14 covers this offence, and if this offence is committed with the intention referred to in S. 20, then a heavier punishment may be inflicted than for the simple offence under S. 14, the penalty for which is provided in S. 19 (f). To be in possession or control of arms other than those mentioned in S. 14 is not an offence, though it is an offence to go armed with them, as provided in S. 13. Some confirmation of this view of the distinction to be drawn between the sections is provided by the recent Bengal Criminal Law (Arms and Explosives) Act (21 of 1932) in which, by Ss. 3 and 4, it is provided that

"whoever commits an offence under Cls. (c), (e) and (f), S. 19, if the offence is committed in respect of a fire-arm, may be punished with transportation for life or with imprisonment for a term which may extend to 14 years."

The result is, that in my opinion S. 20 was not intended to be restricted in its operation as argued on behalf of the appellant, but that an unlicensed person going armed with a revolver, may be convicted under either S. 13 or S. 14, Arms Act, and consequently, may be convicted under S. 20. Upon the facts stated, I see no reason to differ from the

1. (1900) 27 Cal 697=4 O W N 750.

2. (1907) 1 S L R 18=9 Cr L J 259 (FB).

3. (1912) 9 P R 1912 Cr=14 Cr L J 41=18 IC 265.

4. A I R 1914 Lah 280=24 IC 594=15 Cr L J 506.

5. A I R 1926 Lah 262=91 IC 401=27 Cr L J 625=7 Lah 65.

opinion formed by the learned Special Magistrate and this appeal therefore is dismissed.

McNair, J.—I agree that the appeal should be dismissed for the reasons given by my learned brother.

R.K. *Appeal dismissed.*

*** A. I. R. 1933 Calcutta 695 (1)**

C. C. GHOSE, AG. C. J. AND MALLIK, J.

Jogendra Mohan Chowdhury and others
—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 402 of 1933, Decided on 19th June 1933.

* Criminal Law Amendment Act (1908), S. 17 (1)—Hoisting national flag or refusal to take it down when ordered by police is no offence under S. 17 (1).

The hoisting of the national flag over a shop or refusal to take it down at the request of the police does not amount to assisting the operations of an unlawful association and is not an offence under S. 17 (1): *A I R 1933 All 95, Rel on.* [P 695 C 1]

Narendra Kumar Basu and Ajit Kumar Dutta—for Petitioners.

D. N. Bhattacharji—for the Crown.

Judgment.—We have examined the record. We are not of opinion that the hoisting of what is called the national flag in the circumstances disclosed over a shop or refusal to take it down at the request of the police amounts to assisting the operations of an unlawful association or is an offence under S. 17 (1), Criminal Law Amendment Act, 1908: see in this connexion the case of *Ram Prasad v. Emperor* (1) which is on all fours with the present case. The result therefore is that the convictions of and the sentences passed on the petitioners are set aside and the fines, if paid, will be refunded.

R.K. *Conviction set aside.*

A. I. R. 1933 Calcutta 695 (2)

MALLIK AND JACK, JJ.

Pahar Ujalaba Co-operative Bank and others—Decree-holders.

v.

Adu Bhuia and others—Judgment-debtors.

Civil Ref. No. 10 of 1932, Decided on 21st February 1933, from appellate order by 3rd Court, Narayanganj.

Co-operative Societies Act (2 of 1912), S. 43 (2) (1)—Rules made by Bengal Government—R. 22 (7)—Award by arbitrator can be enforced without filing it in Court under Civil P. C., Sch. 2—Such awards need not be stamped—Civil P. C. (1908), Sch. 2.

Schedule 2, Civil P. C., does not apply to awards made by an arbitrator under R. 22 of the Rules of Bengal Government framed under S. 43 (2) (1) of Co-operative Societies Act. Such awards can be enforced in the same manner as a decree of civil Court and they need not be filed in Court under provisions of Sch. 2, Civil P. C. nor are such awards required to be stamped.

[P 695 C 1]

Order.—This is a reference by the Munsiff 3rd Court, Narayanganj, Dacca, under R. 1, O. 46, Civil P. C. Applications were made to his Court for the execution of certain awards of the Inspector of Co-operative Credit Societies appointed arbitrator by the Registrar of the Societies under R. 22 framed under S. 43, Act 2 of 1912 by the Bengal Government. The problem as it presented itself to the learned Munsiff was whether by the order passed under S. 43 (2) (1) the jurisdiction of the civil Court was ousted and a special Court of final jurisdiction created for the trial of domestic disputes of the Societies or whether it was intended by the legislature that the award of the arbitrator should have the same effect as the award of an arbitrator appointed by the parties and that before any execution be possible the award should be filed in Court under the provisions of Sch. 2, Civil P. C. (Ss. 20 and 21) and a decree obtained from the civil Court. S. 43 (2) (1) of the Act states that the Local Government may make rules providing that disputes between members of the society may be referred by the Registrar to arbitration and providing for the enforcement of the awards of the arbitrators. R. 22 (6) provides that an award of the arbitrator if not appealed against within one month, shall (as between the parties to the dispute) not be called in question in any civil or Revenue Court and shall in all respects be

final and conclusive. R. 22 (7) adds that such awards shall, on application to any civil Court having local jurisdiction, be enforceable in the same manner as a decree of such Court. Para. 5, S. 43 of the Act provides that all Rules made under the section shall on publication in the local official gazette have effect as if enacted in the Act.

It is clear that by these provisions the jurisdiction of the civil Court is not ousted. In joining the society its members agree to abide by its rules, thus they contract that their disputes shall be decided as directed by the Act, and under these provisions of the Act the arbitrator's awards are enforced by the civil Court. Such awards are quite different from ordinary arbitration awards and there is no reason to suppose that it was intended that Sch. 2, Civil P. C., should apply to them, and there is no question of this Rule being ultra vires of the Rule making power of the Local Government for it is a rule which the Local Government is authorized to make under the provisions of the Act. Another question that has been referred to us is as to whether these awards should be stamped or not. The Munsiff seems to be of opinion that they should be stamped and in this connexion he has referred to note (3) added to the Government Notification in the General Circular Orders of the Registrar of Co-operative Societies, Bengal (1913-1930). (Published in 1931, p. 17). This note evidently refers to awards of arbitrators which have to be filed in Court before any decree can be passed on them. An award given by the Inspector of Co-operative Societies appointed as arbitrator by the Registrar of Co-operative Societies under R. 22 of the Rules is not such an award. It has the force of a decree and before it can be enforced as a decree it is not necessary to file it in Court as in the case of awards by arbitrators appointed by the contract of parties. In view of the observations recorded above the first point raised by the Munsiff should be answered in the affirmative and as the award need not be stamped, the second point would not arise at all.

K.S.

*Reference answered.***A. I. R. 1933 Calcutta 696**

RANKIN, C. J. AND PEARSON, J.

Elokeshee Dasee—Appellant.*Kunjabihari Basak*—Respondent.

Appeal No. 118 of 1932, Decided on 24th February 1933, from judgment of Ameer Ali, J., D/- 2nd September 1932.

(a) Civil P. C. (1882), Ss. 368, 372 and Civil P. C. (1908), O. 22, R. 10—Preliminary decree in partition suit—No steps taken beyond appointment of commissioner—Application after 53 years to substitute person as defendant in place of deceased defendant and for appointment of commissioner—Held though Court had discretion, prayer should be refused irrespective of whether suit had abated or not.

The appellant obtained a preliminary decree for partition in 1878. After that decree was passed, no further steps were taken beyond the appointment of a commissioner, who died in or about 1896, having done nothing towards the execution of the commission. In July 1932, i.e., some 53 years after the preliminary decree, the plaintiff applied by notice of motion, asking, among other things, that certain names of parties, defendants to the suit, now dead, be struck out and the name of K be substituted in their place, and for the appointment of a commissioner to partition certain properties :

Held : that irrespective of whether the suit for partition had abated or not, the Court had a discretion under S. 372 of 1882 Code or O. 22, R. 10 of 1908 Code ; that the discretion should be carefully exercised and that in this case appellant should not be allowed to resurrect the old decree and as such the application should be dismissed. [P 699 C 1]

(b) Partition—Whether suit for partition does or does not abate after preliminary decree—*Quaere*.

Quaere—Whether a suit for partition does or does not abate after the passing of preliminary decree : *A I R 1929 Cal 430, Ref.* [P 698 C 1]

(c) Partition—Preliminary decree passed—It is not Court's duty to see that preliminary decree is carried into effect.

When a Court passes a preliminary decree for partition it is not the Court's duty, whether the parties take steps or not, to see that the preliminary decree is carried into effect. [P 698 C 2]

S. N. Banerjee and S. R. Das Gupta—for Appellant.

H. D. Bose and B. Bosu—for Respondent.

Rankin, C. J.—This is a somewhat curious case and raises debatable points of law. It appears that the present appellant was the plaintiff in a suit No. 199 of 1878. That was a partition suit and it had reference to six items of property mentioned in the decree, which was passed therein. The decree was dated 2nd July 1879 and was an ordinary decree for partition. The effect of it was to declare that the plaintiff was

entitled to one-fourth interest in all the properties and that two other persons, now dead, were entitled to six-sixteenths each. It seems that, after that decree was passed, no further steps were taken beyond the appointment of a commissioner, who died in or about 1896, having done nothing towards the execution of the commission. In July 1932, that is some 53 years after the preliminary decree, the plaintiff applied to the learned Judge on the original side, by notice of motion, asking, among other things, that certain names of parties defendants to the suit, now dead, be struck out and the name of Kunjabihari Basak be substituted in their places, for the appointment of a commissioner of partition to partition certain properties which were properties Nos. 1 and 2 in the schedule to the preliminary decree under the names of premises Nos. 27 and 28, Charhaddanga Street, but which are now properties in a street called Tagore Castle Street.

It may be desirable to state here that the third property in the schedule to the decree had been acquired by the Calcutta Improvement Trust and that the parties entitled got their respective shares. The same is true of the fifth of the properties mentioned in the schedule. As regards the fourth property mentioned in the schedule it appears that partition suit No. 1162 of 1915 was brought by the present respondent, Kunjabihari Basak, in which the present appellant was a defendant. Proceedings for partition of this property are still pending in this suit of 1915. As regards the sixth property in the schedule, what appears to have happened is that, in the eighties, an agreement was entered into, dated 18th March 1888, according to which the appellant was at liberty to live in this property and was to get an allowance of Rs. 5 a month. It seems that, at some time, she purported to sell the whole interest in that property and that, under that transfer, which as regards the three-fourths share was without title, the respondent Kunjabihari has bought in one-fourth share of the plaintiff, so that he is the sole owner of this property.

The plaintiff in this application makes no claim to be interested in any property except Tagore Castle Street properties, items Nos. 1 and 2 of the sche-

dule to the old decree. During the fifty years, that have elapsed since the decree was passed, all the other parties have died and, in one way or another, if the matter is traced out, it would appear that the respondent, Kunjabihari, can make title to the three-fourths share, which does not belong to the plaintiff. In these circumstances, after so long an interval, and after it is clear that parties had come to an agreement, under which the commission of partition was not to be carried out, the questions that were debated before the learned Judge were, first of all whether it was open to him in law to allow the plaintiff to bring in the respondent and to proceed under the decree as regards this single property, and secondly whether, if it was open in law, the Court had a discretion and ought to exercise the discretion in the plaintiff's favour. It was contended, on the part of the defendant, that the plaintiff's application was incompetent, because long ago the suit had abated as regards the deceased defendants and it was also said that she was out of time to set aside the abatement. It was further contended that the relief, that she sought, was really a relief by way of an order to enforce the decree of 1879 and that this was also barred by limitation. The learned Judge has not been satisfied that either of these answers is available to the respondent but he has come to the conclusion that the Court has a discretion in the matter and that, in the circumstances of the present case, it would be an improper exercise of discretion to allow the plaintiff's claim.

Now, before us the question of abatement and of limitation have also been very carefully argued. They turn out to be very complicated questions, because until 1908 the Code of 1862 would apply to this suit and the Code of 1877 would apply prior to 1882. So far as I can see, under the Code of 1882, the suit had not abated, because there was no order for abatement and we have been referred to the decision of Wilson, J., in *Kedarnath Dutt v. Harra Chand Dutt* (1) as showing that, under what is now O. 22, R. 10 the Court had a discretion, which was not interfered with by any Article of the Limitation Act. It must, I think, be taken that, at all events

until the Code of 1908 came into operation, the position was the position set forth by Wilson, J., in *Kedarnath Dutt's* case (1). His view was that, as there had been a decree in that suit the case did not come under S. 368 (which only applied to deaths of defendants before decree) and that consequently the case came under S. 372—"in other cases of assignment" and so on. Holding that there was no limitation, which fettered an application under S. 372, he made an order of the character asked for in the present case after a lapse of some ten years. He made it upon an affidavit by the plaintiff, that the delay in the proceeding had arisen from his being desirous of effecting an amicable partition, which he had used his best endeavours to do but without success. Now, if we are to examine the question of abatement, as it would arise in this suit when the Code of 1908 came into force, I assume that that Code would take effect upon this case. The position is this—that, although under the previous Code it does not appear that what we now call a preliminary decree for partition was described by the Code as a decree, the practice of this Court, as appears from the present case, was to make a decree. If therefore the suit be taken as one in which a decree had been made of the character of what is now under the Code of 1908 called a preliminary decree, then the question arises whether the provisions of the Code as regards abatement in O. 22 apply after decree at all. At one time, all the Courts in India appear to have held that they did, but there are recent authorities the other way. In particular, there is the authority of a decision of a Division Bench of this Court in *Nazir Ahammad v. Tamijaddi Ahammad* (2) to the effect that, after a preliminary decree, a suit does not abate. Whether this ruling is right or not is a matter which could only be settled if we are to refer this case to a Full Bench; but the case appears to proceed to some extent upon the case of *Lachmi Narain Marwari v. Balmukund Marwari* (3), in which the Subordinate Judge purported to dismiss a suit after a preliminary decree, because the plaintiff had not

appeared to prosecute the directions given by the preliminary decree. It was pointed out in that case by the Judicial Committee that, after decree, a suit could not be dismissed, because the decree could only be set aside by appeal and not otherwise. It was also pointed out in that case that it was unnecessarily hard upon the plaintiff to prevent him having the preliminary decree carried out in view of the fact that his cause of action had merged into decree and another suit could not be brought by him. I desire to say here that we do not propose to make any order, which purports to dismiss the suit or to set aside the decree. I desire to point out further, in the present case, that this is a partition suit and that nothing, which can be done in this partition suit, except a concluded partition, can prevent the plaintiff from bringing another partition suit. I think therefore there is no way, by which it can be said that the decision of the Judicial Committee in the case referred to concludes the present case.

In the result, I propose to deal with this case on the same footing as the learned Judge on the original side purported to deal with it, namely, that I am not satisfied that the plaintiff can be met with any answer on the ground of abatement of the suit and I am not satisfied that what she asked could be regarded under Art. 183, Lim. Act, as being an order to enforce the preliminary decree. Even so however it appears to me that when after 50 years we are asked to make an order bringing in a new defendant and reconstituting this suit, the matter is one for the discretion of the Court. It is quite clear that, if the old S. 372 or the present O. 22, R. 10 applies to the case, the Court has a discretion. The learned Judge appears to have noticed an argument to the effect that, when a Court passes a preliminary decree, so to call it, it is the Court's duty, whether the parties take steps or not, to see that the preliminary decree, e. g., for partition, is carried into effect. Where this doctrine comes from I do not profess to understand. It is very high doctrine and it appears to me to be extremely precarious. I cannot understand that it is any part of the duty of this Court to thrust a partition of the family property on the parties, whether

2. AIR 1929 Cal 430=122 I C 303=57 Cal 285.

3. AIR 1921 P C 198=31 I C 747=4 Pat 61=51 I A 321 (P C).

they apply or not, which presumably means whether they desire or not.

I am therefore clear that the Court has a discretion in the matter and that that discretion has to be carefully exercised on the individual facts of each case. *Prima facie*, an application, which is entirely without excuse, so far as I can see, after 50 years is an application not to be regarded with favour. But, in the present case, we have much more than that. It appears clear enough that this lady under a certain agreement intended that the partition should not be carried to a conclusion. She purported, notwithstanding the decree, to sell the whole interest in the garden property—property No. 6. She has been a defendant to a new partition suit in respect of property No. 4—a suit in which she has never said or suggested that there exists an effective decree for partition. In the 50 years that have elapsed, not only have there been many devolutions of interest but occasions have arisen for various grounds of contention. It is not a very handsome contention, but the respondent desires to contend that long ago, for various reasons, this lady has been by him ousted from the property, which she now seeks to partition. It seems to me, if the lady has any right or could in any way better her position when bringing another suit for partition by calling it a supplementary suit on the analogy of a supplementary bill in equity, she may exercise this right. But on the facts of the present case it would be a very bad example and a wrong exercise of discretion, if we were to allow her to resurrect the old decree in order that, without bringing to a hearing and deciding many matters of contention, which have arisen during the last 50 years, she may use this decree merely for the purpose of getting partition of one of the properties of the original decree. I think therefore the learned Judge has dealt with this case on sound lines and that this appeal fails and should be dismissed with costs in both the Courts.

Pearson, J.—I agree.

K.S.

Appeal dismissed.

*** A. I. R. 1933 Calcutta 699**

RANKIN, C. J. AND PEARSON, J.

Shadanchandra Bhandari—Appellant.

Shewnarayan Golabrai—Respondent.

Appeals Nos. 79 and 92 of 1932, Decided on 24th February 1933, from original orders of Ameer Ali, J., D/- 2nd August 1932.

*** (a) Presidency Towns Insolvency Act (1909), S. 36**—Court has power to examine witness, or insolvent himself, after discharge.

After discharge has taken effect, it is within the power of the Court, under S. 36, to direct either that a witness be examined or that the insolvent himself be examined as a witness: 44 Cal 374, *Ref.* [P 699 C 2; P 700 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 36—S. 36 applies also to any member of public who can give information regarding insolvent's property.

Section 36 applies not specially to the insolvent himself but to any member of the public, who is in a position to give information respecting the insolvent's property. [P 700 C 1]

(c) Interpretation of Statutes—Heading should not be taken at foot of letter.

The heading must not be taken at the foot of the letter. The subject-matter of the sections coming under it must be looked into.

[P 700 C 2]

Sircar and N. G. Chatterjee—for Appellant.

S. N. Banerjee, Khaitan and Agarwalla—for Respondent.

Rankin, C. J.—In this case, we have before us Appeal No. 79, which is an appeal from an order of 20th July 1932, whereby the learned Judge, exercising jurisdiction under the Presidency Towns Insolvency Act, made an order for the examination of the appellant as a witness under S. 36 of the Act. The other appeal (No. 92) is from an order made by the learned Judge on 2nd August 1932, whereby one of the insolvents was directed to be examined under S. 36. The question, which arises in the present case, is the question whether the learned Judge had jurisdiction to make that order, having regard to the fact that the insolvent obtained an order for discharge on 29th March 1931. By that order, his discharge was suspended for six months, but the order of discharge was drawn up and completed in January 1932. The question is whether, after discharge has taken effect, it is within the power of the Court, under S. 36, to direct either that a witness be examined or that the insolvent himself be examined as a witness.

In this Court, there is authority against the appellant in the case of *Re Haripada Rakshit, Ex parte Binodini Dassee* (1). In that case, Greaves, J., for reasons, which I respectfully consider very sound, held that the Court has power, after discharge, to make an order under S. 36 in the case of a third party, but he had some little doubt whether, having regard to the provisions of S. 43 of the Act, an order could be made for the examination of the insolvent. In my judgment, under S. 36 of the Act, the Court has power to direct the examination either of a third party or of the insolvent. It has to be remembered that, while an insolvent may be well entitled to his discharge within reasonable time after the commencement of the insolvency, it may, nevertheless, be necessary that, after his discharge has taken effect, the properties belonging to the insolvent's estate should be administered by the Official Assignee. The law makes it absolutely clear, because not only is there S. 33, which puts a duty upon the insolvent to attend upon the Official Assignee and to do everything necessary to enable the estate to be collected and distributed among the creditors, but, by S. 43, it is expressly provided that :

"A discharged insolvent shall give such assistance as the Official Assignee may require in the realization and distribution of such of his property as is vested in the Official Assignee."

One also has to remember that, in certain circumstances, the Official Assignee takes for the benefit of the creditors the after-acquired property of the insolvent, that is to say, the property acquired after adjudication at any time before the discharge takes effect. So that the mere passing of the order of discharge may, in many cases, leave a considerable amount of winding up administration to be carried out. The principle of the matter is that, both before and after discharge, the insolvent is put under the duty to assist in every way the liquidation of the assets for the benefit of his creditors. That is very extensive and that is his primary duty. S. 36 is a section, which applies not specially to the insolvent himself but to any member of the public, who is in a position to give information respecting the insolvent's property. This has often been called an inquisi-

torial section. It being necessary that the man's property should be handed over to a stranger—a public official for administration, that public official has to rely upon other people for his information. Very often an insolvent may be hostile or an individual creditor may be unwilling to give information. He has therefore compulsory power under the order of the Court or rather, to put the matter more correctly, the Court is given compulsory power, which it may exercise in a proper case for the benefit of the creditors and also for other purposes, that is to say, for investigating in the public interest into the conduct of the insolvent. If, after the insolvent has received his discharge, he is substantially speaking in the same position as before as regards his liability to give all proper assistance in the administration of his estate.

It would indeed be anomalous, if there were no power in the Court to have him examined formally when such examination is necessary in the interest of the administration. It is suggested that the whole part of the Act from S. 9 down to S. 45 is headed : "Proceedings from Act of Insolvency to Discharge ;" but it will be seen that, in that part of the Act, a large number of matters are dealt with; as, for example, it is in that part of the Act that we come across S. 44 with reference to "fraudulent settlements" and there are various other matters, which are not logically dealing with "proceedings from act of insolvency to discharge." After all, the heading must not be taken at the foot of the letter. We have to look at the subject-matter of the sections and section 43, for example, is dealing with proceedings and position after discharge. I do not myself doubt that the power of the Court, under S. 36, applies after discharge and applies both to the insolvent and other persons. In these circumstances, as it is not suggested that the learned Judge was wrong as a matter of discretion in making the order, it appears to me that both the appeals must be dismissed with costs in both the Courts.

Pearson, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 701

LORT-WILLIAMS, J.

Ernest Clarence O'Brien, In re.

Insolvency Case No. 106 of 1932, Decided on 22nd February 1933.

(a) **Presidency Towns Insolvency Act (1909), Ss. 17 and 52 (2)**—Member entitled for provident fund only on retirement or discharge—Alienation of interest in provident fund during service entailing forfeiture—Insolvency of member on his own petition during service and vesting of rights in Official Assignee is voluntary alienation—Provident fund.

The rules of the provident fund of a company provided that a member was entitled to receive the amount only on his retirement or discharge and that in case he transferred his interest during service, he was liable to forfeit his rights for the amount to the company. A member while in service was adjudged insolvent on his own petition, and his rights vested in the Official Assignee.

Held: that the effect of his petition, was to transfer or assign immediately his property to the Official Assignee and that it was equivalent to a voluntary transfer by the debtor to the Official Assignee within the meaning of the provident fund rule. [P 702 C 2; P 703 C 1]

(b) **Transfer of Property Act (1882), S. 12**—Rule restricting right of member of provident fund to transfer interest in such amount is void—Provident fund.

One of the rules in a provident fund of a company was that in case a member transferred his interest in the provident fund during service, he was liable to forfeit the amount to the company:

Held: that the rule offended against S. 12, T. P. Act and was void. [P 703 C 1]

S. M. Bose and D. K. Basu—for Official Assignee.

Pugh and Cammiade—for Company.

Order.—The "Provident Fund for the Permanent European Assistants of Grindlay & Co., Ltd., in India," which is governed by rules, was created on 1st February 1928, with the object of providing members with a pension or payment on the termination of their service with the company (R. 3).

"Member" means every European assistant in the service of the company in India who is a subscriber to the fund (R. 2).

Assistants engaged before 1st February 1928, had the option of joining it, if declared before 1st January 1930 (R. 8).

The fund is administered by trustees appointed by the company (R. 4.)

The fund is fed by payments made by the company and by compulsory deductions from the salaries of members (Rr. 6, 8, 10, 11, 12, 15 and 25).

No member can make any claim upon the fund except as provided by the rules (R. 18).

He cannot receive (except ex gratia) any benefit from that part of the fund derived from payments made by the company until he has served the company for 12 years and is not dismissed for negligence, dishonesty or misconduct. But on retirement or discharge or death, he or his legal representative is entitled to receive the amount of his own contribution with interest (Rr. 19 and 20). Rr. 29 and 30 provide as follows:

"29. Subject to the provisions of R. 28, no member shall be entitled to draw any money from the fund in respect either of principal or interest or to transfer or assign, whether by way of security or otherwise, howsoever his share or interest therein or in any part thereof, and no such transfer or assignment shall be valid, and the trustees shall not recognize or be bound by notice to them of any such transfer or assignment, and all moneys contributed by the member standing in the subsidiary ledger to the credit of any member, who shall purport to transfer or assign his share or interest or any part thereof as aforesaid, shall forthwith be forfeited as from the date of such transfer or assignment to the use of the fund and be dealt with accordingly: if any prohibitory order or attachment or process of a civil or criminal Court be served upon the trustees or any person on behalf of them, by which any moneys standing to the credit of any member in the books of the fund shall be attached or ordered to be paid into Court or be ordered to be withheld from any member, such moneys as represent contributions by the member shall forthwith be forfeited to the use of the fund, provided that the trustees shall be at liberty, in their uncontrolled discretion, at any time thereafter, to give such moneys or any part thereof for the benefit of the wife, children or relations of such member.

30. If any member shall purport to transfer or assign or charge his interest in the fund as aforesaid, or if such interest shall be attached or otherwise dealt with or affected as indicated by R. 29, the company may forthwith cease all contributions to the fund in respect of such member and all moneys standing to the credit of such member in the subsidiary ledger representing contributions by the company and all interest thereon shall forthwith be forfeited to the use of the fund."

The insolvent, E. C. O'Brien, was adjudicated an insolvent upon his own petition on 23rd May 1932. He entered the service of the company on 1st January 1924, and was discharged on 31st May 1932, on account of his insolvency. Prior to the filing of his petition, the following amounts stood credited to him in the books of the provident fund for principal and interest:

	Rs.	a.	p.
London's contribution	4,789	8	0
His contribution ...	3,143	4	3
Bank's contribution	3,771	14	9
Total	11,704	6	0

Though it is not stated it must be presumed that he exercised the option given to him under R. 8. The petitioner who is the Official Assignee, contends that this sum or part of it is the property of the insolvent and vested in the Official Assignee immediately on adjudication as assignee of the insolvent's estate, and he asks for an order compelling the trustees to pay this sum to him forthwith. It is clear that no member has any property in the fund, nor can make any claim upon it, except as provided by the rules, so far as these are legally valid. The so-called contribution or subscription made by the member is derived from a compulsory deduction from or reduction of his salary. These moneys and others contributed by the company belong to the trustees. The member is entitled to claim a payment from the fund, only in certain circumstances specified in the rules. Thus it is clear that O'Brien could not on discharge claim any payment in respect of that part of the fund, which was contributed by the company, because he had not served for 12 years (Rr. 19 and 20). This disposes of the sums called "London's" and "Bank's" contributions respectively. The question remains to be decided whether the sum of Rs. 3,143-4-3 is property of the insolvent which has vested in the Official Assignee. This depends upon the legal effect of Rr. 29 and 30.

The company contends that, if and when, any order of the Court is served upon the trustees, by which any such sum standing to the credit of any member is ordered to be paid into Court or to be withheld from the member, such sum is forthwith forfeited to the use of the fund. This means really that, in such circumstances the member forthwith loses his right to make any claim on the fund, because no member has any property in the fund, which belongs to the trustees, and cannot therefore forfeit any part of it. His claims arise only when he ceases to be a member. For this reason the latter part of the rule, upon which the company's contention rests, is irrelevant, because the in-

solvent ceased to be a member when he was discharged at the end of May. Thereupon his claim upon the fund, whatever it might be, vested, and owing to his insolvency vested in the Official Assignee. The final question remains to be decided, whether he had any claim subsisting at the time of his discharge. This depends upon the earlier part of R. 29. On the date of his insolvency, the insolvent, for the reasons already stated, had no property in the fund, because he was still in the service of the company and any claim he might have could only arise upon his discharge when he would cease to be a member. Therefore if in those circumstances he had purported to transfer or assign his share or interest in the fund, such transfer, according to the rules, would have had no effect except that all contributions made by the member or by the company for him would be ipso facto forfeited forthwith to the fund. This again is badly expressed in the rule and means really if accurately stated, in accordance with the position in law, if the member purported to transfer whatever he might be entitled, under ordinary circumstances to claim when he ceased to be a member, that is to say his future right (if any) of a payment from the fund, then and thereby such right would be extinguished. In my opinion this according to the rules if valid, would be the effect of such an attempt to transfer or assign.

But the insolvent made no such transfer or assignment, and consequently suffered no such forfeiture, unless his petition to be declared insolvent amounts to or is equivalent in law to such a transfer. In my opinion it is. The meaning of R. 29 is that any transfer or assignment howsoever made or caused by the member, shall involve forfeiture. Presentation of a debtor's petition is an act of insolvency [Presidency Towns Insolvency Act, S. 9 (f)], upon which the Court may make an order adjudicating him insolvent (S. 10). Thereupon his property vests in the Official Assignee, as from the commencement of the insolvency, which relates back to the presentation of the petition [Ss. 17 and 52 (2) (a)]. The effect therefore of the debtor's petition, if he is afterwards adjudged insolvent thereon, is to transfer or assign immediately his property to the Official Assignee. Doubtless such

transfer is strictly speaking by operation of law. But in my opinion it is equivalent to a voluntary transfer by the debtor to the Official Assignee and is within the meaning of R. 29. It would be otherwise, if the debtor were adjudicated otherwise than on his own petition, because transfer in such a case could hardly be deemed to be due to the voluntary act of the debtor. It would be otherwise also if it could be shown that there was collusion between the trustees and the debtor to defeat the claims of creditors. This is not suggested in the present case. But S. 12, T. P. Act, 1882, provides that:

"Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void."

When the debtor exercised his option to become a member of the fund, this, in effect, amounted to an agreement to transfer from time to time part of his salary to the fund upon the terms provided in the rules. One of the terms is contained in R. 29. That offends against the provisions of S. 12 and is therefore void. On this point the law in India and England is the same, but differs apparently where the transfer has been made by one person for the benefit of another. In English law all such transfers are protected, whereas in Indian law they seem to be protected only if made by will (Succession Act, 1925, S. 120, *Illus. 7*).

The result is that the debtor's claim to this sum of Rs. 3,143-4-3 became vested when his service terminated and must be paid to the Official Assignee. The petition to this extent is allowed. There will be no order for costs.

K.S.

Petition partly allowed.

A. I. R. 1933 Calcutta 703

MUKERJI, J.

Taraprasanna Ray—Appellant.

v.

Faridunnessa Khatun—Respondent.

Second Appeal No. 2952 of 1930, Decided on 20th February 1933, against decree of Second Class Sub-Judge, Bakarganj, D/- 14th July 1930.

(a) Bengal Tenancy Act (8 of 1885), Ss. 67, 178 and 179—More interest than mentioned in S. 67 cannot be recovered even though so

stipulated in permanent mokarrari lease made prior to 1885.

Interest at a rate exceeding that given in S. 67 cannot be recovered even though it is so stipulated in a permanent mokarrari lease made prior to 1885. [P 704 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 179. Proviso—"Recover" means recovery by suit.

The word "recover" in the proviso to S. 179 has a definite meaning, namely, the ordinary meaning of recovery by suit: 26 Cal 199 note and 2 C L J 540, *Ref.* [P 704 C 2]

Abinashchandra Ghosh—for Appellant.
Bhupendranath Raychaudhuri—for Respondent.

Judgment.—This appeal has arisen out of a suit for rent. The plaintiffs, who are the appellants, ask for a decree for interest at a rate higher than what is allowed by S. 67, Ben. Ten. Act, on the basis of a stipulation contained in the *kabuliyat*, which created a permanent mokarrari lease in a permanently settled estate under a permanent tenureholder and is dated 1283 B. S. The Courts below have allowed interest at 12½ per cent per annum. The suit was instituted on 15th April 1929, that is to say, after the date when the amending Act came into force. The claim was for 1332 to 1335, the major part of the claim being for a period antecedent to that date.

Prior to the amendments, the clause as to interest was a clause of sub-S. (3), S. 178. From the position it then occupied, it meant that a rate of interest in excess of what is provided for in S. 67 was not affected by the provision of that section, if the rate was in a contract made before the passing of the Act in 1885. As a consequence of the amendments, the clause now finds a place in sub-S. (1), S. 178, and means that such a rate cannot affect S. 67, whether it be embodied in a contract made after or in a contract made before the aforesaid date in 1885. S. 179 is an exception to all the provisions of the Act to which it may serve as an exception, and accordingly to S. 178. The present case satisfies the requirements of S. 179, so far as the status of the parties and the character of the lease is concerned. The lease in the present case is therefore a good lease upon the plain meaning of the substantive part of S. 179. But then there is the proviso to S. 179 which has to be considered. That proviso says—I read such portion of it as has any bearing on the question of interest:

"Provided that such holder shall not be entitled to recover interest at a rate exceeding that set forth in S. 67. . . ."

The plaintiff has sued to recover interest at a rate exceeding the rate given in S. 67. The proviso disentitled him from recovering such interest. This is the conclusion which, in my judgment, follows from a plain reading of the different sections to which I have referred. But there are several other matters which I have been asked on behalf of the appellant to consider.

It has been argued that the amendments made as regards abwab stand in the way of such an interpretation being given to the statute. In sub-S. (3), S. 74, which makes, in respect of abwab, an exception, in terms very much alike S. 179, the words "and registered before the commencement of the Bengal Tenancy (Amendment) Act, 1928," have been added. By this amendment, stipulations as to abwab in respect of such leases, if made in leases registered before the commencement of the amending Act of 1928, were saved. Besides there has been from 1919 a proviso to sub-S. (1), S. 74, creating an exception in favour of contracts registered before the amending Act of 1919. The amendments in S. 77 need not detain us; certain fees realised are to be deemed under that section to be abwab. The proviso to S. 179, so far as it relates to abwab, reads thus:

"Provided that such proprietor or holder shall not be entitled to recover . . . anything that is an abwab or the recovery of which is illegal under the provisions of S. 74 or sub-S. (3), S. 77."

There is no doubt some difficulty in reconciling the proviso to S. 179 with sub-Ss. (1) and (3), S. 74, but perhaps the difficulty is not insuperable. But whatever that may be, and this is a matter on which I am not called upon nor do I propose to express any definite opinion here — that difficulty cannot create for interest a reservation or exception that is not to be found anywhere in the Act. I do not understand how, even if there is a difficulty in reconciling the provisions as to abwab, such difficulty should lead us to imagine that it is only in respect of future leases that the proviso to S. 179 is to be applied.

It has next been argued that the amendments of 1928 came into force after the major part of the interest became due, and that, in the view that

that portion of the interest had already ripened into a debt, the amendments cannot affect that portion of the interest. In other words it has been argued that interest which had already accrued cannot be lost to the landlord by reason of the amendments. To this contention, in my opinion, the answer is that such interest had not been recovered; and when it comes to a question of its recovery the proviso to S. 179 will stand in the way. The word "recover" has a definite meaning, namely, the ordinary meaning of recovery by suit: see *Ram Kumar Jugi v. Jafar Ali* (1) and *Sitanath Midda v. Basudeo Midda* (2).

Some other arguments have also been addressed to me based on suppositions as to what must have been the intention of the legislature. I should content myself with saying that whatever its intention might have been what it has said is, in my judgment, capable of no other interpretation than what I am inclined to put upon the provisions. The Courts below, in my opinion, have taken the right view of the matter. The appeal is dismissed with costs.

There is an application filed in the alternative for revision of the order complained of in this case if it be held that no second appeal is competent. On the view that I have taken of the merits of the case, it is not necessary for me to consider the question of the maintainability of the appeal. The application for revision is also dismissed.

K.S.

Appeal dismissed.

1. (1898) 26 Cal 199 n.

2. (1900) 2 C L J 540.

A. I. R. 1933 Calcutta 704

PEARSON, J.

Satis Chandra Mukhopadhyaya and another—Defendants—Petitioners.

v.

Nuba Krishna Roy Chowdhury and others—Opposite Parties.

Civil Rule No. 1207 of 1932, Decided on 10th April 1933, from order of Asst. Settlement Officer, 24-Parganas, D/- 6th June 1932.

Bengal Tenancy Act (1885), Ss. 105 and 106 — Suit by landlord for enhancement of rent — Plea of *mokarari* status and non-liability for enhancement of rent by opposite party taken beyond period provided in S. 106 — Non-prosecution of case by landlord — Op-

posite party is entitled to have its question decided before dismissal of landlord's suit.

An application was made by the landlord under S. 105, Ben. Ten. Act, for enhancement, consequent upon publication of the Record of Rights. The tenants as against that set up in those proceedings that they were not tenure-holders liable to enhancement of rent but were raiyats with mokarari status. Their written statement was filed a considerable period after the lapse of four months which is provided for in S. 106, Ben. Ten. Act, under which they might have made a substantive application as against the entry in the Record of Rights had they been so advised. Issues were settled. Subsequently the landlord came before the Court saying that there were certain defects in his application and that he wished for leave to withdraw the proceedings. The Court thereupon made an order refusing the petition for withdrawal, and merely dismissing the case for non-prosecution. On that occasion objection was raised by the tenants in which they demanded that the question which they had raised as regards their mokarari status should be gone into, having been raised in the issue, and that a finding should be arrived at upon that issue, and the suit should then be dismissed:

Held: that even if the landlord faded away and refused to go on with the suit the tenants were entitled to have the issue raised by them tried and determined though the landlord ceased to take any further part in the proceedings. [P 705 C 2; P 706 C 1]

Sarat Chandra Janah — for Petitioners.

Nasim Ali—for Opposite Parties.

Order—In this case the opposite party instituted proceedings under S. 105, Ben. Ten. Act, consequent upon the final publication of the Record of Rights. That publication took place on 8th August 1931, according to which it appeared that the petitioner was liable to enhancement of rent. On 4th December 1931 an application was made by the landlord opposite party under S. 105, Ben. Ten. Act, for enhancement. The petitioners as against that set up in those proceedings that they were not tenure holders liable to enhancement of rent but were raiyats with mokarari status. The written statement was filed on 9th April 1932, that is a considerable period after the lapse of four months which is provided for in S. 106, Ben. Ten. Act, under which the petitioners might have made a substantive application as against the entry in the Record of Rights had they been so advised. Now, on 6th June issues were settled. Issue 1 raised the question whether the petitioners were liable to enhancement of rent and went on to say: Is he a mokarari raiyat in respect of the disputed

jama? What happened in those proceedings was that subsequently the landlords came before the Court saying that there were certain defects in their application and that they wished for leave to withdraw the proceedings. The Court thereupon made an order on 6th June refusing the petition for withdrawal and merely dismissing the case for non-prosecution. It seems that on that occasion objection was raised by the petitioner in which they demanded that the question which they had raised as regards their mokarari status should be gone into, having been raised in the issue and that a finding should be arrived at upon that issue and the suit should then be dismissed.

The contention put forward by the opposite party before me I think may be summarised thus: that if the petitioners in a case like the present do not take advantage of the procedure laid down in S. 106 within the four months allowed by that section, then they cannot be allowed to have the matter decided by way of raising the issue in a written statement filed long after the four months had expired in answer to proceedings for enhancement of rent brought by the landlord. The question really seems to me to turn on the construction of the section in the Act, in particular S. 105-A. S. 105-A lays down:

"Where, in any proceedings for the settlement of rents under this part, any of the following issues arise: * * * (e) Whether the tenant belongs to a class different from that to which he is shown in the Record of Rights as belonging, the Revenue Officer shall try and decide such issue and settle the rent accordingly."

Mr. Nasim Ali has said that that issue only arises for determination as a matter of benefit to the landlord, that is, if the landlord steps out of the suit there is no room for any trial or decision on that issue for the benefit of the tenant. Upon the best consideration that I am able to give to the matter it does seem to me that the petitioners' contention is valid and if they are party to a proceeding of this kind under which the provisions of the law allow them to raise an issue as to whether they are or are not mokarari raiyats in respect of the disputed jama, that is an issue which the Revenue Officer shall try and decide. Even if the landlord fades away and refuses to go on with the suit, the actual result may be the same in so far that

[the proceedings are dismissed. But in the present case I think, as I say, that the issue is one which the petitioner tenants are entitled to have tried and determined even though the landlord ceases to take any further part in the proceedings. It is unnecessary to say anything else as to the form of the order according to what the finding of the Court may be upon the issue.

I think that the proper order to make is that the Rule should be made absolute, the decree should be set aside and the matter remitted to the Assistant Settlement Officer for trial of the issue raised by the defendants and subsequent determination of the proceedings according to law. The hearing-fee in this Rule is assessed at one gold mohur.

K.S. *Rule made absolute.*

A. I. R. 1933 Calcutta 706

LORT-WILLIAMS, J.

Alexander Brault—Plaintiff.

v.

Indrakrishna Kaul—Defendant.

Original Suit No. 647 of 1931, Decided on 22nd February 1933.

Tort—Malicious prosecution — Criminal proceedings started at D against person residing at C—Summons served at C and damages occurring at C—Court at C has jurisdiction to entertain suit for damages—Letters Patent (Cal.), Cl. 12.

Defendant instituted criminal proceedings at D against plaintiff, who was residing at C. Summons was served on plaintiff at C and as a result of proceedings, plaintiff suffered both general and special damages. The complaint was dismissed. In a suit for damages for malicious prosecution :

Held : that part of the cause of action arose at C and, with leave under Cl. 12, Letters Patent, the High Court at C had jurisdiction to entertain the suit. [P 708 C 1]

Issacs and J.K. Ghosh—for Plaintiff.

S. R. Das and P. K. Sen—for Defendant.

Judgment.—The plaintiff claims damages for malicious prosecution. He is a French subject, aged 76, and for 44 years has carried on business in Calcutta and is of unblemished reputation. Inter alia, he is sole agent for the sale in British India of certain petrol lamps known as "Tito Landi" which he imports from Paris and of which he has sold more than 30,000. By a letter, dated 14th October 1929 the defendant, who is engineer to the Jharia Water Board, ordered one such Lampe de Grand Luxe, Art Bronze, as illustrated in plaintiff's

catalogue and priced at Rs. 42, to be sent V. P. P., and this was sent the following day. On 30th October the defendant wrote, complaining that the petrol container of the lamp leaked, owing to a minute hole in the body of the container, where the metal was too thin and asking that another lamp should be sent in its place. The plaintiff asked that the lamp should be sent to him for inspection, and, on 5th November, the defendant sent back the lamp having first marked with chalk the place where the alleged hole was situate and described the spot as being "directly under the knob of the extinguisher." He also sent a rough sketch, which showed the spot, at a point in the ornamental lines on the upper part of the body of the container. This lamp has been produced in Court by the plaintiff. The leak has been repaired and it coincides exactly with the spot indicated by the defendant in his letter. On 11th November, the plaintiff sent a second lamp to replace the first. In December the defendant ordered certain accessories for the lamp. On 2nd March 1930, nearly four months after the receipt of the second lamp, he wrote, saying that this one also leaked and that

"by closely examining the container, it appears that the bronze metal had been patched up neatly in the place where it has started leaking again. The lamp is lit only for a few hours and I have been filling and lighting up personally, so that the defect is entirely due to the supply of a patched up container"

and asking for a new lamp. The second lamp has been produced in Court by the defendant. The spot indicated by him, where he alleges that the old leak had been patched up, is in a different place altogether from the spot shown in his sketch, being situated near the bottom of the body of the container. No one, who examined the container closely, as he alleges that he did, and who exercised any reasonable care in such examination could possibly have been under the impression that the two spots were the same and I do not believe the defendant when he alleges that he was under this impression. By his letter dated 5th March plaintiff refused, and, in my opinion, reasonably, to replace the lamp, in view of the lapse of time. On 30th April the defendant's pleader, one Gouriram, wrote saying that the plaintiff had sent the second lamp "purporting to be

a new one" whereas it was the first lamp "patched up and revarnished," that his client had paid for "a first class new lamp" whereas the one sent was "not new and serviceable," and that his client had been cheated, and threatened to take legal proceedings both civil and criminal.

The plaintiff replied in a courteous letter dated 5th May. Four months later, on 9th September 1930, the defendant instituted criminal proceedings against the plaintiff at Dhanbad whereby he was charged with cheating under Ss. 417 and 420, I. P. C. Process was served upon the plaintiff at his office in Calcutta. The trial took place upon 19th and 30th January and 6th and 17th February 1931 when the Magistrate dismissed the complaint and acquitted the plaintiff. The plaintiff incurred expenses in defending himself to the extent of Rs. 2,000 and, in my opinion, these were reasonably incurred. His books have been disclosed in confirmation of these payments. The defence is a denial that the defendant acted falsely or maliciously or without reasonable or probable cause, and a plea to the jurisdiction. The following issues were raised: 1. Jurisdiction. 2. Reasonable or probable cause. 3. Malice. 4. Damages. So far as the facts are concerned, this is, in my opinion, an undefended case. I can find neither excuse nor palliation of the outrageous course adopted by the defendant. In the witness box, he persisted in the charge that the second lamp sent was the first one patched up, though he had to admit that the alleged patch in the second lamp was nowhere near the spot indicated in his letter as the place where the first lamp had leaked. In fact far from expressing contrition for his offences, he aggravated them and recklessly charged the plaintiff with fabricating evidence by faking the lamp which he produced in Court with a repair spot in order to deceive the Court. That there was no ground for so serious an accusation is proved sufficiently by the defendant's own sketch, and his counsel wisely refrained from making any such suggestion in cross-examination. With regard to the criminal charge, all that he could say was that he was under the impression that he had been cheated and was so advised by his pleader. Before instituting proceedings, he made no in-

quiry about the plaintiff's position or reputation in the business world, but he had had previous dealings with him and believed him to be honest. In fact, the plaintiff has nothing to do with the sale of the lamps or with correspondence which is attended to entirely by the witness Mrs. Percy on the plaintiff's behalf. The defendant admitted that, if he had got his money back, he would have been quite satisfied and would have dropped the proceedings. Although he thought he had been cheated, he waited four months before instituting criminal proceedings, his explanation being that he waited until his work made it convenient, and then excused the delay by stating to the Magistrate that correspondence was going on, though all correspondence had ceased in May. He says that he carefully considered his position before he took proceedings.

I am satisfied, upon the evidence, that the defendant never had any honest impression or belief that he had been cheated or that the plaintiff had cheated him, that he acted as he did simply out of spite and vexation, because he could not get his own way about the supply of a third lamp, and that he instituted the criminal proceedings solely for the purpose of bringing pressure to bear upon the plaintiff and without taking either reasonable or any care to inform himself about the true facts. In so acting, I am of opinion that the defendant was actuated by malice and that he had no reasonable or probable cause for instituting the proceedings. Further, I hold that the Court has jurisdiction to try this case. Leave was given under Cl. 12 of the Letters Patent, and the cause of action arose partly within jurisdiction. In *Read v. Brown* (1) Lord Esher agreed with the definition of "cause of action" given in *Cooke v. Gill* (2) namely:

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Thus, the fact that the plaintiff suffered the damage, which has been alleged, must be proved: *Engineering Supplies, Ltd. v. Dhandhanias & Co.* (3). Even (1888) 22 Q B D 128=58 L J Q B 120=37. W R 131=60 L T 250. (1873) 8 Q P 107=42 L J C P 98=21 W R 384=28 L T 32. AIR 1931 Cal 659=184 I C 65=58 Cal 539.

general damage is an essential part of the cause of action though inferred by law, and therefore unnecessary to be proved (Mayne on Damages, 10th Edn., 142). Both special and general damage occurred in Calcutta, the plaintiff's reputation suffered and the costs were incurred by him in Calcutta. Here also the summons was served upon him, and most, if not all, of the facts which go to show that the defendant had no reasonable or probable cause and that he acted with malice took place within the jurisdiction. For example, the alleged fraudulent patching up of the lamp took place there. It is true that it is not necessary to prove service of the summons in order to establish a suit for malicious prosecution, but the service was part of the proceedings upon which the present suit is founded and is part of the foundation for the claim for both special and general damages. "Cause of action" means that bundle of essential facts which it is necessary for a plaintiff to prove, and a person is responsible not merely for starting a prosecution but also for continuing it: *Musa Yakub Mody v. Manilal Ajitrai* (4). There remains the question of general damages. The injury, which the defendant has done to the plaintiff's character and reputation, both in his life and in his business, cannot be calculated with any degree of precision. It is impossible to trace the damage which may ensue when a charge of fraud has once been made against a business man. Even though he may have been acquitted and his character has been vindicated, there are many who will apply the maxim that there is no smoke without fire. The conduct of the defendant would justify exemplary damages. He is a Master of Engineering of Liverpool University and an Associate Member of the Institute of Civil Engineers, and therefore presumably a man of some education. Yet he does not seem even now to have any conception of the gravity of the offence which he has committed or of the wrong that he has done. His pleader is equally to blame for the advice which the defendant alleges that he gave and of which he ought to be ashamed. I trust that, far from being paid for this advice, he will be made to pay for it.

The abuse of this section of the Penal

4. (1904) 29 Bom 369=7 Bom L R 20.

Code amounts to a public scandal. It is used constantly by creditors as a means of collecting civil debts and by spiteful persons for the purpose of working off grudges and harassing and annoying their neighbours. If it is considered that the section cannot be dispensed with, then safeguards ought to be provided by law which will avoid this abuse of the process of the Court. I assess the damages at Rs. 6,000 including special damages. There will be judgment for this sum with costs on scale No. 2, including all reserved costs.

K.S.

Suit decreed.

A. I. R. 1933 Calcutta 708

AMEER ALI, J.

Graham—Plaintiff.

v.

Henry Gidney—Defendant.

Original Suit No. 1468 of 1931, Decided on 28th February 1933.

(a) Tort—False imprisonment—Arrest by police—Suit for damages against private individual—Question to be decided is whether defendant has so acted as to make plaintiff's arrest by police act of defendant.

In a suit for damages for false imprisonment, where the person sued is not the person who actually arrests and imprisons the plaintiff, the question in each case is whether the defendant so acted as to render the plaintiff's arrest the act of the defendant. Generally the Court holds a private individual responsible for an arrest by the police, if the individual has either "given the plaintiff into custody," "directed the constable to arrest," or "signed the charge sheet" with the knowledge that the plaintiff would not otherwise be detained: *English case law referred*.

[P 712 C 2; P 713 C 2]

(b) Tort—False imprisonment—Information given to police by private individual—He should not be held responsible for supervening arrest unless he has made it impossible for the police to act otherwise.

A private individual should not be held responsible for the supervening arrest, on the ground that arrest was likely to follow from information given by him unless, although he has not expressly directed the arrest, he has in fact made it impossible for the constable to act otherwise: *AIR 1923 Cal 884, Ref.* [P 713 C 2; P 714 C 1]

(c) Tort—Malicious arrest—It is doubtful whether S. 59, Criminal P. C., is the only defence to person responsible for arrest—Criminal P. C. (1898), S. 59—(Obiter).

It is doubtful whether S. 59, Criminal P. C., is the only defence to a private person who has been responsible for the arrest of another by police (Obiter): *AIR 1925 Cal 884; AIR 1928 Mad 523 (F B)* and *AIR 1930 Cal 892, Ref.*

[P 714 C 1]

(d) Tort—Malicious arrest—Procuring arrest for a crime may give cause of action for suit for damages.

Although most of the cases of malicious arrest arise out of civil process, in a proper case an

arrest by the police for a crime, procured by the defendant maliciously, would afford a cause of action for a suit for damages for such arrest: *ATR 1980 Cal 892, Ref.* [P 714 C 9]

(e) Tort — Malicious arrest — Prosecution not proceeding offence being compoundable — Suit against person causing arrest for damages — Defendant can establish offence for which arrest was effected.

Where the offence being compoundable the prosecution does not proceed and the arrested person turns round and sues the individual who is responsible for his arrest in trespass, it would be open to the defendant to establish that the offence, for which the plaintiff was arrested, had in fact been committed. [P 714 C 2]

Gregory and Prabodhkumar Das—for Plaintiff.

Clough—for Defendant.

Judgment.—On 18th May 1931 the plaintiff was arrested at Lalbazar, was taken under police escort to the Park Street thana and there detained in the lock-up for about two hours. For this trespass to his person he seeks damages from the defendant. The cause of action disclosed in the plaint is "false imprisonment." The plaint includes an allegation that the defendant "maliciously caused the arrest upon a false charge." It would be possible, I think, on this pleading to found a case of "malicious arrest." In point of fact, no issue of "malice" was raised and the case proceeded as one for "false imprisonment." The issues raised by Mr. Clough were as follows: 1. Did the defendant arrest the plaintiff or cause his arrest? 2. If so, was the arrest justifiable? 3. Damages. In my view, the vital questions involved in this suit are as follows: 1. Was the arrest of the plaintiff the act of the defendant or the act of the police? 2. If the latter, is the plaintiff entitled to recover on the basis that the information given to the police was false or was maliciously given. If so, was the information false? 3. If the arrest was the act of the defendant, is the defendant protected by any provision of the Criminal Procedure Code, or by establishing reasonable and probable ground? 4. Is the defendant entitled to establish that the offence in question was in fact committed? If so was the offence committed, and is the defendant protected?

I shall deal first with the facts, then with the law, and last with the conclusions at which I have arrived. The material events happened between 15th and 18th May 1931 inclusive. Very

little need be said by way of introduction. The defendant, Sir Henry Gidney, has long been a personage in public life. He is the President of the Anglo-Indian Association, and he is, as he has himself described it, "the leader of the community." The plaintiff Graham is a youngish man of fine physique and meritorious war-record. The defendant had, at several stages of the plaintiff's career, assisted him in obtaining employment, and, until the events I am about to mention, the plaintiff professed to be an admirer and follower of the defendant. On the defendant's return from the Round Table Conference, early in 1931, apparently, there was a split in the community and the feelings of a considerable number of Anglo-Indians towards the defendant, including those of the plaintiff, underwent a change. The reasons for that change are not material, but, so far as it is relevant, I am prepared to assume that those of the plaintiff were genuine. An association in opposition to that of Sir Henry Gidney was founded, consisting largely of the younger and more ardent spirits. It was not unnatural that the plaintiff, with the qualities I have described, should have found or put himself at its head. The immediate cause of what took place was as follows: The ranks of the Anglo-Indian unemployed had become swollen by the discharge by the railway and other authorities of a considerable number of Anglo-Indian employees in order to replace them with Indian employees. With the rights or wrongs of this policy I have nothing whatever to do. As was inevitable however the section of the community led by the plaintiff, which included the Anglo-Indian unemployed, began in turn to agitate that the Indian staff employed by the defendant should be replaced by Anglo-Indians. Resolutions to this effect were passed at meetings, at which the plaintiff spoke with considerable heat, and it was decided that the result of these meetings should be conveyed to the defendant.

On the 15th the plaintiff, followed by a body of followers, proceeded to the office of the association in Park Street. It is clear that a number waited in the court-yard or on the stairs, and 20 or 30 entered with the plaintiff into each of the office rooms. As to what happened, on that day in the offices of the associa-

tion, considerable evidence has been given. I accept the evidence of Mr. Iyer, Col. Gidney's secretary, and Mrs. Gibson. Both gave their evidence quite clearly, and it is corroborated by the statement in writing given by them to the defendant. Mr. Chandler's evidence is exaggerated by the fact that he was personally involved in the quarrel which ensued.

The plaintiff and his companions would not at first believe that the defendant was not there. They said that they would stay on until he came or until they were removed by the police. They were not at that time threatening or in any way violent. Mrs. Williams then came in and, by way of creating a diversion, took the plaintiff to task for "being seated in the presence of a lady," upon which Mr. Graham got up, and his temper, already ruffled, broke down at the sight of Mr. Chandler (with whom apparently he had some cause for enmity) sitting down and (in his own words) "contemptuously smoking a cigarette." Upon this the plaintiff used some phrase of this kind, "I have only to raise my finger and my 200 followers will pull you to pieces," sufficiently alarming for a man of Mr. Chandler's physical condition. It is relevant to note that the actual "row" (if I may use the expression) took place on what might be called "a point of order," and not in connexion with the motive or purpose of the visit. Mr. Chandler is an Anglo-Indian and to avoid misconception I should mention that the phrase said to have been used by Mr. Graham to Mr. Chandler, "You, Nigger" or "Damn Nigger" has, among this community, no ethnological or special significance.

Mr. Graham and his party were eventually persuaded that Sir Henry Gidney was not there, and they left. Thereafter, Iyer sent a telegram to his master which is of some importance, because it does not appear to indicate an incident of any terrifying nature. Mrs. Gibson is concise and descriptive to the same effect, "I might have been frightened if I had not been so annoyed." I am not prepared to find that the plaintiff's followers came armed in any way, at any rate to the knowledge of the plaintiff.

On the 16th, Sir Henry Gidney returned. Shortly thereafter, Mr. Graham, Mr. Remfry and Mr. Brazier arrived in

the office and made an appointment for the 17th. This matter purports to be described by Sir Henry Gidney in his letter on p. 6, to which description I shall refer again. Sir Henry Gidney sent for Inspector Jennings of the adjacent Park Street thana. Jennings asked certain questions of the staff, which he will not call "inquiries." The written statements, to which I have referred and which are included in the brief, were not taken at that time. Sir Henry Gidney says that he gave certain instructions to Jennings: see correspondence, p. 31, and evidence, questions 168, 170 and 171 to the effect that he did not wish to charge Graham, and that he only wanted Graham to be warned. Jennings does not mention it and it was not put to him, and I find that no such instructions were given apart from what appears from the letter itself, viz., that Sir Henry Gidney wished to discuss the matter with the Commissioner of Police. Jennings says (see questions 6, 34 and 38) that, after he had asked the staff about the matter, he asked Col. Gidney to "put his complaint in writing." This I find to be the fact. The word "complaint" in this context has no special meaning. Sergeant Jennings might just as well have said "put it all down, and I will show it to the Commissioner of Police."

On the afternoon of the 16th, the defendant dictated to Iyer the letter which is the cause of all the trouble. It was addressed and sent to the police officer-in-charge, Park Street thana. In it the defendant narrates somewhat dramatically or sensationally the incidents of the 15th mentioning "trespass" and "criminal intimidation." The letter concludes as follows:

"I lay these facts before you for your information and guidance, because it is quite likely that this man will return tomorrow with another mob of unruly fellows and one does not know what would occur should this take place.

Perhaps, after reading this you will be good enough to place it before Mr. Robertson your officer, seek his advice and consult with me on the matter. I shall be at your disposal from 7-30 this evening onwards."

I find that the real motive of the letter was to obtain police protection: See Iyer, question 55. "The apprehension was that he would visit again with a mob" (see also Mr. McGuire's evidence as to what took place on the 18th which I accept and to which I shall

refer again and the defendant himself at questions 136 and 187). I do not accept the defendant's evidence at other places to the effect that he was not in the least alarmed about the matter (see questions 217 and 246 "I was not afraid," "I felt I could cope with the matter, and I did not want the police"). I have no doubt that Col. Gidney wished to discuss the matter with the Commissioner of Police and to discover some way of putting the plaintiff in check, and enabling him (Col. Gidney) to say: "But for me you would have got into severe trouble." I do not think that his intention was "arrest."

On 17th May in accordance with the appointment, which had been made, Graham and certain of his followers came to meet the members of the committee of Sir Henry Gidney's association and what took place purports to be recorded in the minutes of that association. After the meeting was over, Sir Henry Gidney apparently described what had taken place on the 15th and in his own words "opined that steps must be taken to prevent a repetition." This phrase was quite legitimately made use of by counsel for the plaintiff. On this occasion the two police officers, one of whom was Inspector Jennings, were in Col. Gidney's private premises (see Mr. McGuire's evidence, questions 35 and 37). I am quite sure that they were there in pursuance of Col. Gidney's demand for protection. The defendant will not have this. He says he was extremely surprised to see them and that he remonstrated strongly with them for ever having come. This was not also put to Jennings and I do not think for a moment that it took place. I see no cause for remonstrance at all.

Inspector Jennings had orders from the Deputy Commissioner, Mr. Banerji, to request the plaintiff to attend at the thana at Lalbazar the next day, and he did so. On the 18th at 11 o'clock or thereabouts, Graham was interviewed by Mr. Banerji, the Deputy Commissioner, and the Assistant Commissioner, Mr. Robertson. I am unable to accept wholly Graham's account. We have not Mr. Banerji's account. Jennings' account I consider to be substantially correct. Indeed I accept his evidence as a whole, bearing in mind that it is slightly tinted by departmental instructions. The

police (and I do not blame them for this) in these matters prefer to remain in the background. Jennings' evidence was roughly this: Graham was asked to produce certain books and give certain information about his association. 'If not obstructive, he was certainly not accommodating, and at one stage became what Jennings considers might be called "aggressive." Evidence was given both by Jennings and Graham of Mr. Banerji's final remarks something to this effect: "I arrest you on the strength of this letter (referring to the letter of Col. Gidney)." Objection to this was made by Mr. Clough, but in my opinion the evidence is relevant and admissible not as a statement by Banerji, but as evidence of what took place from which we are able to infer whether Banerji acted upon one basis or upon another basis. Ultimately Banerji directed a charge to be entered under S. 448, i. e., "house trespass" and gave Graham into custody. This charge was entered in the police report or, as it is usually called, the "charge sheet."

On 18th at about 1 p. m. Jennings informed the defendant of the plaintiff's arrest. The defendant went round and wanted to bail the plaintiff out. In point of fact the plaintiff and the other gentleman, who had been arrested, were bailed out by some one else. The defendant then went to Mr. Robertson, and there was a discussion between the defendant and Mr. Robertson, at which Jennings was present. Apparently the defendant went to Robertson for the express purpose of protesting against the action which had been taken. This is the effect of the evidence of the defendant himself. He expressed himself extremely angry at what the police had done (see questions 33, 35, 40, 42, 176 and 181). Why? Again I am unable to say. According to the defendant (question 35), Jennings had already told him that Banerji had arrested the plaintiff because he, the plaintiff, was "cheeky" to Mr. Banerji. This I doubt. In any event the defendant's grievance against the police was entirely unjustified. The answer that he received from Mr. Robertson was, (this again we have from the evidence of the defendant) "If you did not want him to be arrested, why did you write the letter?" On the 19th May Col. Gidney wrote a long

letter to the police, strongly complaining about their conduct on the lines I have mentioned. The last words are:—"The action of the police has surprised and pained me."

Let me summarise the facts as follows: On the 15th May there had been a deputation, or demonstration, at the office of Col. Gidney. On the 16th Col. Gidney heard from the staff a fairly accurate but somewhat highly coloured account of what took place. He wrote to the police an account of the occurrence mentioning criminal offences and asked for police protection. Protection was given to him and the plaintiff was sent for by the Commissioner. On 18th the plaintiff was questioned. The situation was, shall I say, aggravated by the attitude of the plaintiff. I think the situation is probably best expressed in slang, he gave the Commissioner "sauce." The Commissioner had him arrested, and entered a charge on the facts stated in the letter. Without the letter, the plaintiff would obviously not have been arrested: without the "sauce" he would probably not have been arrested. The offence being a compoundable offence, the defendant (although he considered the arrest to be justified) did not wish to proceed. The plaintiff was discharged. The defendant then turned round, attacked the police for what they had done. On behalf of the plaintiff it is contended that the decision in this case must follow the decision of Page, J., in *Gouri Prosad Dey v. Chartered Bank of India, Australia and China* (1). There also a private individual was told by the police to "put his complaint in writing" or to sign a "letter of charge." He did so. The police arrested "on the letter of charge." The private individual was held responsible for the arrest. Page, J., in the case cited, decided two points. The first was that the English law with regard to the justification of private arrests does not apply in India and that in this country the only defence available to an individual is to be found in S. 59, Civil P. C. On this point, I shall indicate my opinion hereafter.

The second point was what Page, J., himself called (p. 621 of 52 Cal.) "the pure issue of fact whether the defendant caused the arrest of the plaintiff." On this point, Page, J., on the evidence of

"Mr. Robertson (then Inspector Robertson), found that the police would not act without a letter of charge—that the individual signed such letter fully appreciating this fact—therefore the individual assumed responsibility for and "caused" the arrest. In coming to this conclusion Page, J., followed the English authorities. It is obvious that the facts of the present case are by no means identical with those of the case decided by Page, J., and I therefore proceed to examine the English cases in order to see how far they provide a test whereby in this case it can be determined whether or not the arrest was "caused" by the defendant. I am not entirely content with the language of the issue at (p. 619 of 52 Cal.) and would prefer to avoid the words "cause," "direct consequence" (p. 626 of 52 Cal.) and "direct outcome" (p. 629 of 52 Cal.), nor do I consider the question "but for the letter would you have arrested?" (reiterated at p. 625 of 52 Cal.) together with its answer conclusive. It is obvious that in most cases "but for the letter" the police would not have arrested. I prefer therefore to state the matter more formally

"where the person sued is not the person who actually arrests and imprisons the plaintiff; the question in each case is whether the defendant so acted as to render the plaintiff's arrest the act of the defendant."

In Pollock on Torts, 10th Edn., pp. 231-2, the law is summarised as follows:

"Every one is answerable for specifically directing the arrest or imprisonment of another, as for any other act that he specifically commands or ratifies . . . But one is not answerable for acts done upon his information or suggestion by an officer of the law, if they are done not as merely ministerial acts, but in the exercise of the officer's proper authority or discretion. Rather troublesome doubts may arise in particular cases as to the quality of the act complained of, whether in this sense discretionary or ministerial only. The distinction between a servant and an "independent contractor" with regard to employer's liability is in some measure analogous."

The authorities are merely examples of how in each particular case the "troublesome doubts" have been resolved. *Hopkins v. Crowe* (2) was a case of cruelty to a horse. The language used by the persons involved in the occurrence was as follows:

"The constable: 'If you charge him with cruelty I will take him in custody'."

Individual: 'I do.'

2. (1886) 4 Ad. & El. 774=2 H & W 21=5 L J K B 147.

And by the Court:

Page 776. 'If the defendant had not directed the constable to apprehend but had only given him information, he was entitled to a verdict.'

* Page 777. He directed 'the officer to apprehend the plaintiff. He made him his servant for that purpose.'

Page 778. 'He was a principal, making an arrest by the hand of the police officer.'

In *Gosden v. Elphick* (3), the defendant pointed out a man as the man who had committed the offence, it was held not to be the defendant's arrest. In that case, the earlier case of *Flewster v. Role* (4) was doubted. In *Grinham v. Willey* (5), the defendant signed the charge sheet. The plaintiff gave evidence that the defendant "gave her in charge" this was not accepted, and the evidence of the policeman was accepted who stated that he took her into custody. It was held that signing the charge sheet did not make the arrest that of the defendant; "he would be liable if he acted mala fide but not otherwise." In *Harris v. Dignum* (6), the language used was as follows:

"Constable: 'Did you give her in custody?'"

Individual: 'Let her be locked up.'

Austin v. Dowling (7):

"But it is found in the case that, though the defendant gave no express direction for the plaintiff's detention, he was expressly told by the inspector on duty that he (the inspector) disclaimed all responsibility in respect of the charge and that he would have nothing to do with the detention of the plaintiff except on the responsibility of the defendant; and that the inspector would not have kept the plaintiff in custody unless the charge of felony was distinctly made by the defendant. Signing the charge sheet with that knowledge therefore was the doing of an act which caused the plaintiff to be kept in custody."

On this basis the arrest was held to be that of the defendant. *Danby v. Beardslay* (8) was a case on the other side of the line. The defendant was held merely to have given information; "there was no direction to the constable to arrest or prosecute."

Swell v. National Telephone Co. Ltd. (9) was a case where the defendant signed the charge sheet. This was held

3. (1849) 4 Ex 445=7 D & L 194=13 Jur 989=19 L J Ex 9.

4. (1808) 1 Camp 187.

5. (1859) 4 H & N 496=28 L J Ex 242=5 Jur n s 444=7 W R 468.

6. (1859) 29 L J Ex 28=1 L T 169.

7. (1870) 5 CP 534=39 L J C P 260=18 W R 1003=22 L T 721.

8. (1880) 43 L T 608.

9. (1907) 1 KB 657=76 L J KB 196=28 TLR 226=51 SJ 207=96 L T 488.

to be evidence against the defendant but not conclusive evidence:

"A person ought not to be held responsible in trespass, unless he directly and immediately causes the imprisonment."

As already indicated, I prefer to avoid the language of causation. Finally, I refer to the earliest case of all. *Rafae v. Verelst* (10), both for its historical interest and significant language. The plaintiff had been arrested and imprisoned by Nawab Suzuddowla. He sued the President of the Council of the East India Company at Fort William. The arrest and imprisonment were held to be the act of the defendant on the finding of the jury quoted at p. 1059 that "the Nawab is a mere machine—the instrument and engine of the defendant." It will be seen that, in each case where the Court has held a private individual responsible for an arrest by the police, the individual has either "given the plaintiff into custody", "directed the constable to arrest," or "signed the charge sheet" with the knowledge that the plaintiff would not otherwise be detained.

The defendant's letter of 16th May 1931 contained no direction to arrest. Nor can it be said that Mr. Banerji was a mere "machine", "instrument" or "engine" of the defendant. This however does not finally conclude the matter; it is still open to the plaintiff to contend that since the letter disclosed criminal offences, the defendant should have anticipated arrest as a probable consequence. The question is whether a private individual should, in such circumstances, be held responsible for the supervening arrest on the ground that a person must be taken to direct an act which is likely to follow from information given by him. In this connexion a passage in *Gouri Prosad Dey v. Chartered Bank of India, Australia and China* (1), is of assistance to the plaintiff:

"If Mr. Clark (the defendant) knew, or, under the circumstances ought to have known, that the arrest would be the natural result of putting his signature to the letter, and as a direct consequence of his action the plaintiff was arrested, in my opinion, Mr. Clark caused the plaintiff to be arrested."

Clerk & Lindsell on Torts, Edu. 8th p. 179, is still more appropriate:

"If the arrest or other trespass is effected by a purely ministerial officer the defendant must clearly be answerable if he in fact authorised the act in question. It is not neces-

10. (1776) 2 Black W 1055.

sary that he should in terms have made a request or demand; it is enough if he makes a charge on which it becomes the duty of the constable to act."

This is getting very near this case. The authority cited in support of the above proposition is *Hopkins v. Crowe* (2). I have carefully considered this case but am unable to see that it fully bears out the proposition quoted. I am far from saying that there may not be cases where the individual must be held liable on the basis that although he has not expressly directed the arrest, he has in fact made it impossible for the constable to act otherwise. In such a case the constable becomes the "instrument" and "engine" of the individual. But, in my opinion, the principle of constructive service or direction by estoppel should not be extended. If *A* is the servant of *B* and *B* gives certain instructions to *A* which *A* may reasonably construe as instructions to assault *C*, *B* may not be entitled to deny that he directed the assault. But the question in these cases is whether *A* was at all the servant of *B*.

Having regard to the finding, which I propose to give on the first question, it is not necessary for me to consider the first point decided by Page, J., in *Gouri Prosad Dey v. Chartered Bank of India, Australia and China* (1), viz., that in India a private person responsible for an arrest cannot look for protection elsewhere than in S. 59, Criminal P. C., but, as the matter has been discussed I take the liberty of expressing a doubt: see *Gopal Naidu v. Emperor* (11) and *Nagendra Nath v. Basanta Das* (12). I quite appreciate that owing to the difference in the two systems of criminal law it may be difficult or impossible to apply the English law in its entirety, but I am as yet not convinced that the only defence to civil trespass is to be found in any section of the Criminal Procedure Code.

CONCLUSIONS.

Question 1.—Judged by the tests above indicated I find that on the facts of this case the arrest was not the act of the defendant.

Question 2.—As I have already indicated this question was not raised in the

11. A I R 1923 Mad 523 = 24 Cr L J 599 = 46 Mad 605 = 78 I C 843 (FB).

12. A I R 1930 Cal 392 = 57 Cal 25 = 125 I C 667.

pleadings and was not argued as an independent point.

Although most of the cases of malicious arrest arise out of civil process, I have no doubt that in a proper case an arrest by the police for a crime procured by the defendant maliciously, would afford a cause of action: see observations in *Gosden v. Elphick* (3), *Grinham v. Willey* (5), and *Nagendra Nath Ray v. Basanta Das Bairagga* (12). The gist of such an action would be malice. In this connexion counsel for the plaintiff has laid stress on what he characterised as the excessive language and exaggeration in the letter of 16th May 1931. The letter is not entirely accurate, the language is not restrained. The best way to describe it is I think in terms suggested to me by Mr. Clough who called it "a plain unvarnished tale." I should describe it as varnished, highly varnished, but not false or malicious in the sense that would found an action for malicious arrest.

Question 3.—Does not arise in view of the finding on question 1. I have already expressed my view as to the law.

Question 4.—This again does not arise. Mr. Clough has relied upon a passage in Halsbury's Laws of England and upon *Cahil v. Fitzgibbon* (13) for the proposition that, notwithstanding the plaintiff's acquittal on the criminal charge, it is yet open to the defendant in a civil action for trespass to establish that the offence was in fact committed. It is to be remembered however that the case quoted was decided with reference to the English law, under which a defendant is protected if he establishes that a felony was committed and that he had reasonable ground for suspicion: see *Gouri Prosad Dey v. Chartered Bank of India, Australia and China* (1).

In my opinion however in this country, where, as in this case, the offence being compoundable, the prosecution does not proceed and the arrested person turns round and sues the individual who is responsible for his arrest in trespass, it would be open to the defendant to establish that the offences for which the plaintiff was arrested, had in fact been committed. I fully realise that this places the civil Court in an invidious position and taking the present case as an example I find great difficulty in

13. (1885) 16 Ir 371.

coming to a finding on the fourth question. As the evidence has been given and discussed, I think it only right that I should give my conclusion and it is that the criminal offence of house trespass was not committed by the plaintiff. In view of my finding on the first question the suit is dismissed with costs.

K.S.

*Suit dismissed.***A. I. R. 1933 Calcutta 715**

RANKIN, C. J. AND PEARSON, J.

Kaluram Marwari—Appellant.

v.

Matilal—Respondent.

Appeal No. 99 of 1932, Decided on 22nd February 1933, from original order of Ameer Ali, J., D/- 25th July 1932.

(a) Civil P. C. (1908), O. 21, R. 63—Appeal from original side from order in claim case does not lie—Appeal.

Whether an order on a claim case is a judgment or not the concluding words of O. 21, R. 63 prevent any appeal from being brought from the original side from such an order: 25 *Mad* 555 and 39 *Mad* 1196, *Inst.*; *A I R* 1927 Rang 287, *Ref.* [P 715 C 2]

(b) Civil P. C. (1908), O. 21, R. 63—Whether order in claim case is judgment—*Quære*—Letters Patent (1865), S. 15.

Quære.—Whether an order in a claim case is a judgment within the meaning of S. 15, Letters Patent. [P 716 C 1]

S. N. Banerjee and *S. C. Mitter*—for Appellant.

N. N. Sircar and *N. C. Chatterjee*—for Respondent.

Rankin, C. J.—In my opinion this appeal fails. A certain firm, which I will call the Mamraj firm, is said to have been dissolved in 1928, but, at any rate, in 1930, a suit was brought against it. The writ of summons was served by registered post, the postal package being refused. On 2nd March 1931 there was an ex parte decree for Rs. 4,500. On 6th April 1932, the defendants obtained at Asansol a decree against another firm called Gurmukhrai Ramgopal for a somewhat larger sum of Rs. 5,432. On 12th April 1932 the plaintiff obtained, in the present suit, an interim injunction against the Mamraj defendants, restraining them from realizing this decree of Asansol. On 14th April it is said that the interim injunction was served. On 20th April the notice of motion was heard ex parte and the injunction was continued. On the same day, an order for attachment was made on the decree at Asansol, wherein the defendants in this suit were the decree-holders. On

25th April the defendants are said to have assigned to the present appellants all their interest under the decree. It is said that the attachment under the order of 20th April was not completed by notice to the Asansol Court until 26th April.

On 13th June summons was taken out by the appellants against the plaintiff in the present suit. That summons may be regarded in two ways. It may be regarded as an incompetent application by a third party to set aside the order of attachment which was made against the judgment-debtors or it may be regarded as an application to the Court under O. 21, R. 58, Civil P. C., in the nature of a claim to the property which had been attached. Mr. Banerjee, for the present appellants, does not seek to support the application as one of the character first mentioned and he disclaims any contention to the effect that he would have a right to apply to set aside the attachment. He says—and we may take it—that his case is really a claim to property, which has been attached; in other words, the application, which the learned Judge has dismissed, is an application under R. 58, O. 21. That being so, we have to consider the effect of R. 63, O. 21. It says:

“Where an objection, is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.”

Now, so far as I know, it has always been considered by this Court that the concluding words of that rule prevent any appeal from being brought from the original side from an order made in a claim case; but Mr. Banerjee has directed our attention to the circumstances that there is some authority the other way. The first case is the case of *Sabhapathi Chetti v. Narayanasami Chetti* (1). But an examination of that case shows that the point upon what was then S. 283, Civil P. C., of 1882, was not laid before the Court at all. The Court dealt with and negatived two arguments—one an argument under Ss. 588 and 591 of the Code of 1882 and another an argument to the effect that an order in a claim case was not a judgment within Art. 15, Letters Patent. That appears to me to be no authority. It is said however that in the case of *O. V. Venu*,

1. (1901) 25 *Mad* 555=11 *M L J* 846.

gopal Mudali v. C. Venkatasubbiah Chetty (2), a Division Bench, thinking that the Madras practice had been for a long time to entertain appeals from orders in claim cases, though recognizing the infirmities of the reasoning in *Saba-pathi's* case (1), held that an appeal under the Letters Patent was not excluded by O. 21, R. 63. So far as there was any reasoning in that case, it would seem that the reasoning was this: that S. 283, of the old Code was in the same position as S. 588. The reasoning seems to be that the principle *generalia specialibus non derogant* was equally applicable to S. 283. That argument appears to me to be unacceptable.

Assuming that the application to the learned Judge was an application authorized by R. 58, O. 21, then R. 63 is a definite prohibition of appeals from orders made in cases coming under R. 58. That is a particular provision for a particular class of cases and to read S. 15, Letters Patent, as permitting applications to be made under R. 58, but on different terms altogether from those prescribed with reference to those particular applications is, to my mind, incorrect. We have also been referred to the case of *Jamal Brothers & Co., Ltd. v. Chip Moh & Co.* (3). In that case, it would appear that an application under R. 58 was dismissed on the ground that it had not been brought in time and it was held that in that case the order was not a "judgment" within the meaning of Art. 15, Letters Patent. I desire to reserve my opinion as to whether it can be contended that an order in a claim case is not a "judgment" under the Letters Patent. It may be that something depends on what the order is: whether it is an order dismissing it without inquiring into the merits, whether it is an order allowing a claim or whether it is an order dismissing a claim. Without in any way committing myself to the view that the order complained of here is not a "judgment" I am of opinion that no appeal lies by reason of the terms of O. 21, R. 63. The appeal therefore must be dismissed with costs.

Pearson, J.—I agree.

K.S.

Appeal dismissed.

2. (1916) 89 Mad 1196=28 I C 867.

3. A I R 1927 Rang 287=104 I C 320 = 5 Rang 381.

A. I. R. 1933 Calcutta 716

RANKIN, C. J. AND PEARSON, J.

Tahiruddin Ahmad—Plaintiff—Appellant.

v.

Masihuddin Ahmad — Defendant — Respondent.

Appeal No. 97 of 1932, Decided on 21st February 1933, from original decree of Lord-Williams, J., in Suit No. 258 of 1931.

(a) *Mahomedan Law—Wakf—Wakf for maintenance of settlor's family is valid provided there is ultimate gift of substantial portion of it to charity.*

A valid wakf can be created for the maintenance and support of the settlor's family or descendants, provided (1) that there is an ultimate gift of the whole property to charity, that is to say, the ultimate benefit is reserved for the poor or for any other religious, pious or charitable purposes, and (2) that the gift to charity is substantial; but, if there is no ultimate gift to charity or if there is such a gift as is illusory, that is, it is small in amount or is too remote, the provision for the settlor's family would be invalid. [P 717 C 2]

(b) *Mahomedan Law—Wakf—Ultimate gift to charity must be implied from terms of document—14/16ths of income for maintenance of family without mention of ultimate gift to charity on failure of descendants—Wakf is invalid—Mussalman Wakf Validating Act (1913), S. 3.*

A deed of wakf provided that 14/16ths of the income of the property was to be utilised for maintenance of settlor's family, but there was no mention that it was for charity on failure of heirs or descendants:

Held: that the ultimate gift must be implied from terms of the document; that there was no ultimate gift to charity and that the wakf was invalid; A I R 1930 All 887 and A I R 1932 Cal 98, *Foll.* [P 718 C 1]

S. C. Ray and S. K. Basu—for Appellant.

N. N. Bose and B. Dutt—for Respondent.

Rankin, C. J. — In my opinion, this appeal must be allowed. The question is whether the wakfnama, made by one Maniruddin, on 12th May 1890, created a valid wakf. Now, first of all, the wakif says that certain parcels of property belong to him and that he hereby endows the said parcels of property, the estimated aggregate value of which is Rs.15,000, as wakf according to Mahomedan law. He then prescribes that, as regards his dwelling house, No. 151, Masjidbarhi Street, it was to be used solely as a dwelling house after his death by his wife and his sons, etc., and for no other purpose and that none of them would be at liberty to alienate it. He says that the wakf property is not to be

available to himself and his heirs. He undertakes, during his lifetime, to devote and apply one anna of the income of the property, other than the dwelling house, to charitable purposes and he reserves 15/16ths of the income for himself during his lifetime. He then declares that, after his death, his eldest son, Masihuddin Ahmad, should be mutawalli. He then describes the destination of the fund, namely, that after his death the mutawalli should apply rents and profits first in paying the ground rent, rates and taxes, repairs and other necessary costs of upkeep of the property dedicated including the dwelling house. The next thing is that the mutawalli is to pay one anna or 1/16th portion of the receipts, that is, of the net income monthly, to Mahomedan poor in cash or in such other form as the mutawalli should think proper. He then says that the mutawalli may deduct and retain another 1/16th part of the net income for himself. Then he says that he is to divide the balance every month among his heirs. The clause goes on to say :

"I declare that after the death of any of my heirs, the heirs of the deceased heir shall be entitled to participate in the portion of the income, which such deceased heir was entitled to, but the heir of an heir, if he or she be not one of my descendants, shall not be entitled to participate in the said income nor have any interest in the wakf estate, but the whole income of the share of the deceased heir will go to such of his or her heir or heirs as may happen to be a descendant or descendants of mine."

The remaining clauses of the wakf-nama throw no light on the only question that arises in this appeal. Now, the question is whether the wakf is a valid wakf, in which case the plaintiff's remedy, if any, is of one character, or whether it is invalid, in which case the plaintiff's right to partition cannot be resisted. It seems that the plaintiff would be entitled to 2/5ths share, the defendant, Masihuddin Ahmad, to 2/5ths share and their sister to 1/5th share. Logically, it appears to me that the first question is, whether this would be valid apart from the Mussalman Wakf Validating Act of 1913, which has now been given retrospective effect. It is conceded by Mr. Roy for the appellant that this Act would apply in the present case, if the circumstances are such as to render it applicable. Logically speaking, the first question seems to me to be whether, apart from the Act of 1913, the

wakf-nama creates a valid wakf. Mr. Bose for the respondent very fairly disclaimed that contention. In my opinion, he very rightly disclaimed any such contention. The law, as I understand it, may be taken from the well-known text-book of Sir Dinshah Mulla and is to the following effect: That a valid wakf can be created even before the said Act for the maintenance and support of the settlor's family or descendants, provided (a) that there was an ultimate gift of the whole property to charity, that is to say the ultimate benefit is reserved for the poor or for any other religious, pious or charitable purpose: and (b) that the gift to charity was substantial, but if there was no ultimate gift to charity or if there was such a gift as was illusory, that is it was small in amount or was too remote, the provision for the settlor's family was held to be invalid.

It seems to me that we have first to come to the question whether there is an ultimate gift to charity; and prior to the Mussalman Wakf Validating Act, even if there was an ultimate gift to charity, nevertheless, if it was indefinitely postponed until the failure of heirs or descendants of the wakif that was regarded as making the gift to charity illusory. Coming then to the terms of the present wakf-nama, it seems to me to be reasonably plain that, apart from the Act of 1913, as a wakf it is not valid. When we come to the Act of 1913 we find that provision is made that it shall be lawful for any person professing the Mussalman faith to create a wakf for the following, among other, purposes: for the maintenance and support wholly or partially of his family, children or descendants, provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by Mussalman law as a religious, pious or charitable purpose of a permanent character. We need therefore under the Act consider no longer any difficulty about the indefinite postponement. The question is whether or not we have here a provision for the support of the family with an ultimate benefit expressly or impliedly reserved for the poor or for any other religious or charitable purpose. Now, in Cl. 5, which I have already recited, after the gift of the income of 14/16ths of the net receipts, there are

no words to say what is to be the destination of the income upon the failure of heirs or descendants.

In the same way, there are no words to say what is to happen, after the failure of all heirs or descendants, to the dwelling house. The learned Judge however from the circumstance that Cl. 1 says that the settlor is endowing the property as wakf, and from the circumstance that 1/16th of the net income of the property other than the dwelling house is to be paid from the date of the settlor's death for ever to the poor in cash or otherwise, has inferred a provision to the effect that the 14/16ths share of the income shall, on the failure of the heirs or descendants, be given to the poor. In my judgment, it is not possible to make any such inference as a matter of construction of this clause. Our attention has been drawn to the circumstances that there was, at one time, some authority to the effect, that, from the mere word "wakf," an intention of ultimate destination to the poor can be inferred. But that is, in my opinion, of no avail under the Act of 1913. Our attention has been drawn to a decision of the Allahabad High Court in the case of *Irfan Ali v. Official Receiver, Agra* (1), and to a decision of this Court in *Masuda Khatun v. Mahammad Ebrahim* (2), in which cases it was held that the ultimate gift to religious purpose must be implied from the terms of the document, and is not to be implied from the mere fact that the testator was purporting to make a wakf. In my judgment these decisions are on that point correct and should be followed.

In the result, I am not of opinion that it is possible to hold that the gift of 14/16ths of the income to the heirs or descendants is a gift which is subject, upon its failure, to be replaced by an ultimate gift to the poor or for that matter to any other charitable object. That being so, it appears to me that, in this case, the settlor has made an invalid attempt to make a wakf for the maintenance and support of his heirs and descendants and that the wakf must be declared to be invalid. In these circumstances, we must make a preliminary decree for partition and we will declare

1. A I R 1930 All 897=130 I C 681=52 All 748.
2. A I R 1932 Cal 98=188 I C 657=59 Cal 402.

the share of the plaintiff and the defendant Masihuddin Ahmad to be 2/5ths each and of the sister 1/5th. There will be no order as to costs in either Court.

Pearson, J.—I agree.

K.S.

Appeal allowed.

* * A. I. R. 1933 Calcutta 718

LORT-WILLIAMS AND MCNAIR, JJ.

Shaheballi and another—Appellant.

v:

Emperor—Opposite Party.

Criminal Appeals Nos. 380 and 390 of 1933, Decided on 21st July 1933.

(a) Penal Code (1860), Ss. 368 and 109—Trial of two persons under S. 368 and S. 368/109—No direction to jury as to contradictory statements of girl seduced—Cases of both not dealt with separately—Abettor not shown to have guilty mind—Convictions were set aside—Criminal P.C. (1898), S. 297.

In a trial of two persons *K* and *S* under Ss. 368 and 368/109, I.P.C., the Judge failed to direct the jury upon the contradictory statements of the girl seduced made before the police and at the trial which were so important to the accused, nor did he make any attempt to deal with their cases separately, beyond a general direction, and he misdirected the jury by telling them that by merely delivering the girl to *K*, *S* abetted him without pointing out to them that it was necessary to be satisfied that *S* had a guilty mind:

Held: that the convictions and sentences imposed upon *S* and *K* must be set aside.

[P 720 C 1]

* * (b) Penal Code (1860), 'S. 366—"Seduced to illicit intercourse" is not limited to inducing girl to surrender chastity for the first time—Proof of girl's life pure from unlawful sexual intercourse at the time of kidnapping is necessary—Mere fact of her previous unlawful sexual intercourse is immaterial as she may have resumed purity at the time.

The expression "seduced to illicit intercourse" in S. 366 is not intended to be restricted to inducing a girl to surrender her chastity for the first time. It is used to indicate a distinction between "seduction" in the popular, usual or ordinary sense. "Seduced to illicit intercourse" means "induced to surrender or abandon a condition of purity from unlawful sexual intercourse." Therefore, an accused cannot be convicted of the offence under S. 366 unless it is proved that the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. It is not necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past, and thereafter have resumed a life or purity. On the other hand if she is already leading a life of indulgence in unlawful sexual intercourse at the time of the kidnapping, it cannot be said that she was kidnapped "in order that she might be seduced to illicit intercourse" within the meaning of the section. In such a case the accused could not have kidnapped her in order that she might be led astray in con-

duct, or drawn away from the right course of action into a wrong one, because she was already astray, and was pursuing a wrong course at the time of the kidnapping: *Case law discussed.*

[P 721 C 2; P 722 C 1]

*(c) Criminal P. C. (1898), S. 297—Offence under S. 366, Penal Code.

• In a trial under S. 366 the direction to the jury that the fact of previous intimacy of the accused with the girl is wholly immaterial, is misdirection.

[P 722 C 1]

A. K. Fazlal Huq, Harendra Kumar Sarbadhikari, Subodh Chandra Dutt, J. P. Mitter and Monindra Nath Mukerjee—for Appellants.

Khundkar and Jitendra Mohan Banerjee—for the Crown.

Lort-Williams, J.—The appellant Taki was convicted under S. 366, I. P. C., of kidnapping a minor girl named Puspallata in order that she might be forced or seduced to illicit intercourse, Kallan under S. 368 for wrongfully concealing or confining the girl and Sabbal under S. 368/109 for abetting him.

The case for the prosecution was that on 10th February 1932, Taki came to Puspallata's house in the evening when her parents were away from home, and on the pretext of taking her to her mother, Matangini, who, he said, was ill, he induced her to accompany him. He put her into a motor car, and after going for some distance Sabbal and others got in. The girl grew suspicious, and was threatened by Taki with a knife. When they arrived at Shamnagar, she was taken to a house where she was kept for a month, during which time Taki cohabited with her on many occasions by threatening her with a knife and by gagging her. Next she was taken to Titagarh where she was kept for about 10 days and Taki cohabited with her as before. Next she was taken to Calcutta to Taki's sister and kept locked up for about ten days. Meanwhile her parents made inquiries and learnt from their younger children that Taki had taken Puspallata away. He was a neighbour and was on familiar terms with the family. Both the father Sudhir Biswas and Puspallata are Indian Christians. Sudhir reported the matter to the police on 13th February, saying that the girl had gone away with Taki "over an illicit love." Matangini questioned Taki and he promised to find the girl and restore her to her parents. After waiting a month without result Matangini filed a complaint before the Magis-

trate on 14th March saying that Taki had enticed the girl away either to marry her or for some other immoral purpose and a case under Ss. 363 and 366 was started against him at Barrackpore.

About 23rd April the girl was taken from Taki's sister's house to Howrah Station in a motor-car by Taki, Sabbal and others. She was dressed in pyjamas and a borkha. Sabbal took her by train to Jaunpore Station and from there to Kallan's house, where she was kept confined until 9th August. Kallan is related to Taki. The kotwali police were searching for another girl and came to Kallan's house to make inquiries. At first Kallan denied that any girl was living in the house, but subsequently he produced Puspallata clothed in Mahomedan dress. She made a statement which was sent to the Noapara Police and by them to the Magistrate at Barrackpore. Subsequently Taki, Sabbal and Kallan were committed to the Court of Session. Puspallata was taken home and was found to be pregnant.

In her statement to the police, which was made in Bengali and translated into Urdu by a Bengali Babu, she said that there was "asnai" between her and Taki for about a year, but her parents were not aware of it. After two months of the "asnai" Taki asked her to elope with him and said that he would keep her in comfort and marry her. About two months after the elopement he told her that her parents had instituted a case against them and that she must go to Jaunpore or she would be detected by the police. She did not say anything about Taki having taken her away on the pretext that her mother was ill, nor did she mention anything about being threatened with a knife or being locked up anywhere. One of the witnesses from Jaunpore stated that Taki said that he had married a second wife in Calcutta, and that he had brought her to Jaunpore to live in Kallan's house. Another said that he used to see Puspallata on the terrace, and in other parts of Kallan's house. She used to visit his house and other neighbours' houses.

The defence was a simple denial. On behalf of Sabbal and Kallan it has been urged that there was no evidence to show that either of them knew that the girl had been kidnapped, or that Kallan concealed her and that the Judge failed

to direct the jury adequately about the separate cases of these two accused. These criticisms are in my opinion justified. There is no direct evidence on the points mentioned. The circumstantial evidence depends upon whether the girl's story about being threatened with a knife during the journey and about being concealed at Kallan's house can be relied upon. Her original statement to the police and the evidence of the witnesses from Jaunpore suggest that this part of her story at the trial was not true, and was invented, very naturally in order to assist her to regain the estimation of her parents and friends. Kallan's first denial of her presence in his house is not surprising, confronted, as he was, suddenly, by police officers and being taken unawares. The Judge failed altogether to direct the jury upon these points, which were so important to both Sabbal and Kallan, nor did he make any attempt to deal with their cases separately, beyond a general direction and he misdirected the jury by telling them that by merely delivering the girl to Kallan, Sabbal abetted him without pointing out to them that it was necessary to be satisfied that Sabbal had a guilty mind. In these circumstances the convictions and sentences imposed upon Sabbal and Kallan must be set aside and they must be acquitted.

The main argument which has been raised in favour of Taki is that illicit intercourse had taken place for some time prior to the kidnapping, and that in such circumstances the girl cannot be said to have been kidnapped in order that she might be seduced to illicit intercourse. In deciding this point the reported cases are not very helpful. *R v. Moon* (1) was a case under S. 17, Children's Act, 1908, which provides that if any person having the custody of a girl under sixteen causes or encourages her seduction or prostitution, he is guilty of a misdemeanour. It was decided by the Court of Criminal Appeal that the word "seduction" in that section means inducing a girl to surrender her chastity for the first time, "which is the usual and ordinary sense" of the word. If mere carnal knowledge was intended, there was no object in using the words "seduction or prostitution."

1. (1910) 1 K B 818=79 L J K B 508=74 J P 231.

"To encourage the seduction of a girl means to encourage her to surrender her chastity for the first time."

On the other hand Channell, J., who tried the case, told the jury that though the popular sense of the word was as stated, he thought, though with considerable doubt, that in that section it was not intended to be so restricted, but applied to any fornication or continual connexion between unmarried persons. In *Emperor v. Nga Ni Ta* (2), Adamson, J., considered that :

"it was a monstrous proposition, and one that would strike at the very roots of social and moral rectitude to hold that, because a man induced a girl, while in the custody of her parents, to surrender her chastity, he committed no further act of seducing to illicit intercourse, when he persuaded her to live with him in a condition of concubinage not sanctioned by marriage."

This statement however is not of much assistance, because it must be remembered that we are not here considering any question of social and moral rectitude, but one of law. Nevertheless this view was followed in *Emperor v. Pessumal* (3) where it was held (one Judge being doubtful) that the word "seduction," as used in S. 366, is not to be confined to the first connexion with an unmarried girl :

"When a man has induced a girl, while in the custody of her parents, to surrender her chastity to him and thereafter induces her to leave the protection of her parents and live with him in a condition of concubinage not sanctioned by law, he commits an offence under S. 366. Every time a woman surrenders herself to a lover, whether it is the first or the twentieth time, there is seduction."

This interpretation of "seduction" would allow no special meaning to the word, but would treat it as equivalent simply to having or persuading to have sexual connexion. This view was again accepted in *Emperor v. Premnarrain* (4) where it was held that previous intimacy was wholly immaterial, and in *Emperor v. Krishna Maharana* (5). In *Emperor v. Prafulla Kumar Basu* (6) the accused had ravished a married minor girl in his own house which he had persuaded her to visit at a time when she was living in the custody of her

2. (1908) 10 Bur L R 196.

3. AIR 1927 Sind 97=27 Cr L J 1293=98 I O 188.

4. AIR 1929 All 270=30 Cr L J 529=115 I C 868.

5. AIR 1929 Pat 651=1929 Cr O 379=31 Cr L J 306=9 Pat 647=121 I O 477.

6. AIR 1930 Cal 209=1930 Cr O 209=31 Cr L J 908=57 Cal 1074=126 I O 656.

parents. Subsequently he enticed her away from her home by deceit and cohabited with her at various places. It was held that "seduction" in the section is not used in the narrow sense of inducing a girl to part with her virtue for the first time, but includes subsequent seduction for further acts of illicit intercourse. In *Emperor v. Baignath* (7) it was held that the term "seduction" can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man :

"Section 366 cannot apply where the accused has been carrying on an intrigue with a girl under sixteen while in the custody of her guardian and goes away with her because obstacles are put in the way of the intrigue, even though he goes away with her with the intention of carrying on that intrigue, that is to say, continuing the illicit intercourse already begun. 'Kidnapping a woman in order that she may be seduced to illicit intercourse is manifestly different from kidnapping a woman whom he had already seduced to illicit intercourse' "

It is clear therefore that two opposing views upon the point are disclosed in these and other decisions which have been collected at pp. 1865, 1866 and 1867 of Gour's Penal Law of India (Edn. 4), Vol. 2. Thus in *Emperor v. Nga Nge* (8) it was stated that :

"the extra three years prescribed by S. 366 are most appropriate for the intention to bring force or persuasion to bear on the girl after she has been removed from the shelter of her home . . . It is contrary to the well-known rule of construction of penal statutes to say that an intention to seduce to illicit intercourse can be presumed when the girl has already consented to illicit intercourse."

In the first place it is necessary to observe that "seduced to illicit intercourse" may be, and probably is, intended to indicate something different from "seduction," otherwise the latter well-known word would have been used in the section. "Seduction" in the usual, ordinary or popular sense of the word, means inducing a girl to surrender her chastity for the first time: *R. v. Moon* (1). On the other hand "seduced to illicit intercourse" must be intended to mean something more than merely "persuaded" or "induced," otherwise one of the latter more general and more ordinary expres-

sions would have been used. Most women, and even prostitutes, need or pretend to need to be persuaded or induced by one means or another to indulge in sexual intercourse, however often the intercourse takes place, and though their companion is the same every time.

According to the Oxford Dictionary "seduce" is derived from the Latin word "seducere," meaning to lead aside or away. Thus (1) to persuade a servant to leave his service. This is the foundation of the Common law action for seduction, i. e. for seducing a virgin : (2) in a wider sense to lead (a person) astray in conduct, to draw (a person) away from the right course of action to or into a wrong one ; and (3) to induce (a woman) to surrender her chastity. Now said only of the man with whom the act of unchastity is committed (not e. g. of a pander). It is stated that (3) is now the prevailing sense and it is necessary therefore to ascertain the meaning of "surrendering her chastity." According to the same authority "chastity" means (1) purity from unlawful sexual intercourse ; continence. Thus "the first degree of chastity is pure virginity, and the second "faithful matrimony." (2) Abstinence from all sexual intercourse ; virginity ; celibacy. "Chaste" means (1) pure from unlawful sexual intercourse ; continent, virtuous ; (2) celibate, single. Thus it is clear that a wife may be chaste and may be seduced, that is to say, induced to surrender her chastity, by some man other than her husband. Therefore "seduced to illicit intercourse" in S. 366 cannot be intended to be restricted to inducing a girl to surrender her chastity for the first time. At first sight the expression appears to be tautological, but on further consideration it seems to have been used deliberately to indicate a distinction between "seduction" in the popular, usual or ordinary sense, described in *R. v. Moon* (1) and that which S. 366 was intended to cover. "Illicit intercourse" seems to be intended to be synonymous with "unlawful sexual intercourse." It follows from the definitions given that "seduced to illicit intercourse" means "induced to surrender or abandon a condition of purity from unlawful sexual intercourse."

Therefore an accused cannot be convicted of this offence unless it is proved

7. A I R 1932 All 409=1932 Cr C 619=33 Cr L J 669=54 All 756=138 I C 609.

8. (1905) U B R 17=2 Cr L J 476.

that the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. This does not mean that it is necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past, and thereafter have resumed a life of purity. On the other hand if she is already leading a life of indulgence in unlawful sexual intercourse at the time of the kidnapping, it cannot be said with any reason or sense that she was kidnapped "in order that she might be seduced to illicit intercourse" within the meaning of the section. In such a case the accused could not have kidnapped her in order that she might be led astray in conduct, or drawn away from the right course of action into a wrong one, because she was already astray, and was pursuing a wrong course at the time of the kidnapping. The learned Judge therefore misdirected the jury on this point, because he told them that the fact of previous intimacy with the girl was wholly immaterial. It remains to be decided whether Puspallata was living a life of indulgence in unlawful sexual intercourse with Taki at the time when he kidnapped her. Two main points have been argued on behalf of the accused to show that she was. She told the police on 9th August that there was "asnai" between her and Taki for about a year, and that after two months of the "asnai" Taki asked her to elope with him.

It is argued that "asnai" means illicit intercourse, but there is no direct evidence on the point. No one seems to have thought it necessary to ask any of the witnesses what the word meant, or the girl or the police what she or they meant when they used that expression or whether she used that word at all, or some Bengali equivalent. According to Shakespeare's *Hindusthani Dictionary* (Edn. 4, 1849) "ashna" means an acquaintance, lover, friend. "Asnai" means friendship, acquaintance. "Ashnai Karna" means to associate, to be familiar, to unite. "Ashnai lagna" means to become intimate, to be united in friendship. It is clear that the girl used it to describe her relationship with Taki not only during the two months or more which elapsed before the elope

ment, but during the six months which followed, and during the latter period there is no doubt that she was cohabiting with the accused. It is a reasonable inference therefore that the girl used the word to describe in a modest way a relationship of illicit intercourse with Taki, which began two months at least before she left home. Moreover on 9th August she was found to be pregnant, and she stated that while at Calcutta her belly became larger. She said also that while she was at Calcutta she felt the foetus moving a little in her womb, and then, that she did not understand the question; also that at Calcutta her belly was not so high (apparently with reference to some measurement suggested to her). She gave birth to a child on 20th October, that is to say about eight months and 10 days after the date when she left home. She stayed a month at Shamnagar, 10 days at Titagarh and 10 days at Calcutta. If these dates may be accepted as substantially accurate, the enlargement of her abdomen must have begun one month and 10 to 20 days after she left home.

But according to Lyon's *Medical Jurisprudence for India* by Waddell, Edn. 7, at p. 277, up to the end of the third month no enlargement of the abdomen is perceptible. Quickening may be felt as early as the 12th week, but generally between the 14th and 24th week. The reasonable inferences to be drawn from these facts are that Puspallata was pregnant before she left home, and that illicit intercourse was going on between her and Taki immediately prior to the kidnapping, and probably had been going on for sometime before that. Consequently it cannot be said that he kidnapped her, in order that she might be seduced to illicit intercourse, and his conviction under S. 366 must be set aside, and he must be acquitted.

McNair, J.—I agree, for the reasons which have been given by my learned brother.

R.K.

Accused acquitted.

A. I. R. 1933 Calcutta 722

LORT-WILLIAMS AND MCNAIR, JJ.

Garibulla Shekh and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 999 of 1932, Decided on 16th June 1933.

Criminal P. C. (1898), S. 297 — Charge to jury — Judge should not lecture on abstract principles of law — His duty is to deal with specific pieces of evidence and tell the jury whether they should be considered or not and then apply the law to concrete instances—He should also explain those particular sections of Penal Code which apply to particular cases—He must also record his explanation of the law to the jury in sufficient detail.

It is quite unnecessary for a Judge to explain to the jury, or to lecture the jury upon abstract principles of law or abstract theories of proof. The Judge's duty is to apply these principles and theories to concrete instances which arise in trials. Thus, instead of explaining to the jury the theoretical principles of proof, it is his duty to deal with specific pieces of evidence, and facts given in evidence, and tell the jury whether or not they are evidence which the jury must consider in that particular case. Though the Judge need not explain to the jury abstract principles of law, he must explain those particular sections of the Penal Code which apply to the particular case which the jury are trying, and he ought to set out in the copy of the charge which is sent up with the record, his explanation in sufficient detail to enable the High Court to ascertain whether he has properly explained the law about the offences, with which the accused are charged, to the jury. [P 723 C 2]

Fazlul Huq and Joges Chandra Sinha
—for Appellants.

Jitendra Mohan Banerjee — for the Crown.

Judgment. — These appellants were charged with three others under Ss. 148, 324, 304, Part 2 (two counts), and S. 304, Part 2 read with S. 149, I. P. C., and tried by the Additional Sessions Judge of Mymensingh and a jury. Garibulla was found guilty under Ss. 324 and 304, Part 2, the latter for causing the death of two persons. They also found him guilty under S. 148. The other six appellants were found guilty under Ss. 148 and 304, Part 2, read with S. 149. The remaining accused were found not guilty. The learned Judge sentenced the appellants to various terms of imprisonment. The trouble which occasioned this trial arose, as so often happens, over the possession of a particular piece of land claimed by opposite parties. Both parties gave information about the fight and the only question which the jury had to decide was, who were the aggressors. This turned on the question of possession. According to the prosecution, their witnesses were engaged in transplanting paddy on the land when the opposite party came up and attacked them with daos, lathis, etc. The result was that two men died and others were seriously injured. Garibulla was the man who

attacked one of the witnesses, Fateh Ali, with a dao so that he seriously injured him, and Misrer Bap and Abdul Jabbar on the head with a plough so that they both died, the first soon afterwards and the second two months afterwards in hospital.

The learned advocate who appears for the appellants has raised various points of criticism of the charge. Firstly, he says that the learned Judge has stated as follows: "Proved" defined and "reasonable doubt" explained: S. 3, Evidence Act. His argument is that the learned Judge ought to have stated in extenso what he said to the jury on these points. Immediately before this sentence the Judge has stated, that if a reasonable doubt remains in the minds of the jury, they are bound to give the accused the benefit of the doubt. With regard to "proved," I can never understand why it is thought necessary for the Judge to read out, or explain definitions of words used in the various Codes to the jury. It is quite unnecessary to explain to the jury, or to lecture the jury upon abstract principles of law or abstract theories of proof. Such matters are fit for law students and others who wish to make a study of the law. The Judge's duty is to apply these principles and theories to concrete instances which arise in trials. Thus, instead of explaining to the jury the theoretic principles of proof, it is his duty to deal with specific pieces of evidence, and facts given in evidence, and tell the jury whether or not they are evidence which the jury must consider in that particular case.

To start off in a charge with a long disquisition on abstract principles is sure to confuse the jury. Moreover if such a practise is encouraged, it leads learned Judges to rely upon such theoretical explanations of the law, and fail to give that guidance about concrete facts and instances in the trial, which it is so necessary for them to give to the jury if they are to be of any use to them in arriving at their verdict. Obviously, though the Judge need not explain to the jury abstract principles of law, he must explain those particular sections of the Indian Penal Code which apply to the particular case which the jury are trying, and he ought to set out in the copy of the charge which is sent up with the record, his explanation in sufficient

detail to enable us to ascertain whether he has properly explained the law about the offences with which the accused are charged to the jury. It is not for us to say how this is to be done, and we cannot fail to recognize the difficult position in which the Judges in the moffussil are placed when they have to deliver their charge orally to the jury, possibly in the vernacular, and afterwards have to prepare in English what is supposed to be an exact reproduction of what they said to the jury. The only remedy for this state of affairs will be when it becomes possible to employ shorthand writers in all the Courts, who will be able to take down either in English or Bengali, or whatever the vernacular tongue may be, the exact words with which the Judge charges the jury.

The other point raised by the learned advocate is that the law with regard to private defence of self or property has not been fully explained. We cannot agree with this criticism. The learned Judge has referred to this point at several places in his charge, and has explained how a party when attacked must defend himself, or when he is in possession of the property and is attacked, may protect his own property. But that he must not inflict more harm than is necessary for the purpose of defending himself or his property, and that if he does exceed it he loses the benefit of this defence. This is a sufficient note of what the Judge said to the jury and we find no misdirection in this charge. Consequently this appeal must be dismissed.

Appellants 2 to 7 who are on bail must surrender to their bail and serve out the unexpired portion of the sentences imposed upon them.

K.S.

Appeal dismissed.

A. I. R. 1933, Calcutta 724

LORT-WILLIAMS AND M. C. GROSE, JJ.

Kusum Kumari Debi and another — Petitioners.

v.

Hem Nalini Debi—Opposite Party.

Criminal Revn. Petn. No. 667 of 1933,
Decided on 26th July 1933.

Criminal P. C. (1898), S. 144 — Magistrate cannot make mandatory order directing party to do some act—He can only make restrictive order — Conviction for disobeying such order is unsustainable — Penal Code (1860), S. 188.

A Magistrate is only entitled under S. 144 to

make a restrictive order preventing the opposite party from doing an act, but it does not enable him to make a mandatory order directing the opposite party to do some act. Consequently that party is under no obligation to obey such an order and his conviction for disobeying such an order under S. 188, Penal Code, is unsustainable.

[P 725 C1, 2]

*Satindra Nath Mookerjee and Amiya Prosad Maitra—*for Petitioners.

*Probodh Chandra Chatterjee—*for Opposite Party.

Lort-Williams, J.—In this case a Rule was issued calling upon the Chief Presidency Magistrate and the opposite party to show cause why certain orders should not be set aside. These orders were made under S. 144, Criminal P. C., and S. 188, I. P. C.

It appears that petitioner 1 is the owner of premises Nos. 23-A and 23-B Masjid Bari Street, Calcutta, and the opposite party is the owner of 24/3, Masjidbari Street. Between the premises there was a passage. This originally had been six feet wide. On about two feet of this the opposite party had built a wall; but she claimed that the whole six feet belonged to her. Petitioner 1 claimed that the balance of four feet odd belonged to her. She became apprehensive that the opposite party was making a hole in this wall, so that they could use this remaining part of the original passage claimed by her. Instead of waiting until any such hole was made and then asking the Court for an injunction, she was advised to build a wall of her own up against the wall built by the opposite party. In passing, I ought to mention that the opposite party claimed that they had always had a door in this wall and therefore had a right to use the passage which, they said, belonged to them. When the opposite party saw the petitioners, workmen digging the foundations of her wall, they applied to the Magistrate and got an order under S. 144 which was made on 4th May 1933, restraining her from proceeding with the building of the wall and ordering her to fill up the excavation at her own cost. This order was made by Mr. Wajid Ali who was then acting for the Additional Chief Presidency Magistrate. But he reverted to his position as Third Presidency Magistrate on 16th May when Khan Bahadur A. Gaffur was appointed Additional Chief Presidency Magistrate. On 19th May Khan Bahadur A. Gaffur took up

the case and asked Mr. Wajid Ali to make an inspection which he did. Subsequently, the present petitioner showed cause against the order, but did not succeed in getting it set aside. As however she failed to obey it, a subsequent order was made, giving the opposite party leave to fill up the excavation at his own cost and that has been done.

The points taken on behalf of the petitioners are : (1) that the Magistrate had no power to make the order. S. 18, Criminal P. O., provides that the Local Government may appoint a sufficient number of persons as Presidency Magistrate and one of them to be Chief Presidency Magistrate. Also that they may appoint any person to be an Additional Chief Presidency Magistrate who shall have all the powers of the Chief Presidency Magistrate as the Local Government may direct. S. 144 of the Code provides that the powers under that section shall only be exercised by a District Magistrate, a Chief Presidency Magistrate, a Subdivisional Magistrate or any other Magistrate specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section. Sub-S. 4 provides that any Magistrate may "either on his own motion or on the application of any person aggrieved" rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor-in-office. The contention is that as Mr. Wajid Ali had ceased to be Additional Chief Presidency Magistrate on 16th May 1933 he had no power to make what the petitioners call the "final order" that is to say, the order made after hearing the present petitioner. In our opinion this contention is unsound. The order under the section was made on 4th May when Mr. Wajid Ali had power to make it. Under the procedure, an opportunity is given to the other side to apply to have the order set aside. If he succeeds, the Magistrate will set aside the order previously made under the section. If he fails the original order stands.

The second point is that the Magistrate is only entitled to make a restrictive order preventing the opposite party from doing an act, but that it does not enable him to make a manda-

tory order directing the opposite party to do some act. The original order of 4th May directed the opposite party, who is the present petitioner 1 to fill up the excavation and as she failed to obey this part of the order, proceedings were started against her under S. 188, I. P. C. In our opinion, this part of the order was beyond the Magistrate's powers being in effect mandatory. Consequently, the present petitioners were under no obligation to obey it and the proceedings under S. 188, I. P. C., must be set aside. The Rule is made absolute to this extent only. That part of the order which restrained the petitioners from building a wall stands.

M. C. Ghose, J.—I agree.

K.S. *Rule partly made absolute.*

A. I. R. 1933 Calcutta 725

MUKERJI, J.

Sadananda Moral and others—Plaintiffs—Appellants.

v.

Heirs of Late Govinda Moral and others—Defendants—Respondents.

Appeal No. 1989 of 1930, Decided on 6th December 1932, from appellate decree of Addl. Dist. Judge, Khulna, D/- 23rd January 1930

Bengal Tenancy Act (8 of 1885), S. 29—Kabuliyat mentioning that tenant would be liable on subsequent measurement of land to pay at highest rate prevailing for neighbouring lands—Highest rate found to be Rs. 4 per bigha—Contract is hit by S. 29—Contract to pay a different rent on measurement is without consideration and unenforceable.

A kabuliyat executed by a tenant of a subsisting tenancy mentioned, that the tenant was holding 40 bighas by guess at Rs. 1-10-0 per bigha and that he was liable to pay on measurement of the land, at the highest rate prevailing for neighbouring lands. The lands were subsequently measured and the highest rate was found to be Rs. 4 and rent was claimed for the ascertained area at Rs. 4 per bigha.

Held: that the plaintiff was not entitled to recover as the contract was hit by S. 29 because the increase in the rate was more than 2 annas in the rupee.

Held further: that as the agreement to pay different rent when measurement would be made was not supported by consideration, it could not be enforced. [P 726 C 2]

Nagendra Kumar Dutt—for Appellants.

Judgment.—This appeal has arisen out of a suit for rent. The plaintiffs' case was that the defendants held a jama of 40 bighas of land for a rental of Rs. 65, that in 1901 the defendants' predecessors had executed a kabuliyat

in favour of the plaintiffs' predecessors agreeing to pay for the lands of the tenancy at the highest rate of rent of neighbouring lands; and that the lands have now been found to consist of 48 bighas and the highest rate of rent of neighbouring lands is Rs. 4. On such basis the claim was made. So far as the findings of fact are concerned there is no dispute now; the lands are roundly 47 bighas in quantity, and the highest rate is Rs. 4 though the Commissioner reported that it was Rs. 3. Both the Courts below declined to apply either of these rates and were of opinion that the original rate of Rs. 1-10-0 per bigha was the rate to be applied. In deference to a plea of suspension of rent the trial Court dismissed the entire suit. The lower appellate Court held that deduction of rent for one bigha was to be allowed and not suspension of the entire rent. It gave the plaintiffs a decree for rent for 47 bighas at the aforesaid rate. The plaintiffs have appealed. Both the Courts have held that the kabuliyat contravenes S. 29, Ben. Ten. Act.

The terms of the kabuliyat, therefore, have to be carefully examined. It states that the tenant was holding a jama of 40 bighas, by guess, at a rate of Rs. 1-10-0 per bigha, that is to say for a rental of Rs. 65, that he would go on paying the said rental, but when the measurement would be next made and the quantity of lands would be ascertained the tenant would remain bound to pay rent at the highest rate paid by tenants of the same class holding neighbouring lands. Two constructions are possible: 1st that if on measurement the tenant is found to cultivate lands outside the boundaries of the plots mentioned in the schedule the tenant would pay Rs. 65 for the 40 bighas at the original rate of Rs. 1-10-0 plus rent at the highest neighbouring rate for the area found in excess; 2nd that on measurement the area being accurately determined, the total area would be charged with the highest neighbouring rate: see *Sukumari Mitra v. Kinu Mandal* (1). I think the former construction should be rejected and the latter accepted; the more so for the reason that the area of 40 bighas had been put down expressly by guess. The question, therefore is

whether this contract by which the tenant agreed to pay for the total area at the highest neighbouring rate is a contract which offends against S. 29, Ben. Ten. Act. The answer must be in the negative if the contract in the abstract has to be considered, for there is no definite rate stated in the contract which would increase the rate in any case to more than 2 annas in the rupee. On the other hand the moment the plaintiffs seek to realise the rent either at Rs. 3 or Rs. 4 per bigha, the contract would be hit by the section and so the plaintiff would not be entitled to recover on its basis. As in the present case the plaintiffs rely on the contract only and on nothing else, the claim must fail; because the plaintiffs cannot be heard to say "If I cannot get so much, give me less." For it is one contract which must stand or fail as a whole.

I also think the claim must fail for another reason. The land was being held from before and the tenancy was an existing one when the kabuliyat was executed. The contract to pay at the highest neighbouring rate was in my judgment void for consideration. It was not a contract for assessment of land which the tenant might come to possess in future by encroachment or otherwise. It was an agreement to pay a different rent when a measurement would be made. For this agreement there was no consideration. I agree with the Munsif that for this reason the agreement regarding payment at an enhanced rate cannot be enforced. The case would have been different if it was a new tenancy which was being created by the kabuliyat with a rent tentatively fixed pending a measurement to take place in future. The plaintiffs undoubtedly have the right to proceed under the law if they desire to enhance the rate of rent but they cannot be permitted to rely on the kabuliyat for that purpose. The appeal therefore must be dismissed.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 727 (1) .

GUHA, J.

Forman Mandal and others—Defendants—Petitioners.

Basanta Kumari Debya — Plaintiff—Opposite Party.

Civil Rule No. 4 of 1933, Decided on 30th January 1933, from order of Dist. Judge, Jessore, D/. 22nd September 1932.

Civil P. C. (1908), O. 43, R. 1 (w) and O. 47, R. 7—Order granting review can be appealed on only one or other of grounds specified in O. 47, R. 7.

Order 43, R. 1 (w) is to be read subject to the provisions contained in O. 47, R. 7. Hence an order granting a review can be appealed from only on one or the other of the grounds specified in O. 47, R. 7: *A I R 1921 Cal 66, Appr.*

[P 727 O 1]

Nani Bhusan Mukerji—for Petitioners.

Hemendra Chandra Sen—for Opposite Party.

Judgment.—This rule is directed against an order passed by the learned District Judge of Jessore, setting aside an order passed by the learned Munsif, second Court at Jessore, granting an application for review of judgment. The Munsif had by his order dated 2nd July 1932 granted an application for review of judgment; on appeal the order of the Munsif was reversed by the Court of appeal below. The trend of the recent decisions in this Court and as also of those of the other High Courts in India is that the provisions of O. 43, R. 1 (w), Civil P. C., are to be read subject to the provisions contained in O. 47, R. 7, that an order granting a review could be appealed from only on one or other of the grounds specified in O. 47, R. 7; and it has expressly been laid down by this Court in the case of *Suria Narain v. Kunja Behari* (1), that although O. 43, R. 1 (w) allows an appeal against an order granting a review, that clause must be read with R. 7, O. 47 by which the grounds on which an order granting a review can be set aside on appeal are limited. I find no reason to differ from the above view of the law applicable to the present case. It must accordingly be held that the Court of appeal below had no jurisdiction to set aside the order of the Munsif granting the review.

The Rule is made absolute, the order of the learned District Judge passed on appeal in this case is set aside, and the

1. *A I R 1921 Cal 66=66 I O 909.*

order of the Munsif, dated 2nd July 1932, allowing the application for review, is restored. I make no order as to costs in this Rule.

The records are to be returned as soon as possible.

K.S.

Rule made absolute.

A. I. R. 1933 Calcutta 727 (2)

LORT-WILLIAMS, J.

Corporation of Calcutta

v

R. C. Banerji—Defendant.

Original Suit No. 720 of 1931, Decided on 8th February 1933.

Calcutta High Court Original Side Rules, Ch 10, R. 36—Though R. 36 does not apply when requisition is properly made, it does apply when requisition is made improperly.

Once a suit has been properly placed in the Prospective List, R. 36 no longer applies; that is to say, if the suit was ready to be heard when the requisition was made. But the rule applies to suits in which the requisition has been made improperly. Where a suit is not ready for hearing, it should not be placed in the Prospective List, but if it is placed on requisition in such list, it is improper and the suit is liable to be dismissed: *A I R 1931 Cal 671, Dist.*

[P 728 C 1, 2]

A. K. Roy and N. C. Chatterji—for the Corporation.

B. C. Ghose—for Defendant.

Judgment.—Rule 36, Ch. 10, of the Original Side Rules provides as follows:

Suits and proceedings, which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their attorneys, to be dismissed for default, unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper.

Formerly this was construed as meaning that, if a suit had not appeared in the Prospective List within six months from the date of institution, it might, subject to the discretion of the Judge in Chambers, be dismissed for default. The result was that such a suit was always thereafter in jeopardy, unless the plaintiff prosecuted it expeditiously.

But in *Haribux Shroff v. Dwijendramohan Ghosh* (1), the Chief Justice decided, and C. C. Ghose, J., agreed, that this construction was, as they expressed it, "impossible," and that the rule means that if "at the time when the suit is placed before the Judge in Chambers" it is not in the Prospective List, and has not previously appeared in the

1. *A I R 1931 Cal 671=133 I O 203=53 Cal 736.*

Prospective List, it may be so dismissed. The result of this decision, if read literally, makes the rule practically useless. Any plaintiff can avoid its provisions by the simple expedient of putting his case in the Prospective List, taking it out again, and then proceeding at his leisure unhampered by any interference from the Court. R. 7 provides that his attorney may, by requisition in writing to the Registrar, have his suit entered in the Prospective List on the ground that it is ready to be heard. R. 8 provides for its removal from the list.

Of course the defendant can take steps to expedite matters, but the existence of the rule is sufficient proof that such action cannot be relied upon.

It is true that the same procedure was possible even under the previous interpretation of the rule, so long as the requisition was made within six months from the date of institution. But greater courage or less conscience would then have been required to state that the suit was ready to be heard, when, in fact, it was not. Since the judgment, to which I have referred, the decision to print a "Special List" of suits liable to be dismissed under R. 36 has been followed, with uncanny haste, and before the necessary notices can be served, by requisitions to place such suits in the Prospective List. The coincidence is too striking to be natural, though it is difficult to say whether, or how, plaintiffs have become aware of the impending inquiry. The explanation given, that this spate of requisitions is due merely to apprehension that owing to a change in the personnel of the Court greater expedition will be required from attorneys, though gratifying, cannot be accepted as sufficient.

This being the position I have to decide whether the Court is powerless to deal with what seems to be an abuse of its process. In my opinion, the judgment means that once a suit has been properly placed in the Prospective List, R. 36 no longer applies; that is to say, if the suit was ready to be heard when the requisition was made. But that the rule applies to suits in which the requisition has been made improperly.

Applying this interpretation to the facts of this case, I find that the suit was instituted so far back as March 1931. The written statement was filed

in May. Nine months afterwards, discovery was asked for and ordered, and plaintiff's affidavit was filed in May 1932. Nothing further was done, and inspection has not yet commenced. But on 3rd January 1933 notice was issued by the Registrar that the suit would be placed on the "Special List" for the 13th. This was served on the defendants' attorney on the 6th, but before it could be served on the plaintiff's attorney he wrote asking that the suit should be placed in the Prospective List "as the same is ready for hearing." Thereupon the Registrar took the suit off the "Special List" and put it in the Prospective List. The defendant then applied to the Court asking why the suit, about which he had received notice, was not in the "Special List," and the Court ordered it to be restored. On 7th January the plaintiff's attorney wrote to the defendants' attorney asking for and offering inspection.

It is obvious that the suit was not ready for hearing on 6th January, when the requisition was made, and ought not to have been placed in the Prospective List. Placing it in the list was a mere subterfuge to enable the plaintiff to take advantage of the judgment to which I have referred.

In my opinion therefore the suit was properly placed in the "Special List," and, in view of the facts already mentioned, I think that it may, and ought to, be dismissed for default with costs, and I so direct.

K.S.

Suit dismissed.

* A. I. R. 1933 Calcutta 728

MALLIK AND JACK, JJ.

Niharmala Debee—Defendant—Appellant.

v.

Sarojebandhu Bhattacharjya—Plaintiff—Respondent.

Appeal No. 1917 of 1930, Decided on 28th February 1933, against appellate decree of Sub-Judge, Burdwan, D/- 31st January 1930.

* Mortgage—Suit by mortgagee—Purchaser of part of equity of redemption not implemented—Purchaser of mortgaged property in execution of mortgage decree can bring a suit for possession and get decree subject to right of redemption by the purchaser of equity of redemption.

A purchaser of mortgaged property in execution of mortgage decree can bring a suit for possession against the holder of the equity of

redemption, who has purchased a part of equity of redemption from mortgagor and who had been left out in the mortgage suit; and a decree can be made in his favour subject to the defendant's right of redemption, if the mortgagee was not aware of the purchase of part of the equity of redemption by the defendant at the time of mortgage suit: *Case law reviewed.*

[P 781 C 1]

Rupendra Kumar Mitra and Sanatkumar Chatterji—for Appellant.

Apoorbadhan Mukherji—for Respondent.

Mallik, J.—This appeal arises out of a suit for declaration of title to some lands and for recovery of possession of the same. The property originally belonged to one Kamaladdi Mandal and his brothers. About 1888 one of the brothers and the heirs of the other brothers mortgaged the property to one Surjakanta Bhattacharjya, the maternal grandfather of the plaintiffs. Surjakanta, in October 1888, executed a will, by which he devised his properties to his daughter Gopendrabala Debee and died. Gopendrabala, in 1889, took probate of the will. In June 1891 the mortgagors executed an instalment mortgage bond in favour of Gopendrabala. In the year 1895 a rent suit was brought against the mortgagors for the rent of the lands, a decree was obtained and, when the property was put up to sale in execution of the decree, one Ahmaddi purchased one half share of the holding, thereby acquiring the right, title, and interest of the mortgagors of the property and becoming the holder of the equity of redemption in respect of one-half share of the property. In the year 1901 the plaintiffs who, as I have said before, are the sons of Gopendrabala, the daughter of Surjakanta, instituted a suit upon the mortgage bond of 1891. In this suit however Ahmaddi was not impleaded as a party.

The plaintiffs obtained a mortgage decree on 26th June 1902, and, in execution of that decree, they purchased the properties on 15th June 1904 and obtained symbolical possession. In 1902 the landlord had obtained a rent decree against Ahmaddi and in execution of that decree the property was put up to sale and defendant 11 purchased the right, title and interest of Ahmaddi on 11th May 1903. Thereafter, on 15th February 1916, the plaintiffs instituted a suit for possession of the property in question on the allegation that defendant 11 who had been in possession was resisting

them from obtaining possession thereof. The defence *inter alia* was that the plaintiffs were not the heirs of Surjakanta, that the mortgage was not a valid mortgage and that the plaintiffs could have no relief against the contesting defendant, namely, defendant 11, who was the purchaser of the equity of redemption, the person whose interest the defendant had purchased not having been impleaded in the mortgage suit. This defence was negated by both the Courts below and the Courts below have given a decree to the plaintiffs, subject to the contesting defendant's right of redemption. Defendants 11/1 and 11/2, who are the heirs of the contesting defendant 11, have appealed to this Court.

The facts relevant for the purpose of the present appeal that would emerge from what I have stated above are these: (1) the plaintiffs purchased the mortgaged property on 15th June 1904 in execution of their mortgage decree dated 26th June 1902; (2) defendant 11 had purchased a portion of the interest of the mortgagors and thereby had become the owner of a part of the equity of redemption on 11th May 1903; and (3) the plaintiffs in their mortgage suit had made the original mortgagors parties, but left out Ahmaddi who had acquired the right of redemption in respect of a part of the properties and whose right was subsequently purchased by defendant 11. The question is whether under these circumstances the plaintiffs' suit for possession against defendant 11 was maintainable or not. On behalf of the appellants who, as I have stated above, are the sons of the contesting defendant 11, the contention was that the suit could not be maintained, whereas on the side of the respondents it was urged that it was maintainable.

Both parties have cited a number of decisions in respect of their respective contentions. The principal decisions relied on by the appellants are: *Grish Chunder Mondul v. Iswar Chunder Rai* (1), *Habibullah v. Jugdeo Singh* (2), *Aghore Nath Bannerjee v. Deb Narain Guin* (3), *Krishtopada Roy v. Chantanya Charan Mandal* (4), *Hargu Lal Singh v.*

1. (1898) 4 C W N 452.

2. (1911) 6 C L J 660.

3. (1906) 11 C W N 314.

4. AIR 1928 Cal 274=49 Cal 1048=69 I C 550.

Gobind Rai (5), *Madan Lal v. Bhagwan Das* (6) and lastly *Bijai Saran v. Bageshwari Prasad Bahadur Sahi* (7), which is a decision of the Judicial Committee of the Privy Council, while those on which the respondents placed reliance are *Prolap Chandra v. Ishan Chandra* (8), *Jugdeo Singh v. Habibullah Khan* (9), *Gangadas Bhattar v. Jogendra Nath Mitter* (10), *Kalu Sharip v. Abhoy Charan* (11), *Bhagaban Chandra v. Tarak Chandra* (12), *Bhodai Shaik v. Lakshminarayan Dutt* (13) and some decisions of the Bombay High Court.

Mr. Rupendrakumar Mitra's contention was that there was a divergence of opinion not only among the different High Courts in India, but also in the decisions of this Court, as to whether the purchaser at a mortgage sale can recover possession from the purchaser of the equity of redemption who was left out in the mortgage suit, but that divergence has now been set at rest by the Privy Council decision in *Bijai Saran Sahi's* case (7). In that case the plaintiff who had purchased the right of redemption in execution of his money decree, brought a suit for possession against the defendants to whom the properties had been mortgaged and who had also purchased the same subsequent to their mortgage, but subsequent also to the plaintiff's money decree against the defendants and attachment of the property in execution of that money decree. It was held that the sale to the defendants being invalid the defendants could not set up their mortgage as shields against the plaintiff's claim for possession. It was urged on behalf of the appellants before us that this decision by necessary implication overruled the decision in the cases of *Kalu Sharip* (11), *Bhagaban Chandra Kundu* (12) and *Bhodai Shaik* (13). I am unable to agree with the learned advocate in this view of the matter. The case of *Bijai Saran Sahi* (7), in my opinion, is clearly distinguishable from the present case, as also the cases which are said to have been over-

ruled by implication. In the case of *Bijai Saran Sahi* (7), there was nothing but the defendant's mortgage to be set up against the plaintiff's claim for possession—a mortgage which by itself gave to the defendants no right to possession—and therefore there was nothing valid in the eye of law to stand between the possession of the properties and the plaintiff who, as the purchaser of the equity of redemption, had stepped into the shoes of the owner thereof and was therefore as owner entitled to the possession of the same. In the present case, as also in the case of *Kalu Sharip* (11), *Bhagaban Chandra Kundu* (12) and *Bhodai Shaik* (13), which are said to have been by necessary implication overruled, the mortgagee had not merely his mortgage to set up as a shield against the claim for possession of the holder of the right of redemption but a decree of the Court and purchase by himself of the property in execution of the decree—a decree which was not altogether void. The Privy Council case cannot therefore be said to be of any great assistance in the present matter.

On the question whether the purchaser at a mortgage sale can successfully claim for possession against the purchaser of the right of redemption, who had not been made a party in the mortgage suit, and if he can on what conditions, there is divergence in the views of the Bombay, Allahabad and Madras High Courts and the earlier decisions of this Court also were anything but uniform. But the weight of authority, at least in recent decisions of this Court, seems to be decidedly in favour of the respondents. Apart from the decision in *Krishtopada Roy* (4), the three decisions of this Court, viz *Grish Chunder Mondul* (1), *Habibullah* (2) and *Aghore Nath Banerjee* (3), are in favour of the appellants. But the correctness of the decisions in *Grish Chunder Mondul* (1) and *Habibullah* (2) was doubted in the case of *Kalu Sharip* (11), and in the case of *Aghore Nath Banerjee* (3), the mortgagee at the time when the mortgage suit was instituted was aware of the purchase of the equity of redemption. As regards the case of *Krishtopada Roy* (4), it is no doubt true that Walsley, J., made one or two observations to indicate that the view taken by the Allahabad High Court in *Hargu Lal*

5. (1897) 19 All 541=(1897) A W N 154 (F B).

6. (1899) 21 All 235 (F B).

7. A I R 1929 P C 298=120 I C 650 (P C).

8. (1898) 4 O W N 256.

9. (1907) 16 C L J 612=12 O W N 107.

10. (1907) 11 O W N 403=5 C L J 315.

11. A I R 1921 Cal 157=62 I C 445.

12. A I R 1927 Cal 259=100 I C 420.

13. A I R 1928 Cal 116=107 I C 355=55 Cal 602.

Singh (5) and *Madan Lal* (6)—a view, in support of the appellants' contention—was the correct view to take. But *Suhrawardy, J.*, followed the decision in *Aghore Nath Banerjee* (3) on the ground that as in the said case of *Aghore Nath Banerjee* (3), there was in the case before him the fact that the mortgagee was aware of the purchase of the equity of redemption. The more recent decisions of this Court, among which I may mention the cases of *Kalu Sharip* (1), *Bhagaban Chandra Kundu* (12) and *Bhodai Shaik* (13), are clear authorities in support of the respondents' contention that a mortgagee can bring a suit for possession against the holder of the equity of redemption who had been left out in the mortgage suit and a decree can be made in his favour as has been done in the present case subject to the defendant's right of redemption, a right which the decree in the present case has allowed him to exercise.

Apart from the decisions in *Grish Chunder Mondul* (1) and *Habibullah* (2), the correctness of which was doubted in *Kalu Sharip* (11), the appellants have cited as observed before, two other cases, *Aghore Nath Banerjee* (3) and *Krishtopada Roy* (4), which in its turn was based on *Aghore Nath's* case (3), in their favour. In both of these cases the mortgagees were found to have knowledge of the purchase of the right of redemption and in spite of that knowledge they had left out the purchasers in their mortgage suits. But there is nothing in the present case to show that the plaintiffs were aware of the purchase by *Ahmaddi* of a part of the equity of redemption. From this point of view the cases of *Aghore Nath Banerjee* (3) and *Krishtopada Roy* (4), which practically are the only decisions of this Court in favour of the appellants, can be distinguished from the fact of the present case.

There is another point of view from which the case may be considered. If the defendant purchaser had not been left out in the mortgage suit he could retain possession only on redeeming and not on anything else. This right of his has in no way been denied to him by the decree made in the present case. By the decree that has been made the defendant has not been prejudiced in any way. On the other hand, the decree has avoided multiplicity of suits and has

done complete justice as between the parties. From no point of view the decree of the lower appellate Court can, in my judgment, be successfully assailed. The appeal in my opinion must therefore fail and is accordingly dismissed with costs.

Jack, J.—I agree.

K.S.

Appeal dismissed.

A.I. R. 1933 Calcutta 731

GUSA AND BARTLEY, JJ.

Two Pleadors, In the matter of.

Civil Rule No. 666 of 1923, Decided on 20th July 1933, from decision of Dist. Judge, Sylhet.

Legal Practitioners Act (1879), S. 12—"Defect of character" includes also such defect in pleader's character which renders him unfit to be member of his profession—Conviction for offences committed in connexion with civil disobedience movement involves serious defect of character and action can be taken under S. 12.

The expression "defect of character" as used in S. 12 must be taken to include not only moral turpitude, but also such defect in the character of a pleader which renders him unfit to be a member of the honourable profession to which he belongs. [P 782 C 1]

The pleaders were connected with the Civil Disobedience movement, and were convicted in 1930; they were convicted again in 1932, for offences committed as members of a procession organized in connexion with the civil disobedience movement.

Held: that the offences for which they were convicted involved serious defect of character, seeing that they were directed against obedience to law, which it was the duty of the Courts and of the members of the legal profession to enforce and maintain, and that action could be taken under S. 12: *AIR 1924 Mad 479 (FB), Ref.*

[P 782 C 2]

Sarat Chandra Basak—for Petitioner.

Judgment.—In this case a rule was issued by this Court on two pleaders practising in the District Judge's Court at Sylhet, to show cause why they should not be suspended or dismissed on the ground (among others) that they had been convicted of offences under Ss. 145 and 151, I. P. C., as also under S. 3, Ordinance 6 of 1930, and that the offences of which they were convicted, implied a defect of character which unfits them to be pleaders. The rule was issued in virtue of the powers vested in this Court by s. 12, *Legal Practitioners Act* 18 of 1879. The pleaders concerned have not thought it fit to appear before this Court, in showing cause, but have sent statements by way of explanation in writing. The gist of the statements so submitted

is that the offences for which they were convicted do not imply any defect of character, inasmuch as they do not involve any moral turpitude. The pleaders have further stated that they have already been sufficiently punished in more ways than one, and that no further action was called for.

It appears from the materials before us that the pleaders were convicted for the offence of joining or continuing in an unlawful assembly, knowing that it had been commanded to disperse, and of knowingly joining or continuing in an unlawful assembly of five or more persons, after it had been commanded to disperse. They were members of a procession in connexion with what is known as the Civil Disobedience Movement, and were convicted as such, for the offences mentioned above on 6th February 1932; the conviction was affirmed by this Court on 10th February 1933. It further appears that the pleaders were previously convicted in the year 1930, under S. 3, Ordinance 6 of that year, which provided for punishment of a person who by words, either spoken or written, or by signs or by visible representations, or otherwise instigated expressly or by implication, any person or class of persons, not to pay or to defer payment of any notified liability and of a person who did any act with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons in a notified area, in any manner whatsoever. On these materials, regard being had to the nature of the offences for which the pleaders were convicted, there can be no doubt that the provision contained in S. 12, Legal Practitioners Act, is applicable, inasmuch as the expression "defect of character" as used in the S. 12 must, in our judgment, be taken to include not only moral turpitude, but also such defect in the character of a pleader, which renders him unfit to be a member of the honourable profession to which he belongs.

In the case before us the pleaders were connected with the Civil Disobedience Movement, and were convicted in 1930, under the Ordinance for an offence the nature of which has been specified above; the offences for which they were convicted again in 1932 were committed as

members of a procession organized in connexion with the Civil Disobedience Movement. The pleaders were, it appears, supporting an organized resistance to the discharge of liability under the law, and had wilfully broken the law as members of a procession which was commanded to disperse by competent authorities. In view of all this, the pleaders in the case before us, have deliberately placed themselves in such a position as made themselves amenable to the disciplinary jurisdiction of this Court. The offences for which they were convicted, as indicated already, involved serious defect of character, seeing that they were directed against obedience to law, which it is the duty of the Courts and of the members of the legal profession to enforce and maintain. There has been repetition of the offences on the part of the pleaders, involving open and deliberate defiance of law; and there is no expression of regret for their past behaviour. As was observed by Couts-Trotter, J., *In the matter of First Grade Pleader* (1) :

"while Courts will not interfere with, or have regard to any man's political opinions, or opinions on public questions, it is impossible to allow a person who proclaims or practises what is called the doctrine of civil disobedience, to ask to be a part of the machinery of the Courts which exists for the very purpose of the thwarting of civil disobedience."

On the facts and in the circumstances of the case before us we have no hesitation in making the rule absolute. The pleaders Messrs. Babus S and G, are suspended from practising as pleaders for the period of six months from 1st August next. The order of suspension is to be communicated to the District Judge of Sylhet as soon as practicable.

K.S. *Rule made absolute.*

1. AIR 1924 Mad 479 (F B).

A. I. R. 1933 Calcutta 732

GUHA, J.

Chuni Lal—Petitioner.

v.

Corporation of Calcutta—Opposite Party.

Criminal Revn. Petn. No. 1235 of 1932. Decided on 14th February 1933.

(a) Calcutta Municipal Act (3 of 1923), S. 386 (1) (a) and Sch. 19 (7)—"Grain" does not include dal—*Obiter*.

Obiter.—Dal is not grain within the meaning of Sch. 19 (7) referred to in S. 386 (1) (a), Calcutta Municipal Act. [P 738 C 2]

(b) Interpretation of Statutes—Enactment specially criminal one, ought not to be construed so as to give it retrospective effect unless such intention is clear from language used.

An enactment ought not to be construed so as to give it a retrospective operation, especially in the case of a criminal matter, unless the language used indicates such intention in the legislature. [P 734 C 1]

(c) Calcutta Municipal Act (3 of 1923), Ss. 386 and 387—Power is given to corporation to prohibit business which is dangerous to health or likely to create nuisance, even though such business has been established before order declaring such business as offensive trade.

The reasonable construction to be put upon S. 386, Calcutta Municipal Act, is that power was given to the Calcutta Corporation in the interest of public health to prohibit the carrying on of a business which was, in the opinion of the Corporation dangerous to health or likely to create nuisance, even though the business might have been established before the intention, that no person shall use any premises for any of the purposes mentioned in S. 386, was expressed, and before the intention was declared by the publication of the declaration in the "Calcutta Gazette": *Butchers' Hide, Skin and Wool Co., Ltd. v. Seacome*, (1913) 2 K B 401, Dist. [P 734 C 1, 2]

Bipinchandra Mallik and Kushiprasanna Chatterji—for Petitioner.

Pashupati Ghosh—for Opposite Party.

Order.—The petitioner in this case is the proprietor of an electric mill, by which dal is manufactured at premises No. 3, Sonar Gouranga Temple Lane, in Calcutta. The Corporation of Calcutta, it appears, by a declaration duly made and published in the Local Gazette in the year 1925, notified that no person shall, in the area in which the above premises were situate, use any premises for dal grinding business, carried on by electric, steam or other mechanical power (other than hand power), and a prosecution was started against the petitioner under S. 488 (2) read with S. 387 (5), Calcutta Municipal Act, for continually working the dal-mill by electricity, in contravention of the declaration published in the Gazette under S. 387. The defence of the petitioner was that S. 387 was not applicable without reference to S. 386 (1) (a), in view of the position that dal is not grain according to the interpretation put upon the word by this Court, that the petitioner's business was neither dangerous to public life, health nor property, nor did it create any nuisance as mentioned in S. 386 (1) (b); and further, that the declaration by the Corporation

of Calcutta, published in the Gazette in the year 1925, could not affect the petitioner's business in question, as it had been established long before the publication of that declaration.

It may be mentioned at the outset that it is not necessary for the purpose of this case to consider whether dal was grain within the meaning of Sch. 19 (7) referred to in S. 386 (1) (a), Calcutta Municipal Act, and the interpretation that the word "grain" does not include dal may be accepted as correct.

The Municipal Magistrate by whom the case against the petitioner was tried has come to the finding on evidence before him, to which reference has been made in his judgment, that dal dust was offensive and injurious to health, and that the dal-grinding business, in regard to which the petitioner was prosecuted, "gave rise to volumes of dal dust" causing nuisance. The finding so arrived at by the Magistrate has to be accepted for the purpose of the case before this Court now. It is clear therefore that prosecution of the petitioner by the Calcutta Corporation under S. 387 (5) was justified in view of Cl. (b), S. 386 (1), Calcutta Municipal Act, irrespective of Cl. (a) and Sch. 19, mentioned in that clause if it were not otherwise invalid. The question for consideration then is whether the declaration by the Calcutta Corporation, to which reference has been made above, could affect the business which was admittedly established and was being carried on from before the declaration. Reliance has been placed by the learned advocate for the petitioner on the case of *Butchers' Hide, Skin and Wool Co. Ltd. v. Seacome* (1), in support of the proposition that where a business was established before the coming into operation of the order declaring it to be an offensive trade, it was not an offence to carry on the business. The decision of the case referred to above depended upon the interpretation of S. 112, Public Health Act 1875, (38 and 39 Vict., c. 55) which runs as follows:

"Any person who, after this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade of blood-boiler, or bone-boiler or fell-monger, or soap-boiler or tallow-melter, or tripe-boiler or any other noxious or offensive trade, business or

1. (1913) 2 K B 401=82 L J K B 726=108 L T 963=77 J P 219=29 T L R 415=23 Cox C C 400=11 L J R 572.

manufacture, shall be liable to a penalty not exceeding £50 in respect of the establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding 40s., for every day on which the offence is continued whether there has or has not been any conviction in respect of the establishment thereof."

This provision contained in the Public Health Act quoted above was subsequently amended in 1907, by S. 51 of 7, Edw. 7, by the substitution of the words :

"Any other trade, business or manufacture which the local authority declare by order confirmed by the Local Government Board and published in such manner as the Board direct, to be an offensive trade,"

for the words :

"any other noxious or offensive trade, business or manufacture."

As observed by Ridley, J., the question which had to be determined in the case was whether the appellants committed an offence in carrying on the business after the making and confirmation of the order declaring the trade to be an offensive trade. Had they carried on a business so established within the meaning of S. 112, Public Health Act, 1875? In the opinion of the learned Judge (with which Pickford and Avory, JJ., concurred), S. 112, as amended, meant that the offence of establishing the offensive business was only committed where business had, at the time of establishment, already been declared by order to be an offensive trade and that a person who was prosecuted for carrying on an offensive business must be found to be carrying on the business "so established," that is to say, established after the order declaring it to be an offensive trade. The interpretation therefore turned upon the expression "so established" used in S. 112, Public Health Act. The provisions contained in Ss. 386 and 387, Calcutta Municipal Act, have to be construed according to the ordinary rules of construction, natural meaning and full effect being given to all the words used in the sections. There can be no doubt that an enactment ought not to be construed so as to give it a retrospective operation, especially in the case of a criminal matter, unless the language used indicated such intention in the legislature. The reasonable construction to be put upon the provisions contained in the Calcutta Municipal Act, to which reference has been made above, is that power was

given to the Calcutta Corporation in the interest of public health, to prohibit the carrying on a business which was, in the opinion of the Corporation, dangerous to health or likely to create nuisance, even though the business might have been established before the intention, that no person shall use any premises for any of the purposes mentioned in S. 386, Calcutta Municipal Act, was expressed and before the intention was declared by the publication of the declaration in the "Calcutta Gazette."

It may be noticed that any other construction of the provisions contained in Ss. 386 and 387 would frustrate the primary intention of the legislature in the matter of empowering the Corporation to adopt measures necessary for the public health and in order to prevent nuisance, which, to my mind, has been clearly expressed. The words used in S. 386, Calcutta Municipal Act, "no person shall use or permit to be used, etc.," and the corresponding words in S. 387 of the Act, that the Corporation may give public notice of their intention to declare that, in any area specified in the notice, no person shall use any premises for any of the purposes referred to in S. 386, sub-S. (1), prescribe no limitation whatsoever as contained in S. 112, Public Health Act, 1875, on which the decision in *Butchers' Hide, Skin and Wool Co., Ltd. v. Seacome* (1), to which reference has been made above, is based in view of the words "so established" as used in that section and as mentioned already, upon which the learned Judges deciding the case laid stress, in coming to the conclusion that the provision of law as contained in S. 112, Public Health Act, could not apply to a business established before the coming into operation of the order declaring it to be offensive trade. The offensive business or trade is subject, of course, to the general law of the land as to nuisance; but that is no reason why the Corporation should be debarred from taking action under S. 387, Calcutta Municipal Act, in the matter of an offensive business, and perpetuate a state of things that was injurious to public health. In a case like the present individuals affected by the injurious business might have the right to have recourse to the general law of nuisance, but the Corporation had, under the provisions con-

tained in S. 387, the undoubted right to proceed in the manner they have done, quite irrespective of the fact that the business in question was established long before the declaration by the Corporation was made under that section.

In the above view of the case, the conviction of the petitioner under S. 387 (5), Calcutta Municipal Act, and the sentence passed on him must be upheld. The decision of the learned Municipal Magistrate is affirmed, and this rule is discharged.

K.S.

*Rule discharged.***A. I. R. 1933 Calcutta 735**

RANKIN, C. J. AND COSTELLO, J.

K. C. Dhar—Appellant.

v.

Ahmad Bux—Respondent.

Appeal No. 34 of 1932, Decided on 10th February 1933, from judgment of Ameer Ali, J., D/- 18th February 1932.

(a) Carriers Act (1865), S. 2 — Licensee under obligation to carry goods of all persons who require his services is common carrier.

Where a licensee under a license issued to him is under an obligation to carry the goods of all persons who required his services and that is his vocation he is a common carrier. [P 737 C 1]

(b) Carriers Act (1865), S. 2 — Common carrier by merely making special stipulation does not indicate that he is acting outside his business as common carrier.

The fact, that a common carrier makes a special stipulation, does not mean that he is acting outside the business of a common carrier.

A common carrier, who was carrying the goods of all people who required his services, had entered into a special stipulation with agent of a steamship company to carry goods safely. He was taking their goods also along with the other goods:

Held: the business done under the above contract was not business of a different character from that of common carrier: A I R 1920 Cal 758, Ref. [P 737 C 2]

(c) Carriers Act (1865), S. 8—Loss caused by common carrier by breach of his common obligations—Person suffering loss can maintain suit apart from any privity of contract.

A person, who has suffered loss by a common carrier's breach of his Common law obligation can maintain a suit independent of contract. "There is no question of this suit being defeated merely by reason of the absence of privity of contract or of privity of contract of insurance: A I R 1920 Cal 758 and 18 Cal 820 [P C] Ref; London & N W Railway Co v. Richard Hudson & Sons Ltd, (1920) A C 324, Rel on. [P 738 C 1, 2]

(d) Carriers Act (1865), S. 8—If common carrier's duty is not performed, he is liable to person who suffers damages unless his obligation is restricted—Who tenders the goods to carrier is immaterial.

Whoever tenders the goods to the common carrier, whatever his position vis a vis the owner

of the goods, if the common carrier's duty is not performed, he will make himself liable to the person, who suffers damage—prima facie the owner of the goods—unless he has, at the time of the contract, restricted his obligation so as to give himself greater protection. [P 738 C 2]

(e) Carriers Act (1865), S. 2—Person holding out to carry goods from jetty to ship is common carrier.

Per Costello, J.—If a person holds himself out to carry goods or if one makes a business of carrying goods from a jetty to a ship in a harbour, he is a common carrier. [P 739 C 1]

P. N. Chatterji and A. C. Gupta—for Appellant.

S. M. Bose and Ormond—for Respondent.

Rankin, C. J.—The plaintiff in December 1926 delivered to the British India Steam Navigation Company at a jetty on the river Hooghly 194 bundles of iron to be shipped by the company's steamship "Warroonga" from Calcutta to Akyab. The goods having been delivered to jetty No. 1, the usual place, at which goods for such shipment were received by the shipping company or its agents, Messrs. Mackinnon Mackenzie, a receipt was granted showing the terms of that shipment. The words, which require to be noticed in the receipt, are as follows:

"All cargo received at No. 1 jetty remains at shipper's risk until placed on board the steamer."

It appears that, for the purpose of transmitting from this jetty to the ship in midstream the goods, which had been in this manner received for shipment, arrangements had been made with the defendant, Ahmad Bux, and embodied in a contract, dated 11th March 1926, between Mackinnon Mackenzie & Co., on the one hand and Ahmad Bux on the other. In this contract, Ahmad Bux, the defendant, was described as carrying on business as "boating contractors." It was recited that:

"the company has received cargo from various shippers at No. 1 jetty and despatched the same by cargo boat or dingi for loading into steamers in port."

It was recited that: "It has been agreed that the contractors shall take possession and receive such cargo, as they may be directed by the firm to receive from such place or places, as the company shall direct, and safely transport and deliver the same as quickly as possible for shipment or otherwise as directed by the company in or about the port of Calcutta."

By the first clause of the contract the defendant undertook to receive from the company cargoes on board his dingis or boats; he was to receive them at such jetty or place, as the company would

direct, and he undertook to carry them safely—not merely to carry them carefully, and to deliver them for shipment in the steamer. The contractors were to have no lien over the goods so delivered. The barges were to be sound. The company was to be at liberty to put a representative on board any boat. The goods were, for the purposes of this agreement, to be deemed to be the goods of the company. The contractors undertook to indemnify the company from all actions and claims, which the company might be exposed to by reason of any loss or delay occasioned to any goods, whether belonging to the company or belonging to any other person in the custody or control of the company, but it was provided that the contractors would not be liable to make good to the company any loss or damage to the goods of other persons, where such loss or damage would be caused by accidental fire, earthquake, flood or other act of God or by a mob or by the king's enemies. It was further provided that nevertheless the contractors would pay any sum, which the company might be called upon to pay and in respect of which the contractor's clause of indemnity applied. The amount of the sum to be certified by the company was to be accepted by the contractors. On these terms, the contractors were to get a sum equivalent to a half of such boating charges as might be collected by the company. The agreement was to be subject to a month's written notice.

Now, acting under this contract, the defendant, by his servants, received the plaintiff's goods from the jetty into his boat. He seems to have taken them up to the ship, but very soon after their arrival alongside of the ship and before they could be delivered into the ship, by some accident, of the particulars of which we have no evidence, the boat or its contents were upset in the river and save for a small quantity of the goods, which was salvaged, the plaintiff's goods were lost. The boat, in which the goods were at the time, was boat No. 4 with No. C 4571 and the defendant had a licence for this, being licence No. 1742. In these circumstances, the plaintiff began his suit, making the British India Steam Navigation Company and Ahmad Bux co-defendants. He alleged negligence against

both the defendants, and at first made the case that Ahmad Bux was an agent of the shipping company. The plaint contained certain allegations that the goods had been lost by negligence on the part of the defendants. An order for particulars was made and it was not complied with. Another order was made whereby all allegations of negligence were to be excluded from the plaint and the plaint was amended in conformity therewith. At the trial, the case against the British India Navigation Company was withdrawn and the plaintiff proceeded against Ahmad Bux upon the footing that he was a common carrier, that the transaction whereby he received the plaintiff's goods from No. 1 jetty to take them to the ship was a transaction entered into by him as a common carrier and that, accordingly the plaintiff, as the owners of the goods, had a right, apart altogether from any proof of negligence or any allegation or presumption of negligence, to recover the value of the goods from the defendant, merely upon showing that he did not safely carry them.

The learned Judge has come to the conclusion, first, that Ahmad Bux was a common carrier by calling. He has come to the conclusion however though apparently with some little hesitation, that in respect of this transaction he was not working as a common carrier. But, even if he was acting as a common carrier in the transaction, the learned Judge thinks that, as Messrs. Mackinnon Mackenzie were not in any way liable for the safety of the goods until the goods arrived in the ship, Ahmad Bux cannot be responsible as an insurer for the plaintiff and cannot therefore be made liable in this suit. A good deal of the difficulty in this case has arisen from the fact that insufficient care has been taken by the plaintiff in the preparation of it. So far as the question is concerned, whether Ahmad Bux was a common carrier within the meaning of the Carriers Act of 1865 the evidence is really the evidence of the terms of the Port Commissioners' licence, which he had obtained for his boat and without which he could not carry on the business of a lighterman at all. It appears that, according to the terms of R. 57 of the rules for the Port of Calcutta under the Indian Ports Act, one

of the rules for licensing and regulating cargo boats and flats is:

"No Cargo boat or flat of any description shall ply, whether regularly or only occasionally, in, or partly within and partly without, the limits of the port unless licensed and registered by the Commissioners."

Rule 72 is:

"The owner or agent or manjhi of a licensed cargo boat, when plying for hire, shall not, without good reason, refuse to carry cargo in such boat;"

and R. 79 is:

"The manjhi of every licensed cargo boat plying for hire within the port shall, when waiting for hire at the wharves, have a hiring note showing the rate at which such boat can be hired by the day."

In addition to the terms of these rules there is the description in the contract of Ahmad Bux as "carrying on business of boating contractors," and there is a page said to represent an entry in this defendant's boat hire book, in which there are a number of columns, one of which is headed "To whom supplied." In the entry with reference to the particular journey of the 3rd December 1926, with which we are concerned, the name of British India Steam Navigation Company, Ltd., is entered under the heading "To whom supplied." Now the defendant in his written statement, has pleaded in a way which is a little embarrassing. He has said that:

"In the usual course of his business he carries certain goods in his boats from the jetties to the company's sea-going vessel lying in midstream in the port of Calcutta."

He says that he does so as an independent contractor under the contract to which I have referred. In addition to that, he denies that he is or was at any material time a common carrier. The first question is whether, having regard to the definition in the Indian Carriers Act, the defendant is shown on this evidence to have been a "common carrier." I agree with the learned Judge that on these materials it is *prima facie* proved that the defendant carries on the business of a common carrier and that that is his vocation. The terms, which are binding upon him, require him and are designed to require him to give the benefit of his services to all persons who may require them, subject, of course, to his having reasonable ground in any particular case for refusal. That is his obligation under the licence and he has given no evidence at all about his business. There is certainly nothing to sug-

gest that he can be carrying on his business contrary to the intention of the rules which require that the people, who carry on this business, shall carry it on for the benefit of all persons, who may require their services. The next question is, whether, though that is the nature and character of his business, namely, that he must be holding himself out to do business with anybody, who requires his services, we should regard his work under the contract of March 1926, as making him a sub-contractor of the British India Steam Navigation Company, in such a sense that, so far as regards the goods received from them, he has departed from the exercise of his vocation as a common carrier and is doing special work of a different character for the British India Steam Navigation Company. It appears to me that, on this question, it is very necessary to apply the test, which was approved by the Privy Council in the case of *Dekhari Tea Co., Ltd. v. Assam-Bengal Railway Co., Ltd.* (1), but to be careful not to assume that the facts of one case will produce the same result as the facts of another. Nevertheless, I am of opinion that in this case it is not shown that the business, done under the contract with Messrs. Mackinnon Mackenzie, was not in the course of his business and within the scope of his business as a common carrier. He undertakes to carry safely to begin with. He has given a special indemnity to the steamship company, which arises out of the fact that they are going to have a lot of business with goods belonging not to themselves but to other people. It is nowhere prescribed that the defendant shall not be entitled to take other goods into the same boat. There is no restriction as to the liability save as regards the indemnity clause—Cl. 8—where there is a restriction, for example, as regards accidental fire. The fact, that a person makes a special stipulation, does not mean that he is acting outside the business of a common carrier. ~~It is~~ quite clear that a common carrier may make a special stipulation; but the question here is not whether he has made a certain special stipulation of any importance for the present purpose but whether, on a review of the contract as a whole, we are to say that it is a con-

1. A I R 1920 Cal 758=57 I C 406=47 Cal 6.

tract controlling business to be done in the course of the vocation of a common carrier or whether it is a contract showing that he has really entered into business of a different character. In my judgment, the correct view to take is that the business done under this contract is not business of a different character, but there are special stipulations as regards certain journeys, which are to be performed by the defendant as a common carrier.

If that be so, then the remaining question is whether the defendant has any answer to the claim on the ground that, though he is a common carrier, he is not vis-a-vis the plaintiff an insurer. The learned Judge appears to have thought that, because Messrs. Mackinnon Mackenzie accepted no liability for the safety of the goods during their transit to the ship, even if the defendant received these goods as a common carrier, he was not liable as an insurer. On this point, I am not able to accept the view of the learned Judge. In order to describe the extent of the liability of a common carrier, it is often said that he has the liability of an insurer. That is a simile. It is not a question of any contract to insure and no contract of insurance has to be made out. The position is that a common carrier, exercising a public employment, has committed a breach of the law by failing to carry safely. An action lies against him, not in any way dependent upon privity of contract between himself and the plaintiffs. This question was raised in the case of *Dekhari Tea Co., Ltd., v. Assam-Bengal Railway Co., Ltd.* (1), and in that case I did not think it necessary to decide the point. I appear to have said that I was not satisfied about the matter and, as it was not necessary to decide it, I left the point open. In that case the owner had a clear right under Ss. 8 and 9, Carrier's Act, and, as the "owner" is specifically referred to in those sections, there could be no doubt about the claim to recover the moment negligence had to be admitted. In the present case, the point arises solely because the plaintiff in this suit has debarred himself from alleging or relying upon any case of negligence. It is not necessary to show that the defendant has not carefully carried. The plaintiff has to proceed solely upon the footing that the defen-

dant has not safely carried. Upon a consideration of the matter, from the point of principle, it may well be that the doubt, which I expressed, was overequitious, because in the judgment of Lord Macnaghten in the case of *Irrawaddy Flotilla Co. v. Bugwandas* (2), the principle of the matter was explained thus :

"The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. 'A breach of this duty,' says Dallas, C. J. [*Bretherton v. Wood* (3)] is a breach of the law, and for this breach an action lies founded on the Common law, which action wants not the aid of a contract to support it."

And very soon after the decision in this Court of the *Dekhari Tea Co.* case (1), the matter was dealt with in the case of *London and North Western Railway Co. v. Richard Hudson and Sons, Limited* (4) by the judgment of Lord Dunedin, in a manner, which removed all room for the doubt which I had expressed :

"That a common carrier is an insurer of goods entrusted to him for carriage, and can only excuse himself on the ground of act of God, or of inherent vice (in which expression I include bad packing) of the goods themselves is axiomatic. Now Lord Mansfield in *Forward v. Pittard* (5) speaks of this obligation on the carrier's part as an obligation independent of the contract. By that I understand that it is not an adjoined term to the contract as made, but is an obligation which attaches from the fact of the goods being carried by a common carrier, in favour of the owner of the goods, whoever he may be. For indeed in many common cases it would seem to be inaccurate to speak of a contract of carriage as being made between the carrier and the consignee."

In my judgment therefore the position is that a person, who has suffered loss by the common carrier's breach of his Common law obligation, can maintain a suit independent of contract. There is no question of this suit being defeated merely by reason of the absence of privity of contract or of privity of contract of insurance. The circumstance that Messrs. Mackinnon Mackenzie assumed no liability for the safety of the goods during the transit from the jetty to the ship does not, in my judgment, afford any answer to the common carrier. He was, under the contract, transporting goods, which he knew to belong to other people. The circumstance that Mackinnon Mackenzie and Company did not

2. (1891) 18 Cal 620=18 I A 121=6 Sar 40 (PC).

3. (1821) 3 Br & B 54=9 Price 408=6 Moore 141.

4. (1920) A C 324=89 L J K B 323=122 L T 530.

5. (1785) 1 T R 27.

purport to be themselves common carriers and did not undertake to insure for the transit to the ship does not import that the defendant is relieved from the consequences of any breach of his common law duty. It is no answer to a man who suffers loss by a breach of Common law duty, to say that some one else has taken care to avoid coming under a similar obligation. Whoever tenders the goods to the common carrier, whatever his position vis-a-vis the owner of the goods, if the common carrier's duty is not performed he will make himself liable to the person, who suffers damage—prima facie the owner of the goods—unless he has, at the time of the contract, restricted his obligation so as to give himself greater protection. In the result, the appeal is allowed and the appellants will recover from the defendant, Ahmad Bux, the sum of Rs. 2,926-6-5 as damages with interest on decree at the rate of six per cent. per annum from the date of the decree of Ameer Ali, J. The appellants will have the ordinary costs of this appeal and costs of two days' hearing before Ameer Ali, J.

Costello, J.—I agree that this appeal must be allowed. The basic matter for consideration in this case is whether or not this defendant was a common carrier. If a person holds himself out to carry goods or if one makes a business of carrying goods from a jetty to a ship in a harbour, he is, in my opinion, a common carrier. The only point of doubt in the present case is whether or not the defendant held himself out as being willing to carry goods for all and sundry. I am satisfied that there was sufficient evidence in the case on which the learned Judge could come to the conclusion he did, that Ahmad Bux was carrying on the business of a common carrier. That question is entirely one of fact and not of law. Having arrived at that decision the only other point of any substance for the determination of the case is whether or not in the circumstances of the case the plaintiff, as the owner of the goods, could sue the defendant and recover from him damages for the goods lost. I do not think it is necessary that I should say anything further on that point because I entirely agree with what has fallen from my Lord with regard to it and I think the matter is concluded by the passages in the judgments of

Lord Macnaghten and Lord Dunedin, to which the Chief Justice has referred.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 739

MUKERJI, J.

Amirannessa Bibi and others—Defendants—Appellants.

v.

Hatemali Khan and others—Plaintiffs—Respondents.

Appeal No. 2844 of 1930, Decided on 10th January 1933, from appellate decree of Third Court Sub-Judge, Mymensingh, D/- 7th July 1930.

(a) *Mahomedan Law — Religious institution—Custom of appointment of khadem by election by residents and sanction from zamindar—Elected man is to be regarded as duly appointed unless zamindar refuses sanction.*

The appointment of khadem was to be made, according to usage, by an election among the Mahomedan residents of the locality and with the sanction of the zamindar :

Held: that a person duly elected by the residents should be regarded as the khadem unless the zamindar has refused to give his sanction.

[P 741 C 1]

(b) *Mahomedan Law — Religious institution—Female is not excluded from holding religious office unless duties of office cannot be performed by her or by her deputy—Onus of proving that she is precluded from holding office lies on person who pleads such exclusion.*

Mahomedan law does not necessarily exclude a female from the office of a khadem. But it must depend upon the nature of the office and the rights and duties appertaining to it, as to whether the female can be validly appointed to it. A religious office can be held by a woman under the Mahomedan law, unless there are duties of a religious nature attached to the office, which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead exclusion: 34 Cal 118 (P C); A I R 1919 Mad 202 and A I R 1920 Cal 800, Ref.

[P 741 C 2]

Rajendra Chandra Guha and Hemendra Narain Bhattacharjee—for Appellants.

Bama Prasanna Sen Gupta—for Respondents.

Judgment.—This appeal has arisen out of a suit which was instituted by the plaintiff for declaration of his title as khadem in respect of certain properties dedicated to a shrine and for recovery of possession thereof. Shortly put, the plaintiff's case was that on the death of the last khadem who had died childless he was, in accordance with a usage which appertained to this shrine, was elected as the next kha-

dem by the villagers with the sanction of the zamindar of the place, who for the sake of brevity will be called the Delduar Zamindar. His case was that the defendants had dispossessed him from the suit land. Amongst the defendants there were two, namely, defendants 3 and 6, the daughters of the last khadem, who contested the plaintiff's claim. Their case mainly was that since their father's death they had been acting as khadems through their husbands and that khademship was hereditary in their family. They further challenged the validity of the title which the plaintiff set up, alleging that the plaintiff, even if she had been appointed as khadem by the Delduar Zamindar, had no authority to act as such.

The trial Court dismissed the suit. The Subordinate Judge has reversed that decision. Defendants 3, 6 and 7 have then preferred the present appeal. Three points have been urged in support of the appeal. The first point taken relates to the findings of the Subordinate Judge on the question of the usage which the plaintiff set up. It is said that the findings of the learned Judge on this question are inconsistent, and that in any event, they are not sufficient for the purpose of holding that the plaintiff has proved his title to the khademship. The learned Judge appears to have referred to certain texts and to have laid down as the proposition to be applied to the case that the appointment of sajjadanashin of any darga must, to a large extent, be regulated by the practice followed in that particular darga. With this proposition in mind the learned Judge proceeded to consider whether it has been proved that a usage of the nature set up on behalf of the plaintiff had been established or not. He found that there was evidence of only one single instance when a practice of the nature alleged on behalf the plaintiff, namely, an election by the villagers and ~~the~~ confirmation of the election by the Zamindar of Delduar was proved. That incident was in connexion with the appointment of one Shah Mahmud to the office of khadem in respect of this very shrine. The learned Judge agreed with the Munsif holding that it was proved that Shah Mahmud got the khademship in this way. He then proceeded to make a remark which runs in these words:

"This one instance however cannot establish a practice or usage. I agree with the learned Munsif so far but it might have been the correct procedure and I will now examine this point. The practice may now be difficult to prove but it might have been otherwise when Shah Mahmud came to the post."

This remark of the learned Judge has been relied upon by the learned advocate, who has appeared on behalf of the appellants, as suggesting that the learned Judge came to the conclusion that the usage set up on behalf of the plaintiff has not been proved. I am not able to agree in this contention. All that the learned Judge says in the passage quoted above is the fact that there was one single instance proved and that single instance by itself would not be sufficient to prove a usage. But then he expressly said that it may be that it is not possible for the plaintiff to prove at this distance of time a usage which he set up and it may yet also be that that is the correct practice to follow in the case of a vacancy occurring by the death of the khadem without leaving any child. In point of fact also the learned Judge proceeded to consider the other facts and circumstances of the case and eventually he found that the election of Shah Mahmud in this way was recognized and assented to by the villagers and from that fact he came to the conclusion that that was really the practice which obtained in this particular shrine. In my opinion there is no inconsistency in the conclusion which the learned Judge has recorded and that eventually the learned Judge has come to the conclusion upon all the facts and circumstances of the case that although there was no direct evidence sufficient for the purpose of holding that the usage referred to on behalf of the plaintiff was established yet the practice that obtained at the time of the election of Shah Mahmud was a practice which really appertained to this shrine and that if the plaintiff was appointed under a similar practice the plaintiff's appointment also must be held to be good. The first point taken in my opinion cannot succeed.

The next contention urged is that even accepting that the usage which the plaintiff set up was established, still, so far as the plaintiff's election is concerned, that did not confer on him any good title because in this particular case the

Zamindar of Delduar who was the mut-tawali in respect of wakf estate had not given his sanction, which was necessary for the purpose of this appointment.

Now to deal with this contention it is necessary to find out what exactly is the usage or practice that has been set up. It is this: the appointment is to be made by an election amongst the Mahomedan residents of the locality; that confers the appointment upon the candidate and the appointment receives sanction from the zamindar. The only way in which this usage can be regarded as a reasonable one is that if any election is to take place the man who is elected is to be regarded as duly elected until the zamindar refuses to give his sanction. There is nothing to show what would happen if the Zamindar refuses to give his sanction, and if in that event the election is to fall through, there would be no point in having an election at all. The interpretation I have just given to the usage seems to me therefore to be the only interpretation which will put the usage on a reasonable basis. The fact that the plaintiff was duly elected by the Mahomedan residents of the locality is a fact which has been proved. The fact that the zamindar or the mut-tawali has not up to this time refused to accept him as khadem is a fact also which cannot be denied. In these circumstances even though there has been no formal sanction granted by the mut-tawali or the zamindar to the appointment of the plaintiff, that cannot, in my opinion, be said to have made the appointment invalid. What has happened in this case is that there is no express sanction by the Zamindar but in point of fact the receiver in charge of the estate made certain orders which were treated as the sanction requisite for the purpose. I am of opinion therefore that the mere fact that it was the receiver who confirmed the appointment and the zamindar did not take any part in this matter would not stand in the way of the claim which the plaintiff put forward.

The third ground that has been urged raises a question of considerable importance. It has been argued on behalf of the appellants that the learned Judge has regarded the question as to whether defendants 3 and 6, the two daughters of Musa Sheikh, are in possession of the

estate are khadems as a pure question of law and has expressed the view, which is supported by certain text-books, that no females can be appointed to that office. The learned Judge really seems to have done so and in that respect it seems to me that he was not right. The question whether the said defendants could claim to have inherited the office from their father is a question which is to be determined not merely as a question of law but also with reference to the particular facts of the present case. The Mahomedan law as I understand it does not necessarily exclude a female from the office of a khadem. But it must depend upon the nature of the office and the rights and duties appertaining to it as to whether the female can be validly appointed to it. As has been pointed out in numerous authoritative decisions:

"A religious office can be held by a woman under the Mahomedan law, unless there are duties of a religious nature attached to the office, which she cannot perform in person or by deputy, and the burden of establishing that a woman is precluded from holding a particular office is on those who plead exclusion."

This proposition has been laid down in several decisions amongst which reference may be made to the cases of *Shahar Banoo v. Aga Mahomed* (1); *Munna Varu v. Mir Mahapalli* (2) and *Kassim Hassan v. Hazra Begam* (3). Having regard to the pleadings of the contesting defendants in their written statement it was necessary for the learned Judge, before giving the plaintiff a decree in the present suit, to have held an investigation into the question as to whether the allegation which the said defendants made as to their being in possession of the properties by virtue of their office as khadem was a true allegation or not and also as to whether they could hold such possession as against the plaintiff on the strength of that office having obtained that office duly and in accordance with law. The learned Judge has not gone into the facts, but has only disposed of the question as a pure question of law. In this the learned Judge was not right. It is obvious also from these authorities that it was the duty of the plaintiff to prove the circumstances which would be necessary

1. (1907) 34 Cal 118=84 IA 46 (P O).

2. AIR 1919 Mad 202=51 I O 489=41 Mad 1088.

3. AIR 1920 Cal 800=60 I C 165.

for the purpose of holding that the said defendants by reason of the fact that they are females are to be excluded from khademship. I do not find that there is any such evidence on the record nor is there any finding of any of the Courts below on this point and it seems to me therefore that there has been no proper investigation of this question. But I must concede that having regard to the fact that no distinct issue was framed with regard to this question and that, on the other other hand, as appears from the judgment of the Munsif, it was not disputed by the parties before him that females cannot under the Mahomedan law discharge the functions of khadem there is no justification for laying the blame on the plaintiff in this respect. At the same time it is a question which, in my opinion, certainly requires investigation in order to do justice between the parties.

The proper order to make in this case, in my judgment is to allow the appeal and to set aside the decision complained of and to direct the case to be sent back to the Court of the Subordinate Judge in order that the plaintiff as well as the defendants may be given an opportunity to adduce evidence with regard to this particular point and on that being done the case should be decided in accordance with law and bearing in mind that with reference to the question of exclusion the onus is on the plaintiff. Having regard to what I have said as regards the omission on the part of the defendants to raise a clear issue on this question and the fact that they proceeded in the trial Court on the footing that females cannot as a matter of law discharge the functions of khadem, I think the order that I now propose to make should be made conditional on the appellants paying to the respondents, within three months from today, the costs of this Court and also the costs in the Court of appeal below. If this condition is complied with, the appeal will be allowed, and the judgment of the Subordinate Judge being set aside, the case will be sent back to the Court of the Subordinate Judge so that it may be dealt with in the light of the observations made above. If on the other hand this condition is not complied with, the appeal will stand dismissed with costs.

K.S.

Order accordingly.

* A. I. R. 1933 Calcutta 742

GUHA, J.

M. & S. M. Ry. Co. Ltd.—Defendant 2
—Petitioners.

v.

Sunderjee Kalidas—Plaintiff—Opposite Party.

Civil Rules Nos. 1138 and 1139 of 1932, Decided on 3rd March 1933, from decree of Sm. C. C. Judge, 24-Parganas, D/- 30th July 1932.

(a) Railways Act (1890), S. 72—Railway administration is liable only on proof of misconduct of their servants—Onus of proving misconduct is on party alleging it—Actual responsibility for guilt or wrongful act and not mere knowledge of likelihood of injury must be proved.

The statutory provision contained in S. 72 limits the responsibility of a Railway Administration in the case of risk-notes, and the risk-notes require proof of misconduct on the part of the Railway Administration's servants. The onus of proving misconduct is on the party alleging it. When misconduct is alleged on the part of servants of a railway company, it must be shown that the servants were actually responsible for the guilt or wrongful act; knowledge on the part of the Railway Administration or of their servant that an act is likely to cause injury is not sufficient: *Sterens v. G. W. Ry. Co.*, (1885) 53 L T 324; *Forder v. G. W. Ry. Co.*, (1905) 2 KB 532 and *All 1928 PC 21*, *Rel on.* [P 743 C 2]

* (b) Railways Act (1890), S. 72—Risk-notes forms B and H—"Misconduct" means intentional doing of some thing which doer knows to be wrong and is opposed to accident or negligence.

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence; it is intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be: *Glenister v. G. W. Ry. Co.*, (1879) 29 L T 423; *Forder v. G. W. Ry. Co.*, (1905) 2 KB 532; *Norris v. Great Central Ry.*, (1915) 85 L J (KB) 285; *Shepherd and Son v. Midland Ry.*, (1916) 85 L J (KB), 283, *Rel on.* [P 744 C 1]

(c) Railways Act (1890), S. 72—Limitation of responsibility and liability of Railway Administration by special contract is not ultra vires.

A limitation of responsibility and liability of Railway Administration by a special contract, if it is in approved form, as prescribed by the risk-notes, is not ultra vires: 80 Cal 257; 18 All 42, 19 Bom 169 and *AIR 1920 Mad 512*, *Ref.*

[P 744 C 1]

Ramesh Chandra Sen and Jitendra Kumar Sen Gupta—for Petitioners.

Hiralal Chakrabarty, Ramendra Mohan Majumdar and Sailendra Kumar Palit—for Opposite Party.

Order.—The petitioner was defendant 2 in the suits instituted by the plaintiff opposite party for damages on the allegation that a number of bags of tobacco

had been damaged during transit from Niphain to Shalimar. The consignments in question were both covered by risk-notes in Forms A and B. The defendant denied liability in the matter of the claim for damages as made in the suits, pleaded protection under the risk-notes, and asserted that all possible care of the goods consigned was taken. The case of the defendant was that the damage to the consignment was due to causes which were beyond the control of the Railway Administration (defendant 2). The learned Judge of the Court of Small Causes at Sealdah, by whom the suits were tried, after stating the case for the parties before him, observed that:

"the existence of the aforesaid damage would lead to an assumption that there was negligence on the part of defendant 2 such as to entitle the plaintiff to relief sought; it has not been established by any reliable independent evidence that there was absolute want of negligence on their part."

With reference to the risk-notes executed by the plaintiff, which purported according to their terms to protect defendant 2 from liability except upon proof of misconduct of the Railway Administration's servants, the learned Judge remarked as follows:

"It does not appear from the evidence on the record that the officers of defendant 2, in whose line the damages have occurred, took all necessary precaution; for had they done so the goods would not have been damaged. Now this would lead to a finding of misconduct on their part."

The Court below concluded by saying that on a consideration of the evidence and circumstance of the cases, the suits by the plaintiffs were to be decreed. Defendant 2 applied to this Court for revision of the decision arrived at by the Court below; and Rules were granted by this Court on three grounds specified in the applications to this Court. The first of these grounds related to the question of onus of proof in the matter of misconduct of the servants of the Railway Administration concerned, in view of the risk-notes in Forms A and B. The next ground was with reference to there being no evidence of misconduct on the part of the servants of the Railway Administration. The last of the three grounds was that the Court below had erred in law in holding that merely because the goods had been damaged, the inference was that the defendant did not take all necessary precautions to prevent the damage complained of.

It is necessary to take into consider-

ation the scope and significance of the risk-notes, in view of the question arising for consideration in these cases, regard being specially had to the question of burden of proof as raised in them. The risk-note in form A is used when articles tendered for carriage, are already in bad condition or so defectively packed as to be liable to damage in transit. Risk-note in Form B is used when the consignor elects to despatch at special reduced rates at owner's risk goods for which an alternative ordinary or risk acceptance rate is quoted in the railway tariff. In both cases it is provided by the terms of risk-notes that the Railway Administrations are free from all responsibility from any loss or damage from any cause whatsoever, except upon proof that such loss or damage arose from misconduct on the part of the Railway Administration's servants. So far as the question of the onus of proof is concerned the statutory provision contained in S. 72, Railways Act, limits the responsibility of a Railway Administration in the case of risk-notes, and the risk-notes require proof of misconduct on the part of the Railway Administrations' servants. The obvious implication of the provision of the law is that the onus of proving misconduct is on the party alleging it and this is what may be taken to be settled law in England: see *Stevens v. G. W. Ry. Co.* (1). When misconduct on the part of servants is alleged, it must be shown that the servants were actually responsible for the guilt or wrongful act: knowledge on the part of the Railway Administration, or of their servant, that an act is likely to cause injury is not sufficient: see *Forder v. G. W. Ry. Co.* (2). It may also be noticed in this connexion that it was observed by their Lordships of the Judicial Committee of the Privy Council in the case of *Ardeshir Bhikaji Tamboli v. G. I. P. Ry. Co.* (3), with reference to risk-notes in form H, which is used as an alternative to risk-note in Form B, when a sender desires to enter into a general agreement instead of executing a separate risk-note for each consignment that a Railway Administration was exonerated for damage to goods except

1. (1885) 52 L T 821=49 J P 810.

2. (1905) 2 KB 532=74 L J K B 871=21 T L R 625=53 W R 574=38 L T 344.

3. AIR 1928 P C 24=107 I C 124=55 I A 67=52 Bom 169 (PC).

where the loss was due to its wilful neglect; and there was ample evidence in the case before the Judicial Committee of negligence on the part of the administration, but the administration could not be made liable merely on that account in the absence of finding of wilful neglect. The word "misconduct" has now taken the place of the expression "wilful-neglect" in the risk-notes in Forms B and H approved by the Governor-General in Council under S. 72, Railways Act. The question as to what is misconduct in the matter of fixing liability on a Railway Administration has received the consideration of the Courts in England; and it may be taken to be well settled now, that misconduct is not necessarily established by proving even culpable negligence: *Glenister v. G. W. Ry. Co.* (4), *Forder v. G. W. Ry. Co.* (2). Misconduct is something opposed to accident or negligence [*Lewis v. G. W. Ry. Co.* (5)]; it is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be: *Forder v. G. W. Ry. Co.* (2), *Norris v. Great Central Ry.* (6), and *Shepherd and Son v. Midland Ry.* (7). The question to be considered next is whether a rule as contained in S. 72, Railways Act, permitting a Railway Administration to limit its responsibility and liability by a special contract which the general law and the Indian Contract Act impose on parties is ultra vires has been considered in many decisions by the High Courts in India, and there can be no doubt that the authoritative view on the subject about which there has not been any divergence of opinion up to the present time, is that a limitation of responsibility and liability, if it is in approved form, as prescribed by the risk-notes, is not ultra vires: see *Toonva Ram v. E. I. Ry. Co.* (8), *E. I. Ry. Co. v. Bunyargi Ali* (9), *Balaram Harchand v. S. M. Ry. Co.* (10), *M. & S. M. Ry. v. Mr. Subba Rao* (11). There was then the onus of proof on the plaintiff claim-

ing damages against a Railway Administration, by virtue of the statutory provisions contained in S. 72, Railways Act, and under the clear terms of the risk-notes in Forms A and B. There was also the initial burden on the plaintiff in a suit to prove his case before the Court. The plaintiff, it must be said, had failed to discharge the two-fold burden that was on him, and it is not too much to state that he had not made even a beginning in the way of evidence on which a liability could be fixed on defendant 2 in the suit.

The learned Judge in the Court below has to my mind failed to appreciate the bearing of the risk-notes in Forms A and B, which contained the terms of special contract between the parties concerned, the plaintiff and defendant 2; it has entirely misdirected itself in proceeding on the footing that it was for the Railway Administration to establish by evidence that there was absolute want of negligence on its part and that it was for the Railway Administration to make out that its officers took all necessary precautions for the purpose of avoiding damage being caused to the goods consigned by the plaintiff under the terms of the risk-notes in Forms A and B. Misconduct had to be proved; and the meaning and import of the word used in connexion with action on the part of carriers in the position of a Railway Administration has been explained by Courts of law, as mentioned above. There was no proof on the side of the plaintiff of such misconduct on the part of the servants of the Railway Administration concerned, defendant 2 in the suit; and the inference made by the Court below that the defendant did not take precautions, from the fact that the goods consigned were damaged in transit, is wholly unsupportable. In the above view of the cases, the decision and the decrees passed by the Court below in favour of the plaintiff opposite party in these Rules, must be set aside. The plaintiff having failed to discharge the onus that was on him to prove misconduct on the part of the Railway Administration's servants and there being no finding of misconduct, the plaintiff's suits should have been dismissed by the Court below. The Rules are made absolute. The decrees passed by the Court below in favour of the

4. (1878) 29 L T 428.

5. (1877) 8 Q B D 195=47 L J Q B 131=87 LT 774=26 WR 155.

6. (1915) 85 L J K B 285=114 L T 183=82 T L R 120.

7. (1916) 85 L J K B 283=114 L T 515.

8. (1908) 80 Cal 257=7 CWN 370.

9. (1896) 18 All 42=(1895) A WN 150.

10. (1895) 19 Bom 159.

11. AIR 1920 Mad 512=55 IC 754=48 Mad 617.

plaintiff opposite party are discharged, and the suits in which the decrees were passed are dismissed. The parties are to bear their own costs in the Court below, as also in this Court.

* K.S.

Rule made absolute.

A. I. R. 1933 Calcutta 745

MUKERJI, J.

Nalin Chandra Chakravarty and others
—Appellants.

v.

Ramesh Chandra Chakravarty and others—Respondents.

Appeal No. 2671 of 1930, Decided on 24th January 1933, from Appellate Decree of 2nd Court Sub-Judge, Sylhet, D/- 12th June 1930.

Landlord and Tenant—Agricultural tenancy—Notice of termination need not expire with the end of the year—Bengal Landlord and Tenant Procedure Act (8 of 1869).

For termination of an agricultural lease, there must be only reasonable notice under Act 8 of 1869 and the notice need not necessarily determine at the end of the year: *Case law reviewed.* [P 745 O 2]

Priya Nath Dutt—for Appellants.

Satyendra Kishore Ghose—for Respondents.

Judgment.—This appeal has arisen out of a suit which the plaintiffs instituted against the defendants for arrears of rent for ejectment and for mesne profits. On 17th Baisakh 1332 defendant's father sold some lands to the plaintiffs by a Kobala, and on the next day the 18th he took some of the lands so conveyed on a lease for one year by executing a kabuliyat. The period of the lease having expired, a notice to quit was served, and on the expiry of the period stated in it, the present suit was brought. The defence was that the kobala and the kabuliyat were meant to constitute a mortgage by way of conditional sale, that it was understood that the lease would be for 5 years while it was fraudulently obtained as for one year, that a part of the rent had been paid up and that no notice was served.

The Munsif overruled all the defences and decreed the suit. The Subordinate Judge has reversed the Munsif's decision and dismissed the suit. He found that no fraud or trick such as was alleged on behalf of the defendants was proved. He preferred not to decide the question whether the deed of sale was really intended to be a mortgage, because he thought that the suit might be disposed

of on the question of notice and so he left the former question open. On the question of notice he found that it was served, but he held that it was insufficient. His reason for this view was that the notice was dated 26th Aswin 1333 (served on 15th October 1927) and was a notice to vacate by the last day of Chait 1334 whereas the year of the tenancy would expire on 18th Baisakh 1335. He held that such a notice was bad. The Subordinate Judge has in one place of his judgment referred to S. 106, T. P. Act, in support of his view that the defendants on the expiry of their lease held over and so came to hold on a tenancy from year to year, and that such a tenancy, by reason of holding over, could be terminated by six months' notice expiring with the end of a year of the tenancy.

It is conceded now that there are no notifications issued under S. 117, T. P. Act, making the provisions of Ch. 6 of that Act applicable to Sylhet. This tenancy has been found to be an agricultural tenancy. The Bengal Tenancy Act, admittedly does not apply. It is the Act 8 of 1869 by which the tenancy is governed. In the latest case under this Act, *Ratneswar Das v. Kamal Deb Adhikari* (1), it has been held that the notice must be reasonable but need not purport to determine the tenancy at the end of the year. I have not been able to find any decision prior to that in the case of *Jugat Chandra Roy v. Rup Chand Chango* (2) in which a notice expiring otherwise than at the end of the year was held to be valid. Two cases are referred to in decision aforesaid, *Rajendra Nath v. Bassidur Rahman* (3) and *Janoo Mandar v. Brij Singh* (4), in both of which however the notices were such as did expire at the end of the year, but they were relied upon in that case in support of the negative proposition that they did not, in fact, lay down that expiry with the end of the year was a *sine qua non*, but proceeded on other grounds. I may state here that the former of these decisions was the decision of a Full Bench which no doubt dealt with a different point but the order of reference proceeded upon the assumption that the notice to be valid must expire at the

1. AIR 1921 Cal 126=63 I C 191.

2. (1883) 9 Cal 48=11 C L R 149.

3. (1876) 2 Cal 146=25 W R 329 (F B).

4. (1874) 22 W R 548.

and of the year. In fact Markby, J., in the order of reference expressly said so, observing :

"It is I think clear upon the authorities that he could not have been ejected without reasonable notice expiring with the end of the year."

And the learned Judge in support of this dictum relied upon two decisions viz : *Bakranath v. Binodram* (5) and *Janoo Mandar v. Brijo Singh* (4) also, Garth, C. J., during the hearing of that case appears to have made a remark :

"It must be taken for granted that a notice to quit must be given a reasonable notice at the end of the year: *Muhammed Rasid Khan v. Jadoo Mridha* (6)."

This Full Bench case was under Act 8 of 1869. The first pronouncement that expiry with the end of the year was not necessary therefore appears to have been made in *Jugat Chandra Ray's* case (2) and it was made in these words :

"A tenant other than an occupancy raiyat is entitled to a reasonable notice to quit; what is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. It is not necessary that the notice must expire at the end of the year."

In the case of *Ram Ratan Mandal v. Netro Kali Dasi* (7) at p. 341, which was a case under Act 8 of 1859 Jackson, J., referring to the aforesaid Full Bench decision observed that the two essentials of a valid notice were sufficiency of the period and expiry of the period with the end of the year. The view propounded in *Jugat Chandra Ray's* case (2) was adopted in *Radhagobinda v. Rakhaldas* (8), *Bidhu Mukhi v. Kefaitulla* (9) and *Kali Kishore v. Golamali* (10). In *Kishori Mohan v. Nund Kumar* (11) the expiry of the notice at the end of the year was insisted on as being consonant with the rule of English law which was held to apply in the absence of any statutory enactment in this country as regards this matter. But in *Digambar Mahto v. Jhari Mahto* (12) a case from Manbhum, in which the question of notice arose under Act 8 of 1869, *Jugat Chandra Ray's* case (2) was followed, the other decisions referred to in support being *Radhagobinda v. Rakhaldas* (8), *Bidhu Mukhi v. Kefaitulla* (9) and *Kali*

Kishen v. Golam Ali (10). *Ismail Khan Mahomad v. Jaigun Bibi* (13) proceeded on the footing that the view taken in *Kishori Mohan v. Nund Kumar* (11) was right. And so did the case of *Hemangini v. Srigolinda* (14). It is not necessary to refer to any of the later cases prior to the decision in the case of *Pratap Narain Deo v. Maigh Lal Singh* (15) in which Jenkins, C. J., pointed out that "the state of the authorities on the question of notice can not be regarded as satisfactory" and observed that "all that could be said by the Division Bench", over which he presided, "was that there must be a reasonable notice and that the notice need not necessarily determine at the end of the year". The same view has been taken in the case of *Ratneswer Das v. Kamal Deb* (1) to which reference has already been made.

In my opinion much undoubtedly may be said in favour of the view that the notice must expire with the end of the tenancy. But in the state of the authorities to which I have referred I am not disposed to take any steps, so far as the present case is concerned, to have the question authoritatively settled, and I think so far as the present case is concerned, I should be content to follow the latest decision on it. Such disinclination as I feel in this respect is due to the fact that it is only a very short period of seventeen days which creates the difficulty. I am also of opinion that upon such circumstances as I can gather from the record, it should be held that there was nothing unreasonable about the notice. In the result I think the Subordinate Judge's decision on the question of notice should not be upheld. As regards the nature of the transaction I feel no difficulty in holding that it was a sale and a lease for one year and nothing else that was meant. In these circumstances, I must allow the appeal and setting aside the decision of the Subordinate Judge restore that of the Munsif. As regards the costs of this appeal and of the Court of appeal below, I order that each party do bear his or their own costs.

K.S.

Appeal allowed.

5. (1868) 1 Beng L R 25=10 W R 33 (F B).

6. (1873) 20 W R 401.

7. (1879) 4 Cal 339.

8. (1886) 12 Cal 82.

9. (1886) 12 Cal 93.

10. (1837) 13 Cal 3.

11. (1897) 24 Cal 720.

12. (1899) 25 Cal 761.

13. (1900) 27 Cal 570=4 C W N 210.

14. (1902) 29 Cal 213=6 C W N 69.

15. (1909) 36 Cal 927=2 I C 656.

A. I. R. 1933 Calcutta 747

Special Bench

RANKIN, C. J., C. C. GHOSE AND
BUCKLAND, JJ.*Bhabananda Banerjee and another —*
Accused—Appellants.

v.

*Emperor — Opposite Party.*Criminal Appeals Nos. 668 and 669 of
1930, Decided on 19th January 1931.

(a) Criminal P. C. (1898), S. 164—No complaint against police—Accused professing to speak of free will — Magistrate need not question accused whether police ill-treated him.

Where the accused made no complaint against the police but professed most emphatically to be speaking of his own free will it is unreasonable to contend that the Magistrate ought to have questioned the accused whether the police had been threatening or ill-treating him. [P 748 C 1]

(b) Evidence Act (1872), Ss. 24 and 26 — Statement of accused that confession was made of free will does not relieve Court from considering whether confession should be excluded under S. 26 on other grounds.

No doubt statements of the accused that confession was made of free will do not relieve the Court from considering whether upon other grounds the confessions should be excluded under S. 26, but the fact that the accused put forward false and not very probable allegations against the police cannot be ignored when the appellate Court is considering whether they were properly treated. [P 749 C 2]

Where the accused had not been in illegal custody for a single moment and the period of their police custody had been exceedingly short :

Held : that there was no ground for saying that the confessions were caused by an inducement, threat or promise within the meaning of S. 24 : A I R 1925 Cal 587, *Rel on*.

[P 748 C 2]

(c) Criminal Trial—To base conviction on retracted confession there must be corroboration for the confession.

Though it is not a rule of law that an accused cannot be convicted upon a confession if he has retracted it, it is very necessary as a rule to make certain before acting on it that corroborative evidence supports the confession. [P 750 C 1]

(d) Explosive Substances Act (6 of 1908), S. 4 (b)—Shots and arsenic supplied for only one bomb to be tested without endangering human life—Act is in furtherance of conspiracy and accused is guilty under S. 4 (b).

Where a person supplied shots and red arsenic for making one bomb only and to try it in a place without being detected and without intending to endanger human life or to cause serious injury to property :

Held : that he had no defence to the charge of being party to a criminal conspiracy to commit an offence under Cl. (b), S. 4, as he had done overt acts in furtherance of such conspiracy.

[P 751 C 2]

Santosh Kumar Basu and Bholanath Roy—for Appellants.*B. M. Sen and Anil Chandra Roy Chaudhury*—for the Crown.

Rankin, C.J.—The appellants are two. First Bhabananda Banerjee whose home is in Kali Banerjee's Lane, Howrah, whose age is 24 years and who is employed as a typist in a mercantile firm. Secondly Monmohon Adhicary known as Naba who lives in the same lane, is aged about 20 years and has had no occupation since leaving school. They are charged in respect of an occurrence which took place at Sibpur at about 3.45 in the early morning of Friday, 16th May last, when a bomb was thrown at a first floor window of the house 51, Raju Sibpur Road, occupied by the Sub-Inspector of Sibpur Police Station, Faniudra Mohan Das Gupta. Naba has been found guilty of throwing the bomb and convicted upon charges laid under Ss. 3 and 4 (b), Explosive Substances Act (6 of 1908). Bhabananda has been found guilty of supplying arsenic and certain shots as materials for the making of a bomb and has been convicted under S. 6 of the same Act. Both have been convicted of conspiracy to commit an offence under S. 4 (b), viz., to make and possess explosive substances with intent to endanger life or cause serious injury to property. Each has been sentenced to five years rigorous imprisonment.

The main evidence against each is his own confession and we have to scrutinise these carefully. Bhabananda was the first of the two to be arrested. He was arrested at his house on the morning of the 17th. Several other persons including Sachindra Nath Khan (P.W.14) were arrested that morning. They were all brought before the Magistrate at 10 a.m., on the following morning (18th) and all except Sachindra were remanded to *hajat*, but Sachindra was remanded to police custody. So they were all in police custody on the 17th, and on that day Sachindra made some statements to the police. On the 17th the accused Naba was not found : he was arrested on the afternoon of the 18th at his house and was brought before the Magistrate next morning (19th) when he was remanded to *hajat* with a direction that he was to be segregated from the others. On the 18th he made a statement to the police and on the next day (19th) his confession was recorded by the Magistrate and a confession or statement was also recorded from Sachindra who was thereupon sent back to *hajat*. On

the 21st Bhabananda who had been in jail since the 17th was directed to be made over to police custody. The Inspector says that he wanted him in order to investigate the truth of certain information as to his being seen to buy certain articles at a shop and that Bhabananda did take the Inspector to a shop, but at that shop no arsenic was found by the Inspector and it had no license for selling it. In the afternoon of the 22nd Bhabananda made his confessional statement before the Magistrate and was remanded to *hajat*. So that Naba when he made his judicial confession had been in police custody since the previous afternoon, and Bhabananda, since he had gone to jail on the 18th, had only been in police custody from the morning of the 21st at earliest. Sachindra's confession is not in evidence and need not be considered. On these materials it was contended before us that there was something highly suspicious about the circumstances under which these confessions were recorded. So suspicious, indeed, that the Magistrate who gave each of these accused very full and proper cautions to say nothing out of fear of the police and that they need not say anything unless they wanted to do so, had failed in his duty by not asking them more detailed questions first as to the time they were in police custody and secondly whether the police had been threatening or ill-treating them. As the Magistrate had himself made all the orders as to the custody of Bhabananda and as Naba had only been arrested the previous day there is no substance in the first point. As neither made any complaints against the police and both professed most emphatically to be speaking of their own free will the second point is equally unreasonable.

There is nothing to suggest that either accused would be readily cajoled or terrorised by the police or that the police would be likely to try such methods. In retracting their confessions the accused stated to the tribunal that the police told them what to say. Bhabananda says he was threatened and tortured by blows and slaps and pulling his hair. Naba says he was told he would be let off if he told the Magistrate that he had thrown the bomb and would not be tortured by the police.

Before us their learned advocate abandoned these allegations of ill treatment but contended that the statements of the accused did not relieve the Court from considering whether upon other grounds the confessions should be excluded under S. 26, Evidence Act. With this proposition I entirely agree [*Emperor v. Panchkaurie Dutt* (1)], but the fact that the accused, willing to make out a grievance against what was done, put forward false and not very probable allegations, cannot be ignored when we are considering whether they were properly treated in this matter. In the present case neither accused had been in illegal custody for a single moment and the period of their police custody had been exceedingly short.

* I see no ground for saying that it appears to the Court that these confessions were caused by any inducement, threat or promise within the meaning of S. 24. Sachindra's confession is not before us (though parts of it were used in cross-examination), but the learned advocate endeavoured to use Sachindra's evidence in support of his contention. Now Sachindra says distinctly that he was not tutored by the police and had no idea that he would be let off if he made his statement. He says that he was kept separate from Naba. So that the argument under S. 24 gets no support from him. What Sachindra does say is that the Magistrate asked him questions from a piece of paper and this, if it were true at all, and were true of the confessions of Bhabananda and Naba, might raise a different question, viz., whether those confessions were properly recorded. But under S. 342 neither accused suggests that what he said was in any way different from what was recorded and Naba distinctly states that he told the Magistrate that he threw the bomb. There is thus no reason for assuming that the Senior Magistrate of Howrah did not carry out his duties properly, and much to show that he took the greatest care. Only in the case of Bhabananda was he asked whether he put intermediate questions while recording the statement and his answer is that he did not.

We come then to the confessions themselves, and to the question of their
1. A I R 1925 Cal 587=26 Cr L J 782=52 Cal 67=66 I C 414.

value as distinct from their admissibility. Naba states that he was a Congress volunteer and had been engaged in breaking the salt laws and picketing. That he used to have talks on the Howrah Maidan with Hrishikesh Dutta against the police and also with Sachindra. That on the Tuesday before the bomb was thrown Hrishikesh told him he had manufactured a sort of bomb and asked him to test it by throwing it against wood or tin. That on the Thursday at night Hrishikesh gave him the bomb in a cylinder; the bomb being of the size of a tennis ball and the mouth of it wrapped in jute fibre. That he put the bomb among some bricks behind Jatin Dutt's house and went to that house about 10 p. m. and slept there till 3-30 a. m. meaning to throw the bomb at Fanindra's house. That he got up at 3-30 and threw the bomb at the half open widow of that house and ran away to a lane, from which he made his way back to Jatin Dutt's house and lay down again. That at 6 a. m. he went to Sachindra's house and told him what he had done and about 7-30 they both went and had a look at the place, after which he remained at home for the whole of the day (Friday). That he left home early next morning and made his way to Chandernagore where he had a class friend but failed to find his house; that about 4 in the afternoon as he was returning to the station he met an old woman whom he knew and who said she had been staying with her son-in-law Jiten Adhikary at Palpara, so he found out the place and went there. That he met Jiten's son and told him there had been a bomb explosion at Sibpur and the police were searching for him. That Jiten's son would not let him stay the night and advised him to go back and confess; and that he got home again about 9 p. m. on that day (Saturday 17th). He was arrested the next afternoon (18th) at his house and was making this confession on the 19th before the Magistrate.

Now the story of his being at Chandernagore on the 17th is corroborated as follows: Naba says nothing about the old woman having or not having any companion, but P. W. 12, Mohesh Mohan Chunder, gives evidence that he was with his grandmother at Chandernagore Station at 4 p. m. when they

were returning to their home at Howrah after staying at her daughter's house at Palpara for a marriage ceremony. That there they met Naba. That the witnesses' uncle, the police officer was at home that day. P. W. 11, Barindra Adhikary, is his cousin and son of Jatindra, the police officer. He says that at 5-30 on the day his grandmother left the house with P. W. 12, a boy came to their house, said that he lived near the witnesses' grand-mother's house, and wanted shelter as he was going on to the salt campaign where he had been before. That he refused to give the boy shelter. That the boy gave his name as something Adhikary. He says however "neither of the accused in the dock is that boy" and on the strength of this we are asked to hold that in spite of Naba's account of his movements two days before, and notwithstanding that at Chandernagore station at 4 p. m. on the 17th P. W. 12 Mohesh who knew him from before met him and heard him talk with the old woman about her coming from that very house in Palpara, it was some other boy called Adhikary who in fact sought shelter there at the time the police were looking for Naba. I think this will not do.

The next witness whose evidence I shall notice is Sachindra Nath Khan. He had made a statement before the Magistrate on the 19th and was cross-examined upon some point in it at the trial. So we may expect to hear if there were any serious discrepancies. He says that he Naba and Hrishikesh used to talk about oppression by the police. That on the evening of the 15th they met on Howrah maidan and Hrishikesh said that a bomb had been made and that an experiment was to be made with it. That on the 16th at about 7 a. m., that is after the bomb had been thrown, Naba came to him at his house and told him that there was an arrangement with Hrishikesh to test a bomb and he had thrown it at the house of the police officer at Sibpur. That he mentioned the deceased Manik and now he used to visit and sleep at Jatin Dutt's. That the witness and Naba then went together to see the house that the bomb had been thrown at and then they parted company. As regards Naba's statement, that he slept at Jatin Dutt's house the prosecution gave as reason for not in the end calling Jatin though he had been

summoned, the fact that he was seen speaking to the defence pleader. Sachindra says that Naba's friend Manik died about a year ago, that Naba was very intimate with that family, and used to visit them after his death. The police, late on the 16th, got some information which led them to get a search warrant to search Jatin Dutt's house as being Naba's temporary residence and this house was searched in the early morning of the 17th. Some books and papers of a harmless sort were then found which clearly belonged to Naba. Beyond Sachindra's evidence as to what Naba told him there is no direct corroboration of Naba's statement that he slept there that night, but it is clear enough that if Naba meant to throw a bomb at Fauindra's house it would be both easy and convenient for him to do as he said he did. It appears to me that the expert evidence as to the nature of the bomb fully supports Naba's description of it.

Though it is not a rule of law that an accused cannot be convicted upon a confession if he has retracted it, it is very necessary as a rule to make certain before acting on it that corroborative evidence supports the confession. In my judgment the confession of Naba has itself several features which make it difficult to regard the statement as an invention and which show that it is not infected with a desire to placate the police or curry favour with the authorities. In my opinion also it is sufficiently corroborated upon a number of material points. In the circumstances of this case it cannot be suggested that Sachindra's evidence was concocted to fit in with Naba's confession and this circumstance deprives of almost all its weight the criticism that as Sachindra knew on the evening of the 15th that a bomb had been made and that an experiment was to be made with it, he should be regarded as an accomplice whose corroboration is of small account. Mr. S. K. Basu has very properly enlarged upon the fact that certain witnesses whose evidence might be material have not been called, particularly as regards the fact of Naba's passing the night at the house of Jatin Dutt. But when all allowance has been fairly made for such criticism of the prosecution evidence I am of opinion that the guilt of Naba is clearly proved. The Commissioners seem to me to have

taken a very just view upon the question of sentence and his appeal should therefore be dismissed. The case against the older prisoner Bhabananda is not so clear. His confession is to the effect that about 10th May Hrishi and a man whom he did not know talked with him at his house about the manufacture of bombs for use against the police. That they asked him to get red arsenic. That Hrishi had brought some potassium chloride and that Bhabananda gave him some shots and also bought 6 pice worth of red arsenic and gave it to him. That the task of making the bomb was given to a man called Ganesh. That that bomb was given to Hrishi and that Hrishi gave it to Naba. Bhabananda says:

"Our intention was to try the bomb first at the Ganges Ghat but then I cannot say why they threw the bomb in Sibpur."

Now Naba's confession says nothing about Bhabananda and Sachindra merely states that he knows this accused. As corroboration of Bhabananda's statement that he gave some shots (bullets) for the bomb we have only the bare fact that when his father's house was searched on 20th May it was found that though he had a muzzle loading gun and some gunpowder and percussion caps there were no shots (bullets) in the house. This is not in itself enough to show that Bhabananda had appropriated any bullets. It would not astonish me to be told that his father living in Howrah kept a gun but did not always have a supply of bullets which are after all easily lost and are in any case expendable ammunition. Bhabananda's confession does not even say that he got them from his father's house though it suggests this. As regards the supplying of red arsenic by Bhabananda we know that Bhabananda on 21st May took the Inspector of Police to a shop where he said he had bought the arsenic but no arsenic was found there and the shop-keeper had no license to sell arsenic. So far the corroboration seems almost entirely to consist in the facts that the bomb was a roughly made article, that red arsenic was used in its manufacture, that it did contain bullets, that it was used against the police, and that it was made and used at a time which fits in with the confession. For evidence outside Bhabananda's confession that the bomb was so made and used by young men of this neighbourhood who would be known to Bhaba-

nanda we have to go to the evidence of Sachindra and for what it is worth against a co-accused to the confession of Naba. Looking at Sachindra's evidence in this way we find that he states that Naba and Hrishi were friends and were concerting together over getting a bomb so as to use it against the police, that Hrishi told him on the 15th that he had got the bomb made and that they were going to experiment.

According to Sachindra, Hrishi had been talking of bombs for some time and had told him that Ganesh could manufacture bombs. All this, if it be believed, is direct corroboration of Bhabananda's confession and the times mentioned by Sachindra fit in exactly. Naba's confession, as I have already pointed out, is to the same effect in great detail, and neither Naba nor Sachindra can possibly be accused of trying to injure Bhabananda or trying to save themselves at his expense. Neither mention Bhabananda as concerned in the matter or profess to know or to suspect or to have heard that he ever supplied Hrishi with bullets or with red arsenic at all. Looking at the evidence as a whole I think it unreasonable to say that Bhabananda's confession is insufficiently corroborated as against himself. The evidence convinces me of its truth. On this footing however Mr. S. K. Basu contends that whether the Court proceeds upon Bhabananda's confession or upon Naba's confession or upon Sachindra's evidence, the charges of which Bhabananda has been convicted are not made out; because it appears that though the object of the whole scheme was to use bombs against the police, it does not appear that more than one bomb was made; and it appears that, until Naba decided otherwise on the 15th May it was intended to use the first bomb for a test or experiment. Mr. Basu very properly admits that on this hypothesis Bhabananda would be guilty of a criminal conspiracy against the life of police officers and thus of a heinous offence against the ordinary law. But he contends that under Cl. (b), S. 4, Explosive Substances Act, of 1908, the offence is:

"makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or cause serious injury to property in British India, etc."

The charges upon which Bhabananda

has been convicted are conspiracy to commit an offence under S. 4 (b) and being accessory to offences under S. 3 and S. 4 (b). Bhabananda says:

"Our intention was to try the bomb first at the Ganges Ghat, but then I cannot say why they threw the bomb in Sibpur."

Naba says Hrishi asked him on the night of 15th May, when the bomb was handed over, to test it by throwing it against wood or tin, and that his own intention was at first to throw the bomb somewhere on the road, but that while going along the road he decided to throw it at the Inspector's house. Sachindra says that when he met Hrishi and Naba at 5 or 6 o'clock on the evening of the 15th at the maidan Hrishi told him that a bomb had been made and that an experiment was to be made with it. Now it seems to me that even if we confine ourselves to Bhabananda's own confession and even if we assume (1) that when Bhabananda supplied the shots and red arsenic he supplied them for one bomb and no more, (2) that to try that bomb at the Ganges Ghat means, not merely to try it without being detected but also that no danger to life or serious injury to property was involved or intended, (3) that this intention existed at the time when the shots and red arsenic were supplied to Hrishi, Bhabananda had no defence to the charge of being party to a criminal conspiracy to commit an offence under Cl. (b), S. 4, Act 6 of 1903, and is clearly shown to have done overt acts in furtherance of such conspiracy. If the first bomb was to be tested this was clearly to be done in order that more bombs might be made and used more effectively against the police or with greater chance of safety or secrecy for the conspirators. The conspiracy was to make and use bombs to endanger life and cause serious injury to property and the first bomb was only the first stage in carrying out that purpose. So far as S. 6 of the Act is concerned Bhabananda seems to me to be within the meaning of the words "in any manner whatsoever . . . counsels . . . the commission of" the offence of making bombs with the intention of endangering life etc., even although the persons concerned had not yet got to the stage of making a bomb for actual use against the police but were arrested before they could put their experience of the test bomb into prac-

tice. It is not even necessary therefore to consider whether S. 237, Criminal P. C., should be applied to the case. This defence fails altogether. Nor does it give ground for any objection to the conspiracy charge that Hrish and Pan-
chanan were on 23rd June 1930 discharged by the Magistrate. Bhaba-
nanda's appeal against his conviction fails and a consideration of his age and of all the circumstances leads me to think that the sentence of five years rigorous imprisonment passed upon him by the Commissioners is reasonable and even lenient. His appeal must also be dismissed.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

R.K.

Appeals dismissed.

A. I. R. 1933 Calcutta 752 (1)

C. C. GHOSE, AG. C. J. AND MALLIK, J.
Khajer Naskar and another—Petitioner.

v.

Tabrej Ali Naskar—Opposite Party.

Criminal Revn. Petn. No. 562 of 1933,
Decided on 17th July 1933.

Criminal P. C. (1898), S. 147 (2)—Final order need not be in all cases exactly in terms of the section.

It is impossible to lay down a hard and fast rule, that in every case the final order of the Magistrate should be in exactly the same words as are used in the section. Each case must depend upon its own facts.

Where it was found that by reason of the erection of a wall, an obstruction to the right of the complainant was caused:

Held: that an order directing removal of the obstruction, though not exactly in terms of S. 147 (2), was valid. [P 752 C 2]

Sudhansu Sekhar Mukerji—for Petitioners.

Probodh Chandra Chatterji and Bireswar Chatterji—for Opposite Party.

Order.—We have examined the terms of the judgments and having regard to the findings of fact arrived at by the Court of first instance, we do not think that this is a case which calls for our interference. There is one point, however, which we must notice. It is argued that having regard to the words in Cl. (2), S. 147, Criminal P. C., as it now stands, the order of the Magistrate directing removal of the obstruction complained of is illegal. The words of the clause in S. 147 run as follows:

"If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

It is admitted that if the Magistrate had made an order in the terms of the section, no complaint could have been found with his order. Each case must depend upon its own facts and it is impossible to lay down a hard and fast rule that in every case the final order of the Magistrate should be in exactly the same words as are used in the section. Here it has been found that by reason of the erection of the wall an obstruction has been caused; in other words, it has been found that the exercise of the right alleged by the complainant has been interfered with; and, if the Magistrate says to the party who is obstructing the exercise of the right alleged by the complainant that he should be prohibited from interfering with the exercise of such right, and if he translates the order in a manner which would be effective by saying that "you the party obstructing must remove the obstruction," that is the same thing as is indicated in the terms of the clause referred to above. The contention of the learned advocate may furnish ground for a dialectical argument; but there is no substance in it nor is there any sense in it. We therefore negative that and direct that the rule do stand discharged.

K.S.

Rule discharged.

A. I. R. 1933 Calcutta 752 (2)

PANCKRIDGE AND PATTERSON, JJ.

Sundar Ram—Petitioner.

v.

Emperor—Opposite Party.

Misc. Criminal Case No. 20 of 1933,
Decided on 21st February 1933.

Criminal P. C. (1898), S. 344 (1)—Explanation.—Existence of reasonable cause is condition precedent to order under S. 344 (1)—Magistrate properly directing postponement has unfettered discretion to remand accused to custody—Explanation to S. 344 (1) gives only one type of reasonable cause—Circumstances other than those mentioned in explanation may afford reasonable cause for remand.

Section 344 (1) makes the existence of a reasonable cause a condition precedent to an order by a Magistrate postponing the commencement of an inquiry or trial. In a case where the Magistrate properly directs postponement, he has unfettered discretion to remand the accused to custody. Even assuming that the language of the explanation to S. 344 shows that there must be a reasonable cause, not only for the order of postponement but for the order of remand as well, as the explanation to S. 344 (1) only describes one type of reasonable cause, there may be cases in which there is a reasonable cause for a remand where

the circumstances are not those set out in the explanation. [P 735 C 1]

A. K. Banerji and P. C. Bose—for Petitioner.

• Khundkar and Anil Chandra Rai Choudhuri—for the Crown.

Judgment.—In this case the petitioner has obtained a rule calling upon the Chief Presidency Magistrate to show cause why he should not be admitted to bail during the pendency of the case mentioned in the petition. I was not a party to the issue of the rule, but my learned brother who was such a party states that the rule was issued for the purpose of giving the Crown and the accused an opportunity of discussing whether on the merits it was desirable that the accused should be enlarged on bail or kept in custody. I state this because at various times during the course of the argument questions have been raised as to the propriety of the orders made by the learned Presidency Magistrate from time to time under S. 344, sub-S. (1), Criminal P. O., postponing the commencement of the inquiry. It appears to me that we must deal with this case on the assumption that the orders for postponement were proper orders. The petition nowhere alleges that the Magistrate was wrong in so far as he postponed the commencement of the case, and the words of the rule indicate that the sole question before us is whether on the assumption that the Magistrate was justified in postponing the commencement of the case, he was also right in remanding the accused to custody or whether he ought to have enlarged him on bail. Now S. 344, sub-S. (1) makes the existence of a reasonable cause a condition precedent to an order by a Magistrate postponing the commencement of an inquiry or trial. As far as the language of the sub-section goes, it appears that in a case where the Magistrate properly directs a postponement he has unfettered discretion to remand the accused to custody. Though this follows from the language of the section, I will assume that the language of the explanation to the section shows that there must be a reasonable cause not only for the order of postponement but for the order of remand. Various cases have been cited before us as to what constitutes a reasonable cause. The majority of those cases are concerned with the language of the explanation,

but I desire to emphasize that the explanation only describes one type of reasonable cause and there may be cases in which there is a reasonable cause for a remand where the circumstances are not those set out in the explanation. For instance, it would be ridiculous to say that there was no reasonable cause for a remand to custody where there was a strong *prima facie* case against the accused, but it was impossible to proceed with the inquiry owing to the unavoidable absence of a witness, although there was reasonable cause for a remand where the case against the accused was merely a case of suspicion, but it was anticipated that if a remand was given it would be possible to obtain further evidence. I therefore conceive that the proper way to deal with this application is to consider whether there was reasonable cause for a remand to custody quite apart from the language of the explanation. A letter has been addressed to us by the learned Magistrate in which he states that the applicant was arrested on suspicion on 15th January 1933. He was arrested in connexion with a search of premises No. 11 Sibtolla Lane in which was found cogent evidence of the existence of a widespread conspiracy against the Government. The name of the applicant was found in two places in a cipher list of names among the papers seized in the house. His name was found in conjunction with the name of a man who is described as a dangerous revolutionary at present detained under the Bengal Criminal Law Amendment Act. It is not denied by the applicant that he has been for many years an intimate friend of this detainee.

These circumstances *prima facie* show that the accused was connected with the conspiracy the existence of which is shown by the documents, fire arms and other incriminating articles found at the search. It therefore appears to me that the Magistrate properly exercised his discretion in remanding the applicant to custody. It may be, in certain cases where there is no fear of the accused absconding or of his indulging in undesirable activities, he would be liberated on bail even though there is a strong *prima facie* case against him. Certainly this case is not one where such a course can be contemplated. In

these circumstances, we think that the learned Magistrate was right to refuse bail and to remand the applicant to custody. We therefore discharge this rule.
K.S. *Rule discharged.*

*** A. I. R. 1933 Calcutta 754**

Special Bench

**C. C. GHOSE, AG. C. J., MUKERJI
AND PANCKRIDGE, JJ.**

News-paper "Advance" and Sudhan Press, In the matter of.

Civil Appln., Decided on 14th July 1933.

(a) Press (Emergency Powers) Act (1931) (as amended by Act 23 of 1932), S. 4 (1)—News item held did not come within Sub-Cl. (f).

In a newspaper a news item was published as follows: "Maulana Hasrat Mohani in an interview to the Associated Press on the suspension of the Civil Disobedience Movement said that an acknowledgment of defeat would not further the cause of national progress. He supported the opinion expressed by Messrs. Bose and Patel in Europe and stated that the fight should be continued till the freedom was attained."

Held: that the words complained of were not hit by sub-Cl. (f). [P 755 C 2, P 756 C 1]

(b) Press (Emergency Powers) Act (1931), S. 4—Whether editor has contravened S. 4 depends on particular facts.

The editor or publisher publishes "news" at his own risk, but whether any real risk has been run depends on particular circumstances.

[P 756 C 1]
(c) Press (Emergency Powers) Act (1931), S. 4—Effect and not merely meaning of words used is to be considered.

Per Mukerji, J.—The effect of the words as published in the newspaper, and not merely the meaning of the words taken by themselves, that has to be considered in order to see whether the statement which is complained of is hit by S. 4. [P 756 C 2]

(d) Press (Emergency Powers) Act (1931), S. 4 (1)—Omission to specify sub-clauses does not make order vague.

The order of the Local Government which did not specify which of the Clauses of Sub-S. (1), S. 4, had been contravened by the petitioners cannot be said to be vague by virtue of the very wide language used by the Act. [P 756 C 1]

H. D. Bose, H. M. Bose, B. K. Chowdhury and N. K. Ghose—for Petitioners.

A. K. Roy and S. N. Bose—for the Crown.

C. C. Ghose, Ag. C. J.—This is an application by two persons named Brojendra Nath Gupta who is described as the editor, printer and publisher of the Advance newspaper and Anil Chandra Dutt Gupta who is described as the keeper of the Sudhan Press where the newspaper in question is printed, under S. 23 of Act 23 of 1931 (The Indian Press Emergency Powers Act, 1931), praying that certain orders of His

Excellency the Governor of Bengal in Council dated 9th June 1933 calling upon these two petitioners to deposit cash or securities to the extent of Rs. 2,000 each may be set aside in the circumstances stated in the petition. Under orders of His Excellency the Governor of Bengal in Council notices under sub-S. (3), S. 7 and sub-S. (3), S. 3 of the said Act were served on these two petitioners directing them to deposit with the Chief Presidency Magistrate, Calcutta, security to the amount of Rupees 2,000 each in money or the equivalent thereof in securities of the Government of India on or before 20th June 1933. We are informed by learned counsel for the petitioners that the securities demanded have been deposited with the Magistrate.

According to the local Government the petitioners have published and printed in the Advance newspaper on 20th May 1933 what is described as an article but which in reality is a news item. This is an annexure to the said orders of the Governor of Bengal in Council containing, it is alleged, words of the nature described in sub-S. (1) of S. 4, Indian Press (Emergency Powers) Act 1931. This Act was amended by the Criminal Law Amendment Act 1932, being Act 23 of 1932, and the question now for our decision is whether the said news item reproduced in the said annexure does or does not contain any words of the nature described in sub-S. (1) of S. 4 of the said Act as amended. The learned Advocate-General on behalf of the Crown informs us that the words in question were considered objectionable by Government as in their opinion they were hit by Cls. (d) and (f) of S. 16, Criminal Law Amendment Act, 1932 (Act 23 of 1932). It is not necessary for me to set out the words originally appearing in sub-S. (4), Indian Press (Emergency Powers) Act, 1931, nor is it necessary for me to set out the whole of the amending section, namely, S. 16 of Act 23 of 1932. It will be sufficient for me to set out the relevant sub-clauses, namely, sub-Cl. (d), and (f) of the said Act. In S. 16 sub-Cl. (d) and sub-Cl. (f) any words, which tend directly or indirectly to do or to have the effect hereinafter described, are hit, and in order to fully explain I set out below the two sub-clauses in question:

"Sub-Cl. (d) 'to bring into hatred or contempt' His Majesty's or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards 'His Majesty (or the said Government, or 'and sub-Cl. (f))' to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or to commit any offence, or to refuse or defer payment of any land revenue, tax, rate, cess or other due or amount payable to Government or to any local authority or any rent of agricultural land or anything recoverable as arrears of or along with such rent, or"

Mr. H. D. Bose, who appears in support of the petition of these two petitioners, has made a sort of half-hearted complaint before us that the order of the local Government did not specify which of the clauses of sub-S. (1) of S. 4 as amended had been contravened by the petitioners and that in the circumstances the order of the local Government was vague. As regards this point, this has been the subject of debate and decision in two previous cases in this Court and I am of opinion that having regard to the very wide language used in the relevant sections of the Indian Press (Emergency Powers) Act, 1931, there has been sufficient compliance on the part of the local Government and that in law the action taken by the local Government cannot be questioned or attacked on the technical ground put forward by Mr. Bose. In my opinion, we are not entitled on any application of this nature to discuss profitably whether the petitioners were put to any disadvantage; we can only proceed upon the words used in the Indian Press (Emergency Powers) Act, 1931. Leaving therefore this technical argument aside, the real question we have got to determine is whether the words reproduced in the annexure to the orders of the local Government are such as are hit by sub-Cls. (d) and (f) of S. 16 of Act 23 of 1932.

Now, the words reproduced in the annexure run as follows:

"Maulana Hasrat Mohani in an interview to the Associated Press on the suspension of the Civil Disobedience Movement said that an acknowledgment of defeat would not further the cause of national progress. He supported the opinion expressed by Messrs. Bose and Patel in Europe and stated that the fight should be continued till the freedom was attained."

The words reproduced in the annexure obviously are a news item transmitted by a news agency called the Associated

Press of India and it appears from a copy of the Advance newspaper dated 20th May 1933 which has been shown to us that the message in question was sent by post from Cawnpore by the Associated Press. It was published as a news item and the substance of the words in question is that in the opinion of a person named Maulana Hasrat Mohani the suspension of the Civil Disobedience Movement amounted to an acknowledgment of defeat and that such acknowledgment of defeat was not likely to further the cause of what is called national progress. The person concerned stated that in an interview with a representative or representatives of the Associated Press and he went on to refer to certain opinions expressed somewhere in Europe by two persons named, Bose and Patel, and expressed the opinion that the fight be continued till freedom was attained.

It is not clear on the evidence before us who the interviewer was, whether he was, to use colloquial expression, a man in the street or whether he was or is a person of any importance whatsoever and whether the words expressed by him were likely to obtain leaving aside widespread acceptance among a considerable section of the intelligent public. We have no evidence before us as to who this person is, what his standing in the country is and whether the views expressed by him are worth listening to or whether they in the circumstances were calculated to directly or indirectly encourage or incite, etc., what is referred to in sub-S. (f). That is the first observation that I should like to make. The second observation is that in the context the "fight" that is referred to in the last sentence obviously had reference to the question of the continuance of the struggle by means of the Civil Disobedience movement. But here again the value of such an opinion on the part of this person depends upon a variety of circumstances to which I have alluded just now. In the absence therefore of evidence of that nature it is impossible to say that the words in question can have directly or indirectly the effect described or referred to in CIs. (d) and (f), S. 16, Act 23 of 1932.

I leave out of my consideration Cl. (d) because, although the learned Advocate-General has in his argument referred to

Cl. (d), as being one of the sections which can be used for the purpose of, if I may again use another colloquial expression roping in the editor, printer and publisher of the words reproduced in the annexure, he has not really attempted to induce us to hold that Cl. (d) can be brought into effective operation in the present case.

The learned Advocate-General's main contention is that the words in question are hit by sub-Cl. (f), S. 16. In addition to what I have already said about the want of evidence regarding the character and standing of the interviewer I have got to consider in this case, as I attempted to say in previous cases, the entirety of the words as they occur in the annexure in a fair and free spirit and not with an eye of narrow and fastidious criticism. In coming to a conclusion on the specific question raised I cannot shut my eyes to the nature and manner of the publication of the words transmitted as they were by a news agency and I must come straight to the point to discover for myself, as to whether a mere expression of disapproval of suspension of the Civil Disobedience movement on the part of a person in Cawnpore about whom nothing is known on the record before us can have the effect such as is referred to in sub-Cl. (f), S. 16, Act 23 of 1932. I am not unmindful of the fact that the editor or publisher published "news" at his own risk. But whether any real risk has been run in this case depends on circumstances. After giving my very earnest and most careful attention to the question raised I am of opinion that the words complained of are not hit, in the circumstances of this case, by sub-Cl. (f) S. 16, Act 23 of 1932. It is not necessary for me to elaborate this point nor is it necessary for me to amplify it in any manner whatsoever. It is sufficient for me to say that the conclusion is that the words are not hit by sub-Cl. (f), S. 16.

In that view of the matter, in my opinion, this application ought to be allowed and an order should be made setting aside the orders passed by the local Government on 9th June 1933, and directing that the moneys or securities deposited with the Chief Presidency Magistrate be returned to the depositors. There will be no order for costs.

Mukerji, J.—I agree, I only wish to add that after all, it is the effect of the words as published in the newspaper, and not merely the meaning of the words taken by themselves, that has to be considered in order to see whether the statement which is complained of is hit by S. 4. Taking the so-called offending statement as a news item, which it is, it is not possible to hold that it does come within the purview of any of the clauses of that section.

Panckridge, J.—I agree with the order proposed by my Lord for the reasons given by him and also for the reasons given by my learned brother Mukerji, J. I desire however to add a very few words to what has fallen from them. In my opinion the learned Advocate-General is amply justified in saying that the words attributed in the newspaper to Maulana Hasrat Mohani amount to an expression of approval of the Civil Disobedience movement and of disapproval of any proposal for its suspension. I also agree with him that the conduct referred to in Cl. (f), S. 16 is conduct which is connected with and characteristic of that movement. I notice that in the petition the petitioners submit that if the report of the interview is read along with the editorial paragraphs in the newspaper it would appear that the petitioners disagree with the view expressed in the interview regarding suspension of the Civil Disobedience movement. Counsel for the petitioners did not elaborate this argument; but I desire to say that in my opinion the argument is without substance. It is idle for the publisher of a newspaper to say:

"True, the article complained of may amount to poison; but if you search the remaining columns of my newspaper you will find an effective antidote."

It is notorious that newspaper readers seldom read the entire publication: many of them confine their attention to the news items and neglect leading articles and comments. With regard to Cl. (d) it is clear to me that that can have no application. The Government established by law is not referred to in the interview either directly or by implication. With regard to Cl. (f), although as I have said, that clause clearly refers to the activities of those supporting the Civil Disobedience movement, I cannot bring myself to think that a

statement in a newspaper that a gentleman, of whose existence I was unaware until today, approves of the Civil Disobedience movement has a tendency to encourage or incite the readers of the newspaper to support it. It is perfectly true that the report of a speech may have a wider and more mischievous tendency than the speech itself; but in the circumstances of this particular case I find it impossible to draw the conclusion that the words upon which the local Government seek to justify their order for security have such a tendency. I concur in the order to be made.

R.K.

*Application allowed.***A. I. R. 1933 Calcutta 757**

MITTER AND HENDERSON, JJ.

Haridas Haldar—Appellant.

v.

Charu Chandra Sircar—Respondent.

Appeal No. 474 of 1932 and Civil Rule No. 397-M of 1933, Decided on 13th June 1933.

(a) Civil P. C. (1908), S. 60 and O. 38, Rr. 5 and 6 and O. 43, R. 1—Question whether property is capable of attachment having regard to S. 60 is appealable—Appeal need not be restricted to grounds in Rr. 5 and 6, O. 38.

The question, whether certain property sought to be attached is capable of attachment, having regard to the provisions of S. 60, is appealable; and an appeal from an order attaching certain property need not be restricted to the grounds mentioned in Rr. 5 and 6, O. 38. [P 757 C2]

(b) Civil P. C. (1908), O. 38, R. 11 and O. 43, R. 1—Appeal from order of attachment before judgment does not become infructuous when decree is passed.

An appeal from an order of attachment before judgment does not become infructuous merely because of the decree being passed in the suit, as the attachment continues to exist even after the passing of decree. [P 757 C2]

(c) Civil P. C. (1908), S. 60 (f)—Shebait's turn of worship which is alienable is capable of attachment.

Pala or turn of worship of a shebait which is alienable at least to a particular class of person by custom is capable of being attached: 42 Cal 455 and 25 Bom 181, Ref; AIR 1931 P C 160, Rel on. [P 759 C1]

(d) Custom—Proof.

Judgments are instances where the custom has been asserted. [P 759 C1]

Manmathanath Roy and Paresk Lal Shome—for Appellant.

Bejoy Kumar Bhattacharjee, Bireswar Bagchi, Radha Benode Pal, Nirad Bandhu Roy and Prem Rajan Roy Chowdhury—for Respondent.

Mitter, J.—This is an appeal on behalf of the defendant and is directed against an order made on 8th August 1932 under

O. 38, R. 5, Civil P. C. for attachment before judgment of certain palas, or turns of worship, of the famous shrine of Goddess Kali at Kalighat. The Subordinate Judge has directed, notwithstanding the objection taken by the defendant that a pala is not attachable having regard to the provisions of S. 60, Civil P. C., that the pala should be attached and in order to make the attachment effective it is stated that he has appointed two receivers, one the defendant himself, and the other the son of the plaintiff. Against this order the present appeal has been brought.

Two preliminary objections have been raised on behalf of the respondent to the hearing of the appeal. It is argued that there is no appeal allowed by the Code because according to the provisions of O. 38, Rr. 5 and 6 an appeal could only lie on the points which are relevant. In other words, it is suggested that the appeal is restricted to grounds mentioned in Rr. 5 and 6 of the said Order. It is said that the question as to whether the properties sought to be attached are capable of attachment having regard to the provisions of S. 60 is not one of the questions which can be determined in an appeal which is provided for under O. 43 against orders directing attachment before judgment. We are of opinion that there is no substance in this contention; for, to take this view of the respondent would be to restrict the scope of the order and the rules. The rules assume that the property sought to be attached must be one, capable of being attached under the law. This objection must be overruled. The next ground put forward on behalf of the respondent is that this appeal has become infructuous as the decree has already been passed. But it would appear from the provisions of O. 38, R. 11 of the Code that attachment continues to exist even after the passing of the decree. O. 38, R. 9 runs as follows:

"Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed."

Order 38, R. 11 enacts:

"Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

Attachment before judgment has the same effect as the attachment made in execution of the decree. It has been conceded by the learned advocate for the respondent that the question as to whether the property attached is attachable or not can be raised in a proceeding under S. 47 of the Code when the attachment is made in execution of a decree. We do not see why the same consideration should not apply when the attachment is made before judgment. This objection also has no substance. In support of the appeal Mr. Manmathnath Roy has contended, and contended strenuously, that the turn of worship of the Kalighat Temple of a particular shebait is not a property which is attachable under S. 60 and he has referred to the provisions of Cl. (i) of that section and contends that the duty of a shebait is a right of personal service and therefore cannot be attached having regard to this particular provision of the particular clause of S. 60 of the Code. It appears however that the question as to whether the pala, or turn of worship, of a particular shebait of this very endowment is transferable has been the subject of judicial decision and it has been held in the presence of the defendant in the present case in the case of *Mahamaya Devi v. Haridas Haldar* (1) that by custom the pala of this endowment is saleable, it is devisable, and it is capable of being seized in execution of decrees. But the custom is to the effect that the transfer must be made in favour of persons within a limited circle, namely, either the shebait or those who claim through them by succession or otherwise. At p. 466 Mukerjee, J., after advertent to the course of proceedings with reference to the sale and transfer of these palas from the year 1819 has come to the following conclusion:

"There is further no question that a Pala has not only been deemed heritable and partible; it has also been treated as devisable, as is illustrated by the case of the sister of defendant 1, who obtained a pala under the testamentary devise of her father. This, again, involves the recognition of the transferable character of a pala: the exercise of the right to make a bequest implies an assertion of the right to make a transfer inter vivos. It follows, consequently, that the customary right to make a sale mortgage, gift or lease of a pala in favour of persons within a limited circle is closely associated with and possibly developed out of the heritable, devisable and partible character of a pala. A custom of this

description clearly cannot be characterized on any rational ground as unreasonable or opposed to public policy: see pp. 476 and 477 of the report in 42 Cal."

It has been argued that it has been laid down in the decision in the case of *Rajaram v. Ganesh* (2) that a vritti of a purohit attached to a temple cannot be sold in execution of a decree and that such compulsory alienation is not only opposed to the Hindu law and public policy but is also against the provision of the Civil Procedure Code. But the same case points out that this is so under the ordinary law but there may be custom in particular endowment which overrides the ordinary law. In the case of 42 Calcutta, instances have been given where palas have been sold in execution of decrees. It has been said that these decrees might have been mortgage decrees and the custom is only to the effect that there should be voluntary alienation of these palas. The report however does not make any such distinction and the custom is to the effect as has already been stated that these palas are alienable to particular classes of persons. Where alienations can be made in such limited manner the property is still capable of being attached. So it has been held in a recent decision with reference to somewhat different state of facts in the case of the *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Ltd.* (3), and it may be pertinent to the present controversy to reproduce the following passage from the decision of their Lordships of the Judicial Committee of the Privy Council in this case, a passage to which our attention has been drawn by Mr. Bhattacharjee who appears for the respondent. Lord Macmillan said this:

"In considering the question thus raised, it is important to bear in mind the provisions of the Civil Procedure Code on the subject of execution. By S. 51 the Court is empowered on the application of a decree-holder to order execution of the decree (inter alia) by appointing a receiver. Then by S. 60, sub-S. 1, there is rendered liable to attachment, and sale in execution of a decree 'all saleable property, moveable or immovable, belonging to the judgment-debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit, with certain enumerated exceptions. Now while the Moorsheadabad Act renders the immovable properties to which it relates inalienable except to the limited extent permitted, it imposes no restriction on the enjoyment of the rents by the

2. (1901) 25 Bom 181.

3. AIR 1931 P C 160=182 I C 727=59 Cal 1=58 I A 215 (P C).

1. (1915) 42 Cal 455=27 I C 400.

Nawab Bahadoor for the time being. So long as he is entitled to draw the rents he may dispose of them as he pleases. It is true that the income of the properties was conferred on him to enable him to maintain his dignity and station, but should he fail so to apply it the Secretary of State is given the special power of stepping in and drawing the rents himself and applying them for the Nawab's benefit. Unless and until the Secretary of State intervenes the Nawab may employ his income as he chooses, nor is there any restraint on anticipation imposed by the statute or the indenture. The Nawab therefore has a disposing power over the income. Once this is established no question of public policy is involved, and their Lordships are unable to see that either the terms of the statute or the indenture are contravened by aiding the creditors of the appellant to effect payment out of his income of the debts which he has incurred."

Applying this principle to the facts of the present case it appears that a shebait has undoubtedly the power of disposition over the palas according to the custom enunciated in the case to which reference has been made. It is true that that decision is not inter partes but is a very good evidence on the question of custom even though not inter partes. Judgments are instances where the custom has been asserted. If the shebait has disposing power over the income one fails to see why his property should not be capable of being attached although ultimately the property will have to be sold in execution of the decree, if such an eventuality occurs, to a limited class of persons. In this view we are of opinion that the contentions raised by the appellant must fail and this appeal must be dismissed with costs. We assess the hearing-fee at one gold mohur. With reference to the Rule we are of opinion, as it has been conceded by Mr. Roy, that the Rule falls with the appeal, that this Rule must be discharged but there will be no order as to costs in this Rule. Let the order be sent down at once.

Henderson, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 759

AMEER ALI, J.

Karunakumar Datta Gupta—Plaintiff.

v.

Lankaran Patwari—Defendant.

Original Suit No. 1276 of 1929, Decided on 9th February 1933.

(a) Arbitration—Arbitration clause in wagering contract is unenforceable—Suit to set aside an award in pursuance of such

arbitration clause lies—Contract Act (1872), S. 30.

An arbitration clause contained in any wagering contract is a part of the contract and is not to be treated as a covenant distinct from the wagering contract and is therefore equally unenforceable with the contract of wager itself. Hence a suit, by a party to such wagering contract to set aside the award made in pursuance of the arbitration clause, lies: *Case law referred.*

[P 761 C 1]

(b) Vendor and Purchaser—Broker authorized to create contract between himself and buyer—Broker is seller in transaction which follows.

When a merchant or agent is authorized at the outset to create a contract of sale between the buyer and himself and not between the buyer and the supplier, that merchant or agent is in the transaction of sale which follows, in fact and in law, a seller: *Case law referred.*

[P 765 C 1]

(c) Contract Act (1872), S. 30—Wagering contract—Adequate proof of common intention to deal in differences only is necessary.

Though adequate proof of common intention is necessary in the normal affairs of life one cannot expect common intention to be declared in writing, sealed, signed and delivered. There must be enough to make the inference certain that the parties agreed not to give or take delivery but to deal only in differences.

[P 766 C 2]

Pugh and S. C. Roy—for Plaintiff.

B. C. Ghose and P. C. Ghose—for Defendant.

Judgment.—This is a suit to set aside an award of the Indian Chamber of Commerce upon certain contracts for the sale and purchase of jute entered into by the plaintiff. A case, very similar on facts and in principle, was decided by Packeridge, J., in *Chong Wong v. Brijmohan Dhandhania* (1). The facts in outline are as follows:

The plaintiff is a retired District Engineer. In September 1928, he was introduced by one Shisirkumar Ray to the defendant firm represented by Sobhachand. Sobhachand was and is a member of an association called The East India Jute Association, Limited, which was formed in 1927. According to the plaintiff and Shisir, the plaintiff wanted to do "fatka" business. There were meetings between the plaintiff and Sobhachand, at one of which, at any rate, Shisirkumar Ray was present. There is some dispute between the parties as to whether the first interview between the plaintiff and Sobhachand took place outside the offices of the East India Jute Association or at the plain-

1. Suit No. 187 of 1929 Decided on 11th February 1930.

tiff's house. It is not disputed that there were interviews between the plaintiff and Sobhachand, subsequently at the plaintiff's house. It is the plaintiff's case that the matter was discussed between himself and Sobhachand and that it was agreed that no deliveries should be given or taken. According to the plaintiff, this discussion ensued upon the receipt by him of the first contract note, on 12th September 1928. In all eleven contracts were passed between 12th September 1928, and 11th October 1928, all being for the delivery date at the end of December. On these eleven contracts, a sum of about Rs. 929 became due from the plaintiff to the defendant and by reason of the last three contracts Nos. 320, 326 and 331 a lot of one thousand bales was left on hand as a sale by the plaintiff, i. e., one thousand bales were to be bought by him to close the contracts then open.

It is the plaintiff's case that on 12th October, he telephoned to the defendant firm to buy in this outstanding one thousand bales, that his request or order was not carried out, that he insisted upon having them bought in at the opening rate, that the defendant firm would not give him that rate, and that therefore he refused to go on with the transaction and repudiated liability for any loss which might ensue. According to Sobhachand, there was no such telephone conversation; the plaintiff would not give instructions to close, so that he had to close according to the system of the association on 16th October 1928, and that did so at a rate which resulted in a loss of Rs. 2,043. This sum together with the sum I have already mentioned is due upon the eleven contracts. Rs. 2,968-12-0 in all was claimed by the defendant firm. On the plaintiff's refusal to pay, the defendant firm submitted the dispute to the arbitration of the Indian Chamber of Commerce, in accordance with one of the clauses of the contract. It is conceded, that the plaintiff had notice of the arbitration. He ignored it. On 12th April 1929, an award was made against the plaintiff for Rs. 2,847-4-6 and costs and on 28th June 1928, this suit was filed. I need not refer to the pleadings. The essential questions involved are as follows:

(1) Does the award comprise or include matters not referred? (1) (a) If so, can the

award be set aside on that ground? (2) Are the defendants entitled to enforce the contracts, having regard to the provisions of S. 236, Contract Act? (2) (a) If not, is the plaintiff entitled to have the award set aside on this ground? (3) Were the contracts by way of wager? (3) (a) If so, is the plaintiff entitled to have the award set aside?

That I think, covers the whole ground. With regard to question (1) and (1) (a), I hold that the award is not bad. With regard to question (2) (a), I should be prepared to hold the award to be in any event binding.

Question (2) is answered in the affirmative, i. e., the point under S. 236 fails. The reasons will appear from the discussion on the last two questions. I will deal with questions (3) and (3) (a) in the reverse order. 1. Can the plaintiff sue to set aside the award on the ground that the contracts were wagering contracts? 2. If so, were the contracts in fact wagering contracts? 1. It has been contended by the defendant that the matter having been decided by the arbitrators, the Court has no jurisdiction to re-open the matter. It is conceded that, where the formation of the contract is challenged, e. g., where it is said that one party did not sign, there a suit lies. Again, it is conceded that where the plaintiff alleges that the contract is voidable on the ground of fraud, coercion, or misrepresentation, there again a suit lies. But it is contended that, where the formation of the contract is admitted where it is admitted that there is a contract, but is argued that the contract is void by reason of want of consideration, mistake, illegality or any other provision of law, there the parties remain bound by the agreement to arbitrate.

In support of this contention Mr. Ghose relied upon certain passages in *Bajinath v. Mansukrai Pannalall* (2) read with the argument of counsel. I do not, however read the passage in *Bajinath v. Mansukrai Pannalall* (2), as meaning any more than that the Court will not assist the party setting up a case of wager by granting him equitable relief by way of injunction restraining arbitration proceedings. Rankin, J., in *Sardarmull Jessraj v. Agar Chand Mehata & Co.* (3), took the same view. I see nothing in these cases, which negatives the right of a party to a wagering

2. A I R 1919 Cal 826=49 I C 988.

3. A I R 1919 Cal 89=52 I C 583.

contract to sue to set aside an award made upon a submission contained in the contract. In *Aubert v. Maze* (4), such an award was set aside, but there the matter had been referred to the Court by the arbitrators. In *Smith, Coney and Barrett v. Becker, Grey & Co.* (5), the principle is clearly acknowledged that if the contract is challenged as being void on the ground of illegality, the arbitration clause contained in the contract is also avoided. The authority, to which I was referred by Mr. Roy, *Joe Lee, Ltd. v. Lord Dalmeny* (6), although dissimilar on facts, is, I think, an authority for the proposition that the arbitration clause contained in any wagering contract is a part of the contract and not to be treated as a covenant distinct from the wagering contract and is, therefore, equally unenforceable with the contract of wager itself.

I consider that the same result follows from an analysis of the Contract Act. By S. 2 (g) of the Act, an agreement, which is not enforceable by law, is void. By S. 2 (h), it is only an agreement enforceable by law that is a "contract." By S. 30, an agreement by way of wager is a void agreement. It is no more a contract than an agreement affected by Ss. 20, 23 or S. 25. I, therefore, agree with the view expressed tentatively by Panckridge, J., in *Chong Wong's case* (1), to the effect that such a suit lies.

2. Were the contracts in suit by way of wager?

It will be convenient at once to summarise Mr. B. C. Ghose's argument on this question.

1. He contends, in the first place, that it matters not if the contracts were by way of wager, because his client was in the transactions in question an agent, and that as an agent he is entitled to his commission and also to an indemnity on account of loss incurred in entering into other contracts upon the mandate of his employer, the plaintiff; 2. He contends, secondly, that the very possibility of "common intention" to wager is in this case excluded by the relationship of the parties and the system under which business was transacted; 3. Thirdly, he contends that in point of fact "common intention" has not been established as between the plaintiff and defendant, far less between the plaintiff and any other person.

1. The answer to point (1) depends upon whether the defendant was, in fact, and, in law, an agent and not a

principal. In the former case, the plaintiff, apart from any special statute, would be entitled to his indemnity whether the contract he procured was not of a wagering nature; 2. Mr. B. C. Ghose's second point may be illustrated by the following example. By contract No. 326, the plaintiff (whom I will call A) bought 250 bales. The defendants, Lankaran Patwari (whom I will call B) gave A a bought note at the rate of Rs. 67.13.0. B, in turn, entered into a transaction with Santokchand Singhi, another modi (whom I will call C) at the same rate of Rs. 67.13.0. C had an order to sell from Ramoharan Panchiram (whom I will call D). The order was, in point of fact, to sell 1,780 bales. Mr. B. C. Ghose was first inclined to suggest that the two principals in the transaction were A and D and that was also, as far as I recollect, the contention put forward in *Chong Wong's case* (1). But his real contention before me has been that A and C were the two principals in the contract of sale, and I deal with the case on that basis. Mr. Ghose's point is this, that, B being the agent, A, being the buyer, and C, being the seller, the chain or circuit of intention is interrupted. In other words, A and C cannot be connected in a common intention to wager. Before proceeding to the law, I propose to discuss the materials on this point under the following heads: (a) the system; (b) the oral evidence; (c) the contract itself.

(a) With regard to the system, I propose merely to give what appear to me to be its principal features.

The East India Jute Association, Ltd., was founded in 1927. There had been a previous association, which came to an untimely end, but that has no bearing on present matter. The secretary of the association is Mr. Jewanram Pandit, who gave evidence, a voluble and impressive gentleman. The association has elaborate rules. They were most carefully drawn in accordance with legal advice. The association consists of about 200 members or modis. These form what is in the vernacular referred to as the "bhitar bazar" and may be called the inner ring. The year is divided up into four three monthly periods, all contracts within any one period being made deliverable at a special date fixed by the association towards the end of

4. (1801) 2 Bos & P 871=5 R R 624.

5. (1916) 2 Ch 86=84 L J Ch 865=81 T L R 151=112 L T 914.

6. (1927) 1 Ch 800.

the period. There is a weekly rate fixed by the association and weekly adjustments between the modis carried out by the association by methods similar to those of a clearing house, that is to say, each week, the modis amongst themselves pay such margins as accrue to each other until the delivery date arrives, when the matter is again adjusted by payment of difference, if any difference remains, or, it is said, by delivery if delivery is insisted on. There is a corresponding weekly adjustment between the modi and his outside customer, the member of the outer ring. Brokerage is charged by the modi against the outside customer, at three annas per bale, upon contracts of sale, it being understood that in the normal course, the contract of purchase will be covered by a contract of sale through the same broker. The modi does not receive brokerage as between himself and the other modi, that is to say, in the inner ring no brokerage is charged. The transaction is effected by the modi, who deals with the outsider by bought and sold notes, in the form of Ex. A. He deals with the other modis on entirely different forms. In his transaction with the other modi, he may split up the amount sold by his outside customer and vice versa. It is not necessary that the other modi should have, at his back, another outside customer, that is to say, taking the symbols I have given, it is not necessary that C should have a corresponding outside customer D. It does not happen, and the illustration I have given is an instance, but as I read the evidence, the other form of transaction A, B, C is quite as common, if not more common. The transactions in suit are of both kinds. It will appear therefore that the modi does more than one kind of business. In one transaction he will be earning only brokerage (in the position of B). In another transaction he will be standing to gain or lose (in the position of C). The same man may have a number of transactions of each kind in one day.

For the details of the system reference must be made to the evidence of Mr. Pandit. Mr. Pandit is naturally proud of the rules of his association. He is convinced of their efficacy as a preventive for gambling. According to him it is quite impossible, having regard to the system in force, for any person, how-

ever anxious to gamble, to enter into a gambling transaction with any modi who is a member of the association. His reasons are of two kinds. First of all he points to the amount of deliveries actually made by members as they appear from the statistics. Secondly, he was at pains to show that one modi, when he makes his contract with another modi in the inner ring, business is done in such a manner that the two parties cannot possibly have a common intention. In my opinion what Mr. Pandit was really doing in the witness box was to argue that, having regard to the requirements of the law as to wager, it would be difficult, if not impossible for any party setting up a case of wager to establish common intention. In other words he was anticipating the argument on this point put forward by Mr. B. C. Ghose, with which I am now dealing. (b) With regard to oral evidence, it is, in my opinion of limited value. Witnesses when asked whether they were principals or agents, are in point of fact asked the very question which I have to decide. Sobhachand, when asked was clearly at a loss how to describe himself and certainly did not wish to be tied down: see questions 16, 18 and 21:

"In all these contracts were you acting as broker?"

"In these contracts I was acting in accordance with the rules of the Association."

On the other hand one matter of importance is clear from his evidence, i. e., that he regarded the transaction between himself and the other modi as that of principal and principal. Indeed Mr. Ghose did not contend in otherwise:

Q. 198 "Will you tell us which of these five men?"

"That refers to the five modis who had between them bought a certain lot sold by the plaintiff."

"Can you tell us which of these five was the other party to this contract?"

"I would be the other party."

"And you in turn sold to five other people similar amount in separate lots?" "Yes, to five modis."

Q. 129. "As regards these transactions, these direct dealings between modis, there is no question of principal or agent or anything else?" "Yes."

As regards Pandit, Q. "He (the outsider) is never concerned with any other party but broker he is dealing with?"

"Yes."

And Q. 161. "My members perform a dual function. So far as outside parties are concerned, they are brokers. While between themselves as members and members they are in the capacity of principals."

As regards Karuna, all he says as to the relationship between himself and the defendants is:

Q. "If it was only a paper transaction, you did not care whether they are brokers or what they were?"

"Of course I did not care what they were but they represented themselves to me as brokers."

Q. "But you would not expect them to have another principal behind them?"

"I think there were."

(c) Lastly there is the contract itself. I have already explained that as between the broker *B* and the outsider *A*, the transactions are carried out in rather a peculiar manner. *A* bought or sold note of a formidable nature with 27 clauses is passed by *B* to *A*, but no corresponding note is passed to *C*. The bulk of the printed matter in these notes is purely appropriate to an ordinary mercantile contract made through a broker. Except for the clause, I am about to quote, there is nothing to indicate that *B* is other than a broker in the strict sense of the term. Cl. 26 reads as follows:

"The contract will be performed between you and ourselves and you will not be entitled to inquire with whom the corresponding contract has been entered into or to require the performance thereof. No contractual privity is established with the person with whom the corresponding contract is entered into."

It goes on to talk of delivery. The contract between *B* and *C* in the inner circle consists merely of a slip in a counterfoil book in the following terms:

"Subject to the bye-laws of the East India Jute Association, we have this day bought from you, etc."

I have already mentioned that *A* sells 1,000 bales, *B* may split up and sell in any quantities he pleases, e. g., 250 to *C*₁, *C*₂, *C*₃, *C*₄ and vice versa.

Mr. B. C. Ghose when confronted with this clause, contended that *A* and *C* can be principals in a contract of sale without privity of contract. In other words, that *B* can remain agent notwithstanding that he is the other party to the contract of sale under Cl. 26 of this contract. For this proposition he relies on the observations of Lord Blackburn in *Robinson v. Mollett* (7) and in *Ireland v. Livingston* (8). That brings me to the law. The proposition for which Mr. B. C. Ghose contends has already, in this Court, been subjected to the most searching criticism by the pre-

sent Chief Justice of Rangoon in *Holmes Wilson & Co., Ltd. v. Bata Kristo De* (9). It is not possible however to appreciate the precise significance of that decision and its bearing upon the point in issue without some knowledge of its inner history. On 28th March 1924, Page, J., gave judgment in *McLeod & Co. v. Ivan Jones & Co.* (10). The plaintiffs *McLeod & Co.*, had imported from America a large number of motor cars upon the order of the defendants (*Ivan Jones & Co.*). *Ivan Jones & Co.* had refused to accept delivery on the ground of defect or difference from description. The plaintiffs had sued as principals upon documents similar or analogous to an indent.

During the case, the plaintiffs, in order to circumvent the defence, sought to amend by pleading in the alternative that they were agents and therefore notwithstanding any default by the shippers entitled to an indemnity. Mr. Pugh for the plaintiffs propounded the view for which Mr. Ghose is now contending and relied on observations of Lord Blackburn in the two cases mentioned and also upon the judgment of Sir Lawrence Jenkins in *Paul Beier v. Chotalal Javerdas* (11). Page, J., rejected the proposition and, in the course of the discussion, gave expression, in unmistakable terms, to the following sentiments—that Lord Blackburn was wrong and that Brett, L. J., was right, that Sir Lawrence Jenkins in *Paul Beier v. Chotalal Javerdas* (11) was tainted with Blackburnian heresy, and that Page, J., had long awaited an opportunity of chastising these errors and incidentally of settling once and for all the law as to indent contracts. The amendment was disallowed. The plaintiffs were held to their original case of sellers and lost.

Page, J., however in his judgment adverted to the other aspect of the case, in a passage, which I have caused to be annexed to this judgment in the form of a footnote. The opportunity sought for by Page, J., arose in the suit of *Holmes Wilson & Co., Ltd. v. Bata Kristo De* (9), then pending. This was a suit similar to *Paul Beier v. Chotalal Javerdas* (11). The defendant (indentor) had ordered through the plaintiffs, merchants, quantities of metal goods upon an indent

7. (1875) 7 H L 802=44 L J C P 362.

8. (1872) 5 H L 395=41 L J Q B 201=27 L T 79.

9. AIR 1927 Cal 668=104 I C 268=54 Cal 549,

10. AIR 1926 Cal 189=97 I C 218.

11. (1904) 80 Bom 1=6 Bom L R 948.

giving fixed price and providing no commission to the merchant. The merchant had entered into a contract with the "suppliers" at a price below that mentioned in the indent. They had handed to the indentors "a placement report." The suit was originally framed as one by sellers against buyers for damages on account of failure to take delivery. Before the hearing however the plaintiffs' advisers, in view of the warning received in *McLeod & Co. v. Ivan Jones & Co.* (10) and, apprehending heavy weather from that quarter, took the precaution to amend by pleading in the alternative that, if agents, the plaintiffs had acted in accordance with mercantile custom known to the defendant who had consented to their so acting. At the hearing counsel for the defendant abandoned all defences on the merits and—if I may use the expression "struck canvas and ran before the wind with *Robinson v. Mollett* (7)." A further result was however that the argument which Page, J., proceeded to demolish was not that advanced by counsel for the plaintiffs, but was the one which Page, J., had so long sought an opportunity to demolish. This he effectively did at pp. 562 and 563 (of 54 Cal. in *Holmes Wilson & Co's case* (9) :

Page 562 (of 54 Cal.) "In other words, in effecting the contracts by which the defendant purchased the goods, were the plaintiffs to be regarded vis-a-vis the defendant as agents or principals? Learned counsel for the plaintiffs during the course of the trial was disposed to argue upon the authority of certain passages in the judgment of Blackburn, J. in *Ireland v. Livingston* (8) that in respect of these sales the relationship of the plaintiffs to the defendant was that both of agent and principal, but, in my opinion, these passages do not support the proposition for which they were cited. In *Robinson v. Mollett* (7), Blackburn, J., in expressing an opinion contrary to that of Brett, J., and other learned Judges, appeared to think that an agent might purchase goods for his principal without himself being the vendor or creating privity of contract between his principal and a third person. But the view that found favour with Blackburn, J., as I understand *Robinson v. Mollett* (7), was not accepted by the House of Lords, and I am clearly of opinion that under the contracts of sale by which the defendant purchased the goods in suit the plaintiffs inevitably must have been either principals or the agents of the defendant, and in the eye of the law cannot be regarded as filling at the same time both capacities."

Page 563 (of 54 Cal.) "In my opinion where goods are purchased through A by B, A inevitably must either have sold the goods to B on his own account as a principal, or as agent for B have created privity of contract between B and a third person: *Foote v. Wray* (12), *Ireland*

v. Livingston (8), *Robinson v. Mollett* (7) *Cassaboglou v. Gibb* (13)."

These passages should be compared with the first portion of the judgment in *McLeod & Co. v. Ivan Jones & Co.* (10) The argument, which the plaintiffs attempted to put forward, was not that the merchant was both seller and agent in the contract of sale but that (i) the merchant was from the outset a seller of the goods with certain of the rights and liabilities of an agent, appending to to him, or (ii) that, assuming the merchant to be, at the inception, an agent, as soon as a supplier was found, the contract placed and the indentor notified, a contract of sale between indentor and merchant developed naturally from the indent nucleus (i. e., without any fresh consent by the indentor). That from that point of time at any rate the merchant was a seller, notwithstanding that certain agency rights and liabilities might continue to operate. In other words, that there were in the transactions two parallel relationships in contact with each other—in terms of biology—that conditions indicated not a hybrid, but two organisms symbiotically combined. In the end Page, J., held:

"(a) that under the former indents in suit the relationship of principal and agent was created between the defendant and the plaintiffs: See p. 564; (b) That by usage in the case of indents as described, the merchant is entitled to buy from the supplier at one price and sell to the indentor at another price: See p. 759; (c) That the defendant consented to the plaintiffs performing the contracts in suit in the manner sanctioned by the said usage." See pp. 579 and 582.

It will appear from the report that Page, J., did not, in so many words, determine that the plaintiffs were sellers. This question became of practicable importance during the inquiry as to damages ordered by Page, J. The defendant contended that the plaintiffs were entitled to an indemnity only: *Cassaboglou v. Gibb* (13). The view taken by the plaintiffs was that the case had travelled in a complete circle and that the effect of the decision was to hold that

"quod the contract of sale, the contract between the plaintiff and the defendant was one of vendor and purchaser: see p. 563."

On an application to Page, J., he declined to express any further opinion
13. (1888) 11 Q B D 797=52 L J Q B 588=48
L T 850=32 W R 188.

but in fact directed that the inquiry should ascertain the difference between the contract and market price on the dates when the defendant should have taken delivery. Having regard to *Cassaboglou v. Gibb* (13), it appears to me that the conclusion is inevitable, that Page, J., held the plaintiffs to be sellers and that the real effect of the case is to decide that when a merchant or agent is authorized at the outset to create a contract of sale between the buyer and himself and not between the buyer and the supplier, that merchant or agent is, in the transaction of sale which follows, in fact and in law a seller. Before proceeding to discuss the Indian authorities other than *Holmes Wilson & Co., Ltd. v. Bata Kristo De* (9), I desire to make certain observations with regard to the three English cases which have been referred to. As regards *Ireland v. Livingston* (8), I desire to express a doubt whether Lord Blackburn ever intended to convey that an agent qua agent can be a principal in a contract of sale. Did he mean any more than this: taking indenter A, merchant and commission agent B and supplier C, that B qua contract of employment is always an agent. That B qua contract of sale may be (a) an agent without any liability; (b) an agent with liability as guarantor, or (c) the seller; and that in case (c) the two contracts, the one of employment and the other of sale, may continue to exist side by side. As regards *Robinson v. Mollett* (7), I desire to suggest that perhaps too much has been made of this case and that the whole result may be summarized as follows:

"When there is only the relation of broker and customer the broker cannot satisfy the terms of his employment by selling his own goods to the customer. Apart from the special circumstances of the case *Robinson v. Mollett* (7) establishes no more than this. Lord Halsbury in *May v. Angeli* (14)."

As regards *Cassaboglou v. Gibb* (13), I have found this case as difficult to appreciate as to pronounce. In that case B the merchant and commission agent had sued their buyer A for failure to take delivery. It was held that B had not created privity of contract between A and C the foreign supplier, yet it was held that B could not recover against A except on the basis of indemnity. This result appears to me difficult to reconcile. 11. (1899) 14 T L R 551.

cile with the view taken by the same learned Judge, Brett, L.J., of the position of a commission agent with foreign principal, e.g., in *Ex parte Myles: In re Isaacs* (15):

Now, what is the meaning of sending such an order to a 'commission agent'? (B) It means that Morrice & Co. (A) direct or request Elkin & Co. (B) to buy the goods as principals from Turner & Co. (C) and to sell them again as principals to Morrice & Co. (A), but subject to this, that Elkin & Co. (B) bind themselves to sell to Morrice & Co. at the same price that they pay to Turner & Co., adding only to that price the agreed commission between themselves and Morrice & Co."

It will be seen that, in *Cassaboglou v. Gibb* (13), the merchant and commission agent was executing the order on a commission basis and therefore would, in no event, be entitled to more than the agreed commission plus protection against any loss suffered by him in carrying out the transaction. Had the commission agent been working on difference in price the result would possibly have been otherwise. I now turn to Indian authorities other than *Holmes Wilson & Co., Ltd., v. Bata Kristo De* (9). These arise out of transactions of two kinds, foreign or indent trade [of which *Holmes Wilson & Co., Ltd., v. Bata Kristo De* (9) is an example] and provincial trade known as pukki and kutchi adat business, in particular that carried on from Bombay. It so happens that in Vol. 30 of *I. L. R. Bom.* both classes of cases are represented: both being decisions of Sir Lawrence Jenkins on appeal. At p. 1 is reported the case of *Paul Beier v. Chotalal Javerdas* (11), a suit on Indent Contract which has already been referred to. In that case Sir Lawrence Jenkins proceeded upon the usage proved (p. 23). He was careful not to decide whether the merchant was or was not a principal.

Page 24. "Moreover the argument assumes that the contract between the parties was that of agency."

Page 25. "In the view however that I take of the case it is not necessary nor is it desirable that we should decide whether on the acceptance of the indent the relations of the parties became crystallised into those of vendor and purchaser pure and simple."

In other words, Sir Lawrence Jenkins took the line of least resistance. He took the same line in *Bhagwandas Narotamdas v. Kanji Deoji* (16). This was a case of pukki adat contract. It was 15. (1885) 15 Q B D 39=54 L J Q B 566.
16. (1905) 30 Bom 205=7 Bom L R 611.

held that by established usage no privity of contract is created between the up country constituent and the Bombay Merchant. Both look to the pukka adatia alone (pp. 213-215) and that the contract is solely between pukka adatia and the Bombay merchant, who is not entitled to any contract with the up country constituent.

Page 216. "The evidence does not (in my opinion) show that the relations between the pukka adatia and the up country constituent is that of mere seller and buyer On the other hand I do not think there was the relation of principal and agent pure and simple."

Page 217. "I do not say that there is no relation of principal and agent between the parties at any stage So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated."

In this case, the pukka adatia had sued as principals and the defendant had set up liability to account. In *Burjorji Ruttonji Bomanji v. Bhagwandas Parashram* (17), the point in question arose in direct relation to the question of wager. The result of the decision was that the contract being between pukka adatia and Bombay merchant on the one hand and pukka adatia and up country constituent on the other, in a suit by pukka adatia the defence of wager would be established by proving common intention on the part of pukka adatia and the party sued. It would not be necessary to establish common intention between Bombay merchant and up country constituent, there being no privity of contract between them. The plaintiff appealed to the Judicial Committee. Unfortunately the defendant was not represented and the appeal was allowed ex parte. The ruling of the Board through Sir Lawrence Jenkins is to be found in *Bhagwandas Parashram v. Burjorji Ruttonji Bomanji* (18). Except for the finding that, in the circumstances of that case, common intention was in fact absent, I share the difficulty expressed by McLeod, C. J., in *Manilal Raghunath v. Radhakisson Ramjiwan* (19) in discovering what legal principle

was intended to be laid down. In *Manilal Raghunath v. Radhakisson Ramjiwan* (19), the whole matter came again before the Bombay Court in appeal and so far as matters of principle are concerned this is the authority which I propose to follow. At p. 406 (of 45 Bom.) it is pointed out that :

"If the contract between the two is a contract of employment, such a contract can never by its very nature come within the definition of a wagering contract and the pukka adatia must win unless the constituent can bring the contract within the provisions of Bombay Act 3 of 1865."

At p. 419 (of 45 Bom.) it is pointed out that the pukka adatia by reason of the fact that he creates no contract between Bombay merchant and up country constituent is excluded from any class of mercantile agent. In other words he is a seller. At p. 424 (of 45 Bom.) the Court found an understanding that all transactions should be closed by payments of differences not only between plaintiffs and defendants but also between the plaintiffs (pukka adatia) and the persons with whom the plaintiffs had made covering contracts. The passage appears to me to relate to a condition of affairs very similar to those disclosed by the evidence in the present case. Finally in *Chong Wong v. Brijmohan Dhandhanias* case (1), Panckridge, J. inclined to the view that, by reason of Cl. 26, Ex. A, the so-called broker was in fact a principal. For reasons above explained, with this view I agree. In other words, the ingenious attempt of the East India Jute Association, Ltd., to devise a system whereby the whole transaction could be confined to A, B yet reserving to B the privilege of immunity from the effects of the law as to wager fails. (3) There remains the question, whether there was common intention in fact. Now, I agree with everything that has been said as to the necessity of adequate proof of common intention, subject to this, that in the normal affairs of life one cannot expect common intention to be declared in writing, sealed signed and delivered. I agree that there must be enough to make the inference certain the parties agreed not to give or take delivery. I agree also that the distinction between speculation and wager must be borne in mind. First, as regards common intention, between plaintiff A and the defendant B. Of the two,

17. A I R 1914 Bom 819=20 I C 884=38 Bom 204.

18. A I R 1917 P C 101=44 I C 281=45 I A 29=42 Bom 378 (P C).

19. A I R 1921 Bom 288=45 Bom 386.

other things being equal, I do not for a moment say that I should prefer Karuna's evidence. The defendant Sobhachand seemed to me a perfectly respectable business man, carrying on a business which he regards as respectable, and doing business so far as this case is concerned in a perfectly respectable manner."

But I do hold that enough was said and done between the parties to make it perfectly clear that there was to be no giving or taking delivery and that that was the agreement. I think that Shishirkumar Ray is to be believed to this extent, that he did explain the whole system to the plaintiff. Sobhachand himself states that he did so (questions 147 and 267). I have no doubt that the plaintiff stated that he wished to do "fatka business" and that the parties agreed to do such business to which they attach a common meaning, "wager." Secondly, as regards common intention between A and C, the other broker, I take the view that if A proposes to wager and C proposes to wager, there being no meeting between the two, if the two parties are brought into relationship by some intervening machinery common intention would exist. That is to say, if you can regard these transactions as contracts between A and C, as I do not, then assuming the conditions above described the contract between A and C would be by way of wager. In this case, although there is no direct evidence, I would be prepared to draw the inference that in all the transactions in suit the "other modis" with whom the defendant made covering contracts, also had the intention never to give or take delivery: See for a similar finding *Manilal Raghunath v. Radhakisson Ramjiwan* (19). The whole system and evidence points to such a conclusion. I do not intend that anything I have said should be regarded as a finding against the East India Jute Association, Ltd., or as to the transactions of the association. On the contrary, it appears to me that its system is admirably adapted to various classes of business, substantial trade, speculative trade, and wagering. My decision is solely a decision that the plaintiff was gambling with Sobhachand. The plaintiff is entitled to have the award set aside.

As regards costs, I take a definite

view. The plaintiff considers that he has some grievance in regard to his directions to sell on 12th October. As far as I am concerned, that is not established to my satisfaction. I do not say the system as it has been described could not lead to abuses. But in this case Sobhachand struck me as an honest man. The plaintiff has set up a case of fraud. He has set up a case under S. 236, Contract Act, which on my finding, that he knew perfectly well what Sobhachand was going to do and what position he was occupying fails. This Court does not enforce wagering contracts, and according to my view, will set aside awards based on wagering contracts. But it seems to me to allow people to wager as long as they win and to repudiate their losses when they lose is not discouraging but rather encouraging persons who wish to gamble. I therefore propose to make no order as to costs. I have heard Mr. Roy on the question of costs. Right or wrong, the view which I have already expressed is the one that appeals to me.

K.S.

Order accordingly.

A. I. R. 1933 Calcutta 767

O. C. GHOSE AND S. K. GHOSE, JJ.

Jyoti Prosad Singha Deo Bahadur—Appellant.

v.

Kenarem Dubey and others—Respondents.

Appeal No. 137 of 1929, Decided on 8th February 1933, against original decree of Dist. Judge, Burdwan, D/ 29th January 1929.

Land Acquisition Act (1894), S. 30—Compensation awarded to kheraji brahmottardars for acquisition—Minerals not acquired—No abatement of rent claimed—Zamindar is not entitled to participate in compensation—Landlord and tenant.

Kheraji brahmottardars were awarded compensation for acquisition of lands. The minerals to which the zamindar was entitled were not acquired, nor was an abatement of rent claimed or allowed by such acquisition:

Held: the zamindar was not entitled to any portion of the compensation money: 30 Cal 801; 5 C L J 662; 17 I C 163 and AIR 1914 Cal 726, Ref. [P 768 C 2]

N. N. Sircar and Karunamoy Ghose—for Appellant.

Joges Chandra Roy, Gopendra Krishna Banerjee, Purna Chandra Chatterjee and Sailendra Nath Banerjee—for Respondents.

C. C. Ghose, J.—The facts giving rise to this appeal, shortly stated, are as follows: 73 bighas 3 cottas and 4 ohhitaks of land in Mauza Dosra Napuria were acquired under the Land Acquisition Act. It appears that the land in question was in the actual possession of Messrs. Apcar & Co. They were tenants under certain Kheraji Brahmottardars and these latter held the land under Raja Jyoti Prosad Singh Deo Bahadur, zamindar of Panchkote. Messrs. Apcar & Co., were awarded a sum of Rs. 18,507-11-0 as compensation and they were satisfied with the award. As regards the rest of the parties, namely, the zamindar and the Kheraji Brahmottardars a sum of Rs. 30259-11-9 was awarded. There is dispute between the two sets of persons viz., the zamindar and the Kheraji Brahmottardars as to the division of this last mentioned sum of money. The District Judge, on consideration of the evidence adduced in the case, came to the conclusion that no part of this said last mentioned sum should go to the zamindar but that the entirety of the sum should be divided among the Kheraji Brahmottardars. It is against this judgment that the present appeal has been preferred.

It appears that the minerals to which the zamindar would be entitled have not been acquired under the Land Acquisition proceedings. That has been made clear to us by the production of the original declaration under the Land Acquisition Act and the learned Advocate-General who appears on behalf of the appellant has not pressed any claim on account of minerals. We need not therefore take into our consideration the question as to whether or not the zamindar had been deprived for all time of all the minerals under the land which was acquired. That being so, the only question is whether the zamindar had made good his claim to participate in the sum of Rs. 30259-11-9. Now it appears that there were three mouzas, in respect of which satisfactory documentary evidence has been produced (see in this connexion, Ex. 19) from which it is clear that the rents payable in respect thereof have remained the same from the Bengali year 1197 corresponding to 1790 A.D. It is also clear from Ex. B printed in the paper-book in this case and from the record of rights that these

rents which are set out in Ex. 19 have remained the same till, at any rate, 1924 and that one of the mouzas, namely Dosra Napuria is included in mouza Santa which again is included in mouza Narshingband. From these documents the conclusion may fairly be drawn that so far as Dosra Napuria is concerned, the rent has remained unaltered from 1790 A. D., and in that state of circumstance the further conclusion follows that the rent in question is mokarari rent and that save and except a sum of Rs. 2-8-0 the landlord is not entitled to anything else per year on account of rent.

The question therefore is whether the landlord, i. e., the appellant is entitled to anything else, except the capitalised value of the rent which he was getting. It is clear from what has been stated to us at the Bar that no abatement has been allowed and the respondents have informed us that no abatement of rent is intended to be claimed on behalf of the Brahmottardars on account of the area acquired. That being so, no question of the landlord being allowed the capitalised value of the said sum of Rs. 2-8-0 or any portion thereof need be taken into consideration. Now if therefore the landlord does not suffer any abatement or diminution of rent, then on the state of the authorities in this Court and also on the facts of this case, it is clear that he cannot get any portion of the compensation money awarded by the land acquisition Collector: See in this connexion, the cases reported in *Dinendra Narain v. Tularam* (1) *Bhupati Roy v. Secy of State* (2) *Bipradas v. Sarat Chandra* (3) and *Gunpat Singh v. Motichand* (4). That being so, this appeal has no substance and must, accordingly, be dismissed with costs. We assess the hearing fee in this appeal at 15 gold mohurs.

S. K. Ghose, J.—I agree.

K.S.

Appeal dismissed.

1. (1909) 80 Cal 801=7 C W N 810.
2. (1907) 5 C L J 682.
3. (1912) 17 I C 168.
4. AIR 1914 Cal 726=17 I C 171.

A. I. R. 1933 Calcutta 769

C. C. GHOSE AND S. K. GHOSE, JJ.

Shyam Sundar Debanshi—Plaintiff—Appellant.

v.

Sm. Kamal Kumari Dassi and others
Defendants—Respondents.

Appeal No. 1 of 1932, Decided on 8th December 1932, from original decree of Dist. Judge, Birbhum, D/- 30th November 1931.

(a) Will—Onus of proving that will should be admitted to probate is on person propounding will—In such cases Court should first look to positive evidence of execution and then test it by terms of will—Court should not embark on an inquiry as to execution of will by discussing its terms seriatim at considerable length.

The onus of proving that a will should be admitted to probate is on the person propounding the will. The proper procedure to be followed by the Court, in such cases, is to look at the positive evidence in favour of execution in the first place, and then only to test that by evidence of terms of the will. No doubt where the circumstances are such as cast suspicion upon the fact of the execution of the will the Court, in examining the evidence bearing on that point, will of necessity exercise the utmost vigilance and will insist upon the propounder removing all grounds of suspicion that might exist. This process is not to be reversed, and the Court should not embark upon an inquiry as to whether or not the will has been executed by discussing seriatim and at considerable length the terms of will : *A I R 1932 P C 315* and *21 Cal 279, Ref. [P 770 C 1, 2]*

(b) Evidence—Value.

Because a person is a very junior muktear and young man, that is no reason by itself for discarding his evidence. [P 773 C 1]

(c) Appeal—Though regard must be had to finding of fact of trial Court, appellate Court can come to its own conclusion.

In questions relating to facts, although regard must be had to the finding of a Court of first instance, the appellant is entitled to invite the appellate Court to come to its own independent conclusions thereon. [P 772 C 2]

A. K. Roy, Bijan Kumar Mukherji and Hari Prasanna Mukherji—for Appellant.*N.K. Basu and Surendra Nath Basu* 2
—for Respondents.

C. C. Ghose, J.—This is an appeal against the judgment and decree of the District Judge of Birbhum, dated 30th November 1931, refusing probate of the will of one Ramaprasanna Debanshi, dated 15th January 1930. The testator about the time of the execution of the will was about 36 or 37 years of age and he died on 19th March 1930, after having, it is alleged, executed the said will. So far as the signatures on the will itself are concerned, it is not disputed that

those signatures were those of the testator. But what is suggested on behalf of the objectors is that those signatures had been put by the testator sometime previously on blank pieces of paper and that such papers had been left by him with Shyam Sundar Debanshi and that the latter in conspiracy with a number of other persons had written out on these blank papers a will purporting to be a will of the testator. In other words, the contention is that the body of the will is a forgery and that there is internal evidence to show that the will itself had not been duly executed by the testator. It is further contended that if one examines the contents of the will, the irresistible conclusion is that the will is of such an extraordinary character that very grave suspicion must attach to the will and that in the circumstances, a Court of probate will not admit the said will to probate unless and until the propounder satisfied the conscience of the Court that the will is a genuine one and that it was duly executed by the testator and that the circumstances alleged on behalf of the objectors, properly scrutinised and analysed, do not throw any suspicion whatsoever upon the question of the execution of the will by the testator.

Now, the learned Judge has gone into the matter at very great length. He has in his judgment discussed almost every point that was raised on behalf of the objectors and he finally came to the conclusion that the will was of such an extraordinary character, having regard to the state of the family of the testator to the fact that the will was alleged to have been executed by a young man of 36 or 37 and to the character of the dispositions themselves, that taking all circumstances into consideration, it was impossible to hold that the will had been executed by the testator.

The learned Judge after setting out the facts relating to the testator's family and the circumstances under which the will came to be executed as alleged, goes on to examine the reasons given by the propounder why the testator thought it right to make a will. Those reasons, according to the learned Judge were insufficient and the learned Judge found that the main reason alleged on behalf of the propounder, namely that the testator was on terms of enmity with his

tenants, that the testator had instituted as many as 200 suits against his tenants in the Settlement Court and that he was in danger of his life, was not a ground either substantial in itself or a ground for which there was even material in fact. The learned Judge then goes on to the question about the preparation of a draft and although he finds that according to the propounder no less than two drafts had been prepared, such drafts had not been produced and that that in itself was a circumstance which cast doubt on the question of the execution of the will by the testator. He then proceeds to examine the evidence of the execution, and attestation of the execution by the various witnesses who had been called before the learned Judge.

In cases of this description although no doubt the onus probandi is on the person propounding the will, it is useful to remember that the proper way, to look at the question as to whether or not a will should be admitted to probate, is to proceed in the manner indicated by their Lordships of the Judicial Committee in the case of *Bulli Kunwar v. Bhagirathi* (1). Their Lordships observed that a Court of probate must consider first the question of the execution of the will. In a case where the trial Judge found that the will set up before him was a forgery primarily from a consideration of the contents of the will which he considered so extraordinary as to over-balance altogether the evidence of the witnesses who spoke to having been present and seen the testator sign the will and to having themselves signed the will as witnesses, their Lordships held that the trial Judge's method of procedure in discussing the question before him was an erroneous one namely, first to make up his mind about the contents of the will and then to look at the positive evidence in favour of its execution from that stand-point. (Per Lord Daye) : see also in this connexion *Palchur Sgākara Reddy v. Palchur Mahā-lakshmana* (2).

What is meant by "due execution" will be found discussed at very considerable length in a case decided by this Court: *Woomesh Chunder Biswas v. Rashmohini Dassi* (3). It will therefore

not be necessary for us to elaborate the question of the "due execution" of the will. If the Court considers that the "due execution" has been proved, that in itself will amount to a finding that the testator with full knowledge of the claims of his relations upon his bounty, with full knowledge of the state of his properties and with full knowledge of every material circumstance, had executed the will. No doubt where the circumstances are such as cast suspicion upon the fact of the execution of the will, the Court, in examining the evidence bearing on that point, will of necessity exercise the utmost vigilance and will insist upon the propounder removing all grounds of suspicion that might exist. But it is not permissible to a Court of probate to consider aliunde the terms of the will, to consider whether the terms are generous or not, to consider whether the relations who had natural and legitimate claims on the testator's bounty, have been cut off altogether or not and then to consider the "due execution" of the will with preconceived ideas and to hold that the onus probandi had not been fully discharged by the propounder and to refuse to grant probate of the will.

As we had occasion to say the other day there is not much difficulty in ascertaining what the law is on the subject, and if there is as a matter of fact, no difficulty in ascertaining the law as laid down by eminent judicial authority from the dates of the very early cases reported in 2 *Moore's Privy Council Cases* down to the present time, then the question becomes really a question of pure fact, aye or no, whether the evidence of execution as spoken to by the attesting witnesses should or should not be given credence.

The first witness is the executor Syam Sunder Debansi. (After discussing his evidence, the judgment proceeded.) As regards Tincari it is said that he is a Naib of the Debansis and that therefore he cannot be expected to go against his employers, the Debansis. There may be some justification for an observation of this character but the evidence of Tincari does not stand by itself. The evidence of Tincari has got to be taken along with the evidence of the various other witnesses referred to above. As regards Madan Mohan De, the muktear, it is stated that he is a very junior

1. (1905) 9 C W N 649 (P.O.)

2. A I R 1922 P C 815 = 70 I C 949 (P.C.).

3. (1894) 21 Cal 279.

muktear and that he is a young man of Syam Sundar's age. Of course the learned Judge had before him the witnesses, an opportunity which he had and which we have not. But we are entitled to examine for ourselves the reasons given by the learned Judge for discarding the evidence of these witnesses. Because a person is a very junior muktear and a young man, that is no reason by itself for discarding his evidence. (After discussing the evidence of other witnesses, the judgment proceeded.) There again the learned Judge has introduced reasons in his judgment which do not really bear on the question of the execution of the will but which really suggest that there were reasons for coming to the conclusion that the will was a suspicious one. No doubt as has been observed above where the circumstances are suspicious, the highest degree of vigilance and scrutiny should be exercised before the Court grants probate of a will. But it all depends upon the view-point you take. If you approach the question of the execution of the will by embarking on an elaborate inquiry as to whether or not the contents of the will were iniquitous or the reverse and try to frame your final conclusions on the question of the execution of the will in the light of what you may consider about the nature of the contents of the will, then in the words of their Lordships of the Judicial Committee you embark upon an inquiry which is not permissible in a matter of this description.

It is not to be understood for one second that our reading of the cases in the Privy Council is this, that you must confine your attention exclusively to the due execution of the will and come to a conclusion one way or the other whether probate of the will should be granted or not, irrespective of the rest of the evidence on record. To start with, you have to consider the question of the execution of the will and direct your mind towards a close scrutiny of the evidence bearing on the question of the execution of the will. But at the same time you are not to overlook or disregard such elements of suspicion as may be brought to your notice.

In other words, you are to analyse the direct or positive evidence as regards the execution of the will and try to test

the accuracy of that evidence remembering all the time what are the real elements of suspicion which may attach to the execution of the will. Even at the risk of repeating what we have already said, it may be stated at once and finally that the process is not to be reversed and that you are not to embark upon an inquiry as to whether or not the will has been executed by discussing seriatim and at considerable length the terms of the will. From this point of view many of the criticisms urged as against the positive evidence bearing on the question of the execution do not bear scrutiny and examination and cannot be regarded as matters forming just grounds for refusing probate. We accept as correct the evidence of the execution of the will.

Now, as the learned Judge has discussed the nature of the terms of the will, it is just as well to make a brief reference to it. (After discussing the terms, His Lordship proceeded.) Now, to put it very shortly we do not think that the evidence of execution is unsatisfactory, we do not think that the evidence of execution is unreliable; on the contrary we are of opinion that all the available evidence that could be got has been produced by the propounder and he has finally discharged the onus that lay on him.

To sum up our conclusions, we are of opinion that the learned Judge started with a prejudice against the propounder, such prejudice having its origin in what he considered to be the iniquitous character of the will. He came to the conclusion that the will was an extraordinary one, he came to the conclusion that the testator had no reasons whatever for making the will, that he was a young man of 37 and that unless danger, palpable danger, had been shown to exist threatening his life there was no reason for him to execute the will. The learned Judge based his judgment really on these two points and then he proceeded to consider the question of the execution of the will. Now, if one is satisfied about the factum of execution, you are not entitled to pay exclusive attention to the terms of the will.

The testator apparently had to fight a large army of refractory and recalcitrant tenants. That is not denied by the witnesses, for what is suggested is that at the time of the execution of the will

he had come to terms with a large body of his tenants, that he was in the habit of addressing his tenantry who belonged to the Moslem faith by endearing terms and that he did not entertain apprehensions about his life. Shamsundar has given a detailed and graphic account of what the testator's apprehensions were, and if once Shamsundar's story is accepted then you must come to the conclusion that the testator for reasons of his own may have thought it necessary to make this testamentary disposition of his properties lest on his death disputes and differences arise and render it possible for interested parties to squander away his properties including the patrimony that he had inherited. If once this conclusion is reached then all the elaborate reasons given by the learned Judge about there being no reason in existence for the making of the will would disappear.

We are further of opinion that the reasons given by the learned Judge for the finding that it was a forged will are insufficient and further that under no circumstances could Shyamapada Mukherji have been disbelieved. Nor was there any justification for coming to the conclusion that Baidyanath had come to Court to retail a story packed with untruths and supported by fanciful theories. There are no reasons for dismissing Syamsundar with the curt observation that because he was an interested party therefore no reliance should be placed on his testimony. If the theory of interestedness were to prevail the same standard must be applied to the defendant's witnesses and it cannot be denied that Kamal Kumari was as much interested in upsetting the will as Syamsundar was for supporting the will. We have already given sufficient reasons for coming to the conclusion that the terms of the will looked at fairly and squarely and from the point of view of the circumstances surrounding the testator and being not unmindful of what had gone on in the past with him are not extraordinary.

Kamal Kumari was deprived because she never pulled on well with her husband, she hardly lived with her husband, she came only thrice during the whole course of her married life and on each occasion she stayed only a few days and her subsequent conduct showed that she

did not care much for her husband but she was interested only in securing a large slice of the husband's properties. Taking all these circumstances into consideration and being not unmindful of what has been observed by the learned Judge as a Judge of fact and of the circumstances that in questions relating to facts although regard must be had to the finding of a Court of first instance the appellant is entitled to invite us to come to our own independent conclusions thereon, we are unable to agree with the terms of the judgment and we have no other alternative but to direct that the judgment and decree of the Court below should be set aside and that this appeal be allowed with costs and that probate of the will should be granted. We assess the hearing-fee in this appeal at ten gold mohurs. In view of the terms of our judgment the order appointing the Nazir of the District Court as Administrator pendente lite to the estate of the deceased must cease to have operation.

S. K. Ghose, J.—I agree.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 772

GUHA, J.

Majidan Bewa and others—Defendants
—Appellants.

v.

Basanta Kumar Basu—Plaintiff—Respondent.

Appeal No. 2405 of 1930, Decided on 19th December 1932, from appellate decree of Sub-Judge, Bogra, D/- 24th April 1930.

(a) Evidence Act (1872), S. 92—Written contract cannot be varied by local custom.

A written and express contract cannot be controlled or varied or contradicted by local custom. [P 773 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 178 (c)—Tenant acquiring occupancy right—He cannot contract himself out of such right by executing a lease.

Where a tenant has acquired a right of occupancy, he cannot contract himself out of such right by executing a lease to the landlord, nor can the landlord base his claim for ejectment on such lease: *A I R 1930 Cal 815, Ref. [P 774 C 1]*

(c) Bengal Tenancy Act (8 of 1885), Ss. 3 (3) and 4 (3)—“Tenant.”

The word “Tenant” in the Act includes an under-ryyat. [P 774 C 2]

Radhabinod Pal and Bhupendra Nath Dutt Roy—for Appellants.

Bijan Kumar Mukerji—for Respondent.

Judgment.—The suit out of which this appeal has arisen, was for ejectment of

an under-raiyat, according to the terms of a registered lease executed by him (the under-raiyat) on 15th Agrahayan 1324 B. E. The defence of the under-raiyat was that he had acquired right of occupancy by custom, and was not liable to be ejected. The right of occupancy claimed by the under-raiyat was recorded in the settlement records, as finally published. The controversy in the case before the lower Courts appears to have centered round the question whether the terms of the contract evidenced by the registered lease could bar the operation of the local custom, in the matter of acquisition of occupancy right, as claimed by the under-raiyat. The trial Court answered the question in the negative, and in that view of the case, held that the defendants could not be ejected from the lands in suit, in which he had acquired right of occupancy by custom. On appeal by the plaintiff, the decision arrived at by the Court of First Instance was reversed. According to the learned Subordinate Judge in the Court of appeal below, the settlement record had been rebutted and the defendants were held not to have acquired a right of occupancy by local custom; a decree was therefore passed by the lower appellate Court, entitling the plaintiff to get khas possession of the lands in suit. The Court of appeal below based its decision on the decision of the Court in the case of *Mahammad Ayejuddin v. Prodyat Kumar Tagore* (1), in which it was held in the case of a tenure, that an agreement where the tenancy was non-transferable in express words, no evidence could be given of the customary transferability of tenures in the locality; deducing from the said decision that evidence of custom in respect of a tenancy was inadmissible where the custom alleged was contradictory to the terms of a written agreement. No exception can, to my mind, be taken to the view expressed by this Court in the decision referred to above, and which is in consonance with the observations of Story, J., in *The Schooner Reside* (2), which are quoted in the treatises on the Law of Evidence, where the very eminent Judge said :

"But I apprehend that it can never be proper to resort to any usage or custom to control or vary positive stipulations in a written contract, and a fortiori not in order to contradict the same.

An express contract of the parties is always admissible to supersede or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by local custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow more presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict the most formal and deliberate declarations of the parties."

In the case before us, the position is that there is the entry in the finally published record of rights, showing that the defendant, an under-raiyat, had acquired right of occupancy in the lands in his possession, by custom prevalent in the locality; the statutory presumption attaching to this entry had to be rebutted by the plaintiff in the suit; and the way in which he sought to rebut the presumption was by the contract between the parties, as evidenced by the registered lease, by which the tenant defendant in the suit acknowledged the plaintiff-landlord's right to ejectment, after the expiration of the lease in 1332 B. E. In my judgment, the question in the present case is not whether evidence of custom was admissible where the custom alleged was contradictory to the terms of a written contract, nor also whether the contract was inconsistent with the growth of custom as propounded by the lower appellate Court; nor is the real question for consideration in the case, whether the contract contained in the written lease could bar the operation of local custom, as stated by the trial Court. The question is, could the tenant, as an under-raiyat, with a right of occupancy acquired by custom, contract himself out of his right so acquired. The learned Advocate for the defendants-appellants, the successors-in-interest of the original tenant defendant in the suit, has placed reliance on the decision of this Court in the case of *Abdul Hamid v. Eakub Ali Pandit* (3), in which it was held that where an under-raiyat was recorded in the record of rights as having a right of occupancy, it must be presumed that that right of occupancy has been acquired by him by virtue of a custom: it is for the plaintiff in a suit for ejectment to show that an entry to that effect in the record of rights is wrong.

1. AIR 1921 Cal 741=61 I C 503=48 Cal 359.
2. 2 Sumn 507.

3. AIR 1930 Cal 315=123 I C 266.

The proposition as laid down in the above decision must be accepted as a correct proposition of law; but it does not deal with the question requiring consideration in this case. The question still remains whether the written contract as evidenced by the registered lease executed by the tenant relating to ejectment could rebut the presumption in favour of the tenant as to his having acquired a right of occupancy, which precluded the landlord from seeking ejectment. The question thus arising for consideration, as has been mentioned already, was whether the tenant could contract himself out of his right as an occupancy raiyat; could the plaintiff landlord insist upon his right to eject the tenant by virtue of a contract which does away with the right of occupancy acquired by the tenant. This leads us to the consideration of the operation of the statutory provisions contained in the Bengal Tenancy Act, if any, bearing upon the subject. In S. 178 of the Act, it is expressly provided that nothing in any contract between a landlord and a tenant shall take away an occupancy right in existence at the date of the contract. So far as the case before us is concerned, upon the settlement records, the tenant had acquired a right of occupancy; could that right, which must be treated as a right in existence, be taken away by any contract between a landlord and a tenant? As the provision of the law stands, the contract would be wholly inoperative in the matter of the landlord's right to eject the tenant on the land in suit, if the word "tenant" used in S. 178, Bengal Tenancy Act, includes an under-raiyat.

The word "tenant" has been defined in the Act; it means a person who holds lands under another person, and is, or ~~has~~ for a special contract would be, liable to pay rent for that land to that person. The definition, as it stands, does not exclude an under-raiyat. In addition of the definition of the word "tenant" there is, in the Bengal Tenancy Act, a Chapter dealing with the "classes of Tenants", coming within the purview of the Act; and in S. 4 contained in that Chapter, the classes of tenants have been enumerated. In S. 4 (3) under-raiyats, that is to say, tenants holding whether immediately or mediately under raiyats, are classed as tenants. The

Bengal Tenancy Act therefore specifically keeps the under-raiyats within the operation of that Act, and in that view of the matter, S. 178 (a) to which reference has already been made, is a positive provision contained in the statute, which negatives the plaintiff's case, so far as his claim for ejectment, as made in the suit was concerned; if the occupancy right was in existence at the date of the contract evidenced by the lease on which the plaintiff bases his claim for ejectment, the contract could not, under the law, take away the occupancy right of the tenant if it were in existence at the date of the contract in 1324 B. E. The Courts below have not come to any finding on the question as to when the defendants' right of occupancy came into existence: the entry in the record of rights cannot help the defendants for determining that question, inasmuch as the entry was made some time after the lease was executed by the tenant, in the year 1324 B. E.

In my judgment therefore the case has to be sent back to the Court of appeal below, for the purpose of determination of the question as to whether the right of occupancy claimed by the tenant, and as recorded in the record of rights, came into existence before the year 1324 B. E. If the tenant had acquired right of occupancy before the year 1324 B. E., that right could not be taken away by the registered lease executed in favour of the landlord in that year, and the landlord's claim for ejectment could not succeed. In the result, the appeal is allowed, and the case is remitted to the Court of appeal below, for a rehearing of the appeal before it, in the light of this judgment, on the materials on the record, and on further materials, consisting of documentary and oral evidence, as may be placed before the Court by the parties, in support of their respective cases. The costs in the litigation up to the present stage, including the costs in this appeal, are to abide result on remand. Future costs are to be awarded according to the discretion of the Court below.

K.S.

Case remanded.

A. I. R. 1933 Calcutta 775

MUKERJI, J.

Golam Nabi Mridha—Plaintiff—Appellant.

v.

Mafijaddi and others—Defendants—Respondents.

Appeals Nos. 3021 and 3022 of 1930, Decided on 7th February 1933, against decrees of Addl. Sub-Judge, Backergunj, D/- 31st May 1930.

Bengal Tenancy Act (1885), S. 22—Purchase of non-transferable occupancy holding by cosharer landlord—His cosharers are entitled to treat holding as abandoned and take possession to the extent of their shares.

A purchase by the cosharer landlord of a non-transferable occupancy holding, in respect of which he is a cosharer landlord, entitles his cosharers to treat the holding as abandoned and to take khas possession of it to the extent of their shares: *AIR 1933 Cal 687, Ref; AIR 1923 Cal 701 and AIR 1926 Cal 158, not foll.*

[P 775 C 2]

Jatindra Nath Sanyal—for Appellant.

Abinash Chandra Guha and Srish Chandra Dutt—for Respondents.

Judgment.—These two appeals arise out of two suits which were instituted by the plaintiff to eject the defendants on the allegation that they hold the land as under-riyats and the periods of their leases have expired. The alleged under-riyati holdings consist of two-thirds and one-third shares of the land of a holding which belonged to one Amjad Ali Mridha under a purchase made by him in 1322. In 1324 Amjad Ali granted the two under-riyatis for a period of nine years. In 1332 the plaintiff purchased the interest of the heirs of Amjad Ali. The suits were dismissed by the Munsif and his decision has been affirmed on appeal by the Subordinate Judge. The plaintiff has then preferred these appeals. The controversy in these appeals relates to the question of merger, which was the main plank in the case for the defence and which arises in this way Amjad Ali had, at the date of his purchase of the riyati in 1322, a share in the howla to which the riyati was subordinate. It was contended that on his purchase the subordinate interest which he acquired became merged in the superior interest which he had held from before and that, accordingly, the subordinate interest which Amjad Ali created in favour of the defendants could only be a riyati and not an under-riyati.

It has been found that the holding which Amjad Ali purchased was a non-transferable occupancy holding. The Subordinate Judge was of opinion, on the strength of two decisions of this Court, one in the case of *Roshan Ali v. Chandra Mohan* (1) and the other in the case of *Hoshanuddi v. Abdul Hakim* (2), that S. 22, Ben. Ten. Act, would apply to all occupancy holdings, transferable as well as non-transferable. This view, it may be stated, is not the view generally accepted by this Court and is directly antagonistic to the large body of cases which have firmly laid down the law that a purchase by the cosharer landlord of a non-transferable occupancy holding, in respect of which he is a cosharer landlord entitles his cosharers to treat the holding as abandoned and to take khas possession of it to the extent of their shares: see *Sarat Chandra Saha v. Bepin Behary Chakravarti* (3).

Indeed the learned advocate for the respondent has not sought to support the view on which the learned Judge has proceeded, but has endeavoured to make out that independently of that section there was a merger. I have carefully considered his arguments, but I regret I do not see how it can be said that because the holding was non-transferable, Amjad Ali should be regarded as having purchased a holding which was extinguished by the purchase, so that the only interest which Amjad Ali was capable of creating was a riyati and not an under-riyati. I do not find any indication of any intention on the part of Amjad Ali not to keep his two interests separate from each other. The rent-decree which the plaintiff obtained against the defendants sufficiently established the validity of the plaintiffs' purchase of Amjad Ali's interest and the plaintiff seems to me to be competent to deal with the defendants just in the same way as Amjad Ali could have done.

On the whole I can see nothing which can rightly stand in the way of the plaintiff's obtaining a decree in ejectment against the defendants. But I agree with the Courts below in holding that the defendants are entitled to the compensations reserved by the agreements, Exs. A and B. It appears that

1. *AIR 1923 Cal 701=50 Cal 749=75 I C 447.*
2. *AIR 1926 Cal 158=90 I C 816.*
3. *AIR 1933 Cal 687.*

the plaintiff while making the purchase was fully alive to the contingency of having to pay the compensation in case the defendants are ejected. The result is that in my judgment these appeals should be allowed in the following terms:

That the decrees passed by the Courts below should be vacated and in lieu thereof a decree should be passed in plaintiff's favour to the effect that on the plaintiff's depositing Rs. 333-5-4 in the Court of first instance for payment to the defendants by the end of the current Bengali year, the plaintiff will have a decree in ejectment of Rent Suit No. 2917 of 1927, and on a similar payment of Rs. 166-10-8 in the said Court within the said time the plaintiff will have a decree in ejectment in Rent Suit No. 2916 of 1927, and it be ordered that in case the condition is not fulfilled as regards any of the suits, the appeal in connexion therewith will stand dismissed. There will be no order for costs in this litigation in any of the Courts. Leave to appeal is asked for but it is refused.

K.S.

*Order accordingly.***A. I. R. 1933 Calcutta 776 (1)**

LORT-WILLIAMS AND HENDERSON, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

Luchmi Narayan Sarman and another—Respondents.

Criminal Govt. Appeal No. 2 of 1933, Decided on 10th August 1933.

Criminal P. C. (1898), S. 417—Appeal by Local Government from order of acquittal by Special Magistrate appointed under Bengal Act 12 of 1932 is not competent—Bengal Suppression of Terrorist Outrages (Supplementary) Act (24 of 1932), S. 5.

An appeal to the High Court by the Local Government from an order of acquittal passed by a special Magistrate appointed under Bengal Act 12 of 1932 is not competent under S. 5 of Act 24 of 1932. [P 776 C2]

N. R. Das Gupta, Joges Chandra Sinha, Heramba Ch. Guha, Joy Gopal Ghose and Kamalesh Sen—for Accused.

Khundkar and Anil Chandra Rai Chaudhuri—for the Crown.

Henderson, J.—This is an appeal by the Local Government under S. 417, Criminal P. C., against an order of acquittal passed by a Special Magistrate appointed under the provisions of Act 12 of 1932 of the Bengal Legislative Council. A preliminary objection has been

taken to the effect that the appeal is incompetent. Mr. Khundkar has argued that the wording of S. 417 is sufficiently wide to cover the present case. It is quite clear that an accused person convicted by a Special Magistrate could have no appeal apart from the special provision. S. 404 provides that no appeal shall lie, except as provided by the Code or by any other law for the time being in force. There are no special Magistrates under the Code and there is no provision in Ch. 7 for an appeal against the conviction by such a Magistrate; for example, it would not be possible to say whether such an appeal would lie to the District Magistrate, to the Court of Session or to this Court. Mr. Khundkar has therefore argued that while it is necessary to provide specifically for an appeal by an accused person it is unnecessary to do so in the case of an appeal by the Local Government under S. 417, because the section does so by its own terms. It is unnecessary for us to decide this point, because in our judgment the present case is concluded by S. 5 of Act 24 of 1932 passed by the Indian Legislature.

On this point Mr. Khundkar has attempted to argue that an acquittal is not an order or sentence. In our opinion, it would be impossible to uphold such a contention; but in any case, the section goes on to say that no Court shall have jurisdiction of any kind in respect of any proceedings of a Special Magistrate, save as provided in the Local Act as supplemented by this Act. It is therefore clear that this appeal is incompetent under this section and we therefore dismiss it.

Lort-Williams, J.—I agree.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 776 (2)**

M. C. GHOSE, J.

S. W. Colbert—Petitioner.

v.

Mrs. H. Colbert—Opposite Party.

Criminal Revn. No. 1104 of 1932, Decided on 6th December 1932.

Criminal P. C. (1898), S. 488—Compromise of proceedings under S. 488—Enforcement of compromise is within jurisdiction of civil Court and it cannot be incorporated in order of Magistrate.

Where in a proceeding for maintenance under S. 488, the parties enter into a compromise, the enforcement of the compromise comes within the jurisdiction of a civil Court and not a criminal Court.

nal Court; and the Magistrate should relegate the parties to a civil Court for enforcement of the compromise and should not incorporate it in his order: *A I R 1920 Lah 524, Rel. on.*

[P 777 C 2]

Sudhansu Sekhar Mukherji—for Petitioner.

Judgment.—In this case Mrs. Colbert made a petition against her husband stating that he had married her about 16 or 17 years ago but that lately he had treated her badly and neglected to maintain her; that he was living with another woman for the last four years and refused to maintain her; that he earned about Rs. 150 per month and she asked for a maintenance of Rs. 50 a month. The husband stated in his written statement that he married her in 1917 upon her false representation, but afterwards she brought into his house her illegitimate children and a married daughter with children; and he was asked to maintain all of them, and when he refused to do so he was turned out. He further stated that he was willing to maintain her but not her grown-up children; that although he was willing to maintain her she refused to come to him. The matter was fixed for trial on a certain date when the pleader of the husband was absent and in his absence a compromise petition was drawn up by the pleader for the complainant to the effect that by the intervention of friends the husband has agreed to pay Rs. 30 per month as maintenance towards the wife. The learned Magistrate thereupon ordered that the defendant Mr. Colbert do pay Rs. 30 per month as a separate maintenance to the wife, Mrs. Colbert. The present rule was issued on two grounds, namely, (1) that the order of the Magistrate is bad in law, and (2) that the petitioner not having been a consenting party to the compromise, the case should not have been disposed of on the basis of the compromise.

No one has appeared to oppose the rule. The learned Advocate for the petitioner has urged that the petitioner very foolishly agreed to the compromise without understanding the true import of it; that in fact he did not agree to pay Rs. 30 per month to the wife for living separately from him; that his proposal was to maintain her if she lived with him; and that he is willing to maintain her if she live with him without the grown up children. The learned advo-

cate quoted a Lahore case *Sham Singh v. Mt. Hakam Devi, A. I. R. 1930 Lah. 524* where it was laid down that where in a proceeding for maintenance under S. 488 the parties enter into a compromise; the enforcement of the compromise comes within the jurisdiction of a civil Court and not a criminal Court; and urged that in this case the learned Magistrate should have relegated the parties to a civil Court for enforcement of the compromise and should not have incorporated it in his order. There is no opposition to the rule. It is made absolute and the order passed by the learned Magistrate is set aside.

K.S.

Rule made absolute.

* A. I. R. 1933 Calcutta 777

RANKIN, C. J. AND BUCKLAND, J.

The Anglo Persian Oil Co. Ltd., In re.

Civil Reference, Decided on 8th February 1933.

* (a) Income-tax Act (1922), S. 10 (2)—Whether payment is capital expenditure depends on nature of business of payer and other related factors—Money paid by company in lump sum as compensation for loss of agency to avoid future revenue expenditure as commission is not capital expenditure.

The principle that capital receipt spells capital expenditure or vice versa, is simple, but it is not necessarily sound. Whether a payment is or is not in the nature of capital expenditure depends or may depend upon the character of the business of the payer and upon other factors related thereto. The case of payer and payee must be considered upon an independent statement of the relevant facts proved in his presence, there being no overriding principle of law that the income-tax authorities are entitled to tax once at least on every payment. [P 779 C 1,2]

A company paid certain amount to its agent in lump sum as compensation for loss of agency whereby the company relieved itself of future annual payments of commission chargeable to revenue account;

Held: that the payment was not capital expenditure: *Anglo-Persian Oil Co. Ltd. v. Dale, (1933) 1 K B 124 and A I R 1931 Cal 676 (SB), Rel.* [P 779 C 2]

(b) Income-tax Act (1922), S. 18—Payment made for some improper or oblique purpose outside course of business management—Deduction of such amount is not permissible.

If it appears from the assessee's own case or the facts found, that the payment is made by way of distribution of profits or is wholly gratuitous or for some improper or oblique purpose outside the course of business management, the deduction cannot be regarded as permissible. [P 779 C 2]

* (c) Income-tax Act (1922), S. 10 (2) (ix)—Expenditure need not be made with view to produce profits in year of account.

Clause (9) of sub-S. (2), S. 10 of the Act, does not say that the expenditure must be made with

a view to produce profits in the year of account: *Aik 1921 Bom 891 and Vallambrosa Rubber Co. Ltd. v. Farmer*, (1910), 5 Tax cases 529, Ref.

[P 779 C 2]

(d) Income-tax Act (1922), S. 34—Deduction improperly allowed—S. 34 is applicable to put right assessment—*Obiter*.

Obiter.—S. 34 is applicable to put right an assessment—by which a deduction has been improperly allowed. Such a case is a case of income escaping assessment—not the whole income of the assessee but part of it escaping assessment, and there is nothing in S. 34, which limits it to cases of non disclosure by the assessee, or discovery of new matter by the income-tax authorities or inadvertence as distinguished from erroneous deliberations on the part of these authorities: *AIR 1925 Mad 287, Rel on.; Anderson & Halstead, Ltd. v. Birrel*, (1932) 1 K B 271, Dist. [P 780 C 1]

Pugh, S. M. Bose and S. Chaudhuri—for Assessee.

N. N. Sircar and Radhabinode Pal—for Income-tax authorities.

Rankin, C. J.—The assessee is the Anglo-Persian Oil Company (India) Ltd., a company incorporated in England. They have since 1921 carried on, in India the business of selling fuel oil and other products through selling agents paid by commission on sales. Until 1928 the selling agents were Messrs. Shaw, Wallace & Co., but in that year the assessee determined this agency and a new company called the "Burma Shell Oil Storage and Distributing Company of India" became the selling agent of the assessee. Pursuant to certain verbal negotiations the assessee in August 1928, paid to Messrs. Shaw, Wallace & Co. the sum of Rs. 3,25,000 as compensation for the loss of their office as agents to the assessee. The payment made in 1928 came to be considered by the income-tax authorities when dealing with assessments for the year 1929-30. In that year of assessment, the present assessee—the Anglo-Persian Oil Company (India), Ltd.—put forward the payment as a permissible deduction from their gross profits and their claim was allowed. Messrs. Shaw, Wallace & Co., the recipients, were at first assessed upon that sum as part of their profits of the previous year, but the question was taken by them to this High Court, where it was decided [*In re Shaw, Wallace & Co.* (1)] that the sum received was not income, profits or gains within the meaning of the Income-tax Act. The income-tax authorities ap-

pealed from this decision to the Privy Council, but meanwhile proceeded under S. 34 of the Act to re-open the question with the present assessee, claiming that as the High Court had held that in the hands of the recipients it was a receipt on capital account, it must needs follow that in relation to the business of the assessee it was in the nature of capital expenditure, or a "capital payment." The income-tax officer, the Assistant Commissioner, and the Commissioner have all agreed in this and appear to regard it as a simple and obvious truth. The two questions referred to us by the Commissioner under S. 66 of the Act are as follows:

1. Whether the sum of Rs. 3,25,000, being money paid by the company in a lump sum as compensation for loss of agency, whereby the company relieved itself of future annual payments of commission chargeable to revenue account, can be disallowed as being an improper deduction from the income, profits or gains of the business and whether an equivalent part of the company's income was chargeable to tax therefor. 2. Whether S. 34 of the said Act could in law be applied, in the circumstances of the case, to re-open the assessment and review a deduction made and allowed and whether an equivalent part of the income could be subsequently held to be a part of the income, which had escaped assessment."

Now, after this reference had been made, the appeal in the case of Messrs. Shaw, Wallace & Co. [*Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.* (2)] was decided by the Judicial Committee (14th March 1932). The appeal was dismissed, but the finding—that the money received by Messrs. Shaw, Wallace & Co., was not income, profits or gains within the meaning of the Indian Act—was in no way based upon the view that it was a receipt on capital account. Indeed, upon the facts as stated in the case then before their Lordships, they do not appear to me to have thought that view correct in the absence of any assignment of goodwill or other asset.

Now the present assessee, who after all were no parties to the proceedings to assess Messrs. Shaw, Wallace & Co., and had no opportunity therein at any time to put forward any facts about their own business and how they came to make this payment, took the proper steps to do so before the Commissioner, in so far as this

1. AIR 1931 Cal 676=134 I C 833=59 Cal 1153 (FB).

2. AIR 1932 P C 138=136 I C 742=59 I A 206=59 Cal 1343 (P C).

was necessary to meet the adverse findings of the income tax officer and Assistant Commissioner. Their petition the Commissioner has on all material points accepted as a statement of truth and has very fairly incorporated in his own statement of the facts. In particular, he has, in formulating the first of the two questions submitted, embodied the statement that the Rs. 3,25,000 was "money paid by the company in a lump sum as compensation for loss of agency, whereby the company relieved itself of future annual payments of commission chargeable to revenue account."

This is part of what was pleaded by the assesseees as bringing them within the decision of the English Court of appeal in *Anglo-Persian Oil Company, Limited v. Dale* (3) and as showing that the payment was not in the nature of capital expenditure. Save for their reference to the *Shaw Wallace* case (1), neither the Assistant Commissioner nor the Commissioner has dealt on the merits with the contention of the present assesseees. Yet the parties are different, the question of law is different and the statement of facts in the two cases is noticeably different. The Advocate-General, at the hearing of this reference, did not seek to support the reasoning of the income-tax authorities to the effect that the receipt by Messrs. Shaw, Wallace and Co. was a capital receipt and that therefore the payment by the present assesseees was a capital payment. On the contrary he conceded at an early stage of Mr. Pugh's argument that this payment in question was not capital expenditure. We are therefore relieved of the duty to examine the principles of law, by which expenditure is distinguished as on capital account or revenue account. I think it right to say however that the Commissioner and his assistant adopted a wrong method of approach to the present question. The principle, that capital receipt spells capital expenditure or vice versa, is simple, but it is not necessarily sound. Whether a sum is received on capital or revenue account depends or may depend upon the character of the business of the recipient. Whether a payment is or is not in the nature of capital expenditure depends or may depend upon the character of the business of the payer and upon other factors related thereto.

If a tramway company buys six tramway cars from a concern, whose business it is to make and sell such articles, I doubt whether the income-tax authorities would allow the tramway company to lessen its taxable profits for the year by deducting the price, and I doubt still more whether they would listen to an argument from the seller that the price was received on capital account. If a butcher sells his pony to a horsedealer, or a tradesman sells his delivery van to a dealer in motor vehicles, it is not obvious to me that the price is a revenue receipt, though I am certain it is not a capital payment. The case of payer and payee must be considered upon an independent statement of the relevant facts proved in his presence, there being no overriding principle of law that the income-tax authorities are entitled to tax once at least on every payment. As the first question submitted to this Court is limited by its terms to the particular payment of Rs. 3,25,000 made by the assesseees in August 1928, it might well be thought that the reference was concluded by the Advocate General's admission. He asked us however to consider two further points, suggesting (a) that the payment was not shown to have been made solely for the purpose of earning profits and (b) that, even if this were shown, it was not made solely for the purpose of earning profits in the year of account. For this purpose he expressed himself as willing to accept the statement of facts contained in the assesseees' own petition filed before the Commissioner. In my judgment, no effect can be given to either argument.

As regards (a), no doubt, if it appeared from the assesseees' own case or the facts found that the payment was made by way of distribution of profits or was wholly gratuitous or for some improper or oblique purpose outside the course of business management, we could not regard the deduction as permissible. But no such suggestion can be made even upon the facts found in the case stated and there appears to me to be no reason why we should entertain it. The income-tax authorities do not at any stage appear to have considered that there was any doubt about the matter. As regards (b), the argument must be held erroneous. Cl. (ix), sub-S. (3), S. 10 of the Indian Act does not say and does not

mean that the expenditure must be made with a view to produce profits in the year of account. This was held by the Bombay High Court in *In re Tata Iron and Steel Co. Ltd.* (4) and, though the case of *Vallambrosa Rubber Co., Ltd. v. Farmer* (5) was not decided under our Indian Act, the judgment of the Lord President of the Court of Session in Scotland in that case may conveniently be referred to as very fully disclosing the soundness of the Bombay decision. The first of the two questions referred to us must, in my judgment, be answered in the negative, that is, in favour of the assesses.

The second question is really whether S. 34 of the Act could have been applied to the present case, had it appeared that the original allowance of the deduction was unwarranted. Strictly speaking, this question does not, in my opinion, arise but, as the point of law has been fully argued and as it might have been taken as a preliminary objection to the new assessment, I think it well to express an opinion on it. I see no way of holding that S. 34 is inapplicable to put right an assessment by which a deduction has been improperly allowed. Such a case is, in my opinion, a case of income escaping assessment—not the whole income of the assessee but a part of it escaping assessment—and there is nothing in S. 34, which limits it to cases of non-disclosure by the assessee, or discovery of new matter by the income-tax authorities or inadvertence as distinguished from erroneous deliberations on the part of these authorities. In most cases of under-assessment of profits it could be said that the whole profits were assessed at a certain figure; but where that figure is shown to be less than the true amount of assessable profit, the balance has, in my opinion, "escaped assessment" within the meaning of those words as they appear in S. 34. We have been referred to the Madras decision in *Commissioner of Income-tax v. Raja of Parlakimedi* (6) from which I see no reason to differ, and to the English case of *Anderton and Halstead, Limited v. Birrell* (7), which

4. A I R 1921 Bom 891=64 I O 12=45 Bom 1906.
5. (1910) 5 Tax Cases 523.
6. A I R 1926 Mad 287=91 I C 940=49 Mad 22.
7. (1932) 1 K B 271.

does not seem to afford any assistance upon the construction of the Indian Act.

In view of the form of the second of the questions referred to us however we need make no formal answer to it. I think the assesses should be paid their costs of the reference by the Commissioner. These costs to be taxed by the Registrar, Original Side, independently of R. 7, Ch. 30-A of the Original Side Rules and to include two counsel.

Buckland, J.—I agree.

K.S.

References answered.

A. I. R. 1933 Calcutta 780

MUKERJI, J.

Sailaja Ranjan Gupta and others—Appellants.

v.

* *Ram Gopal Dey*—Plaintiff—Respondent.

Appeal No. 84 of 1931, Decided on 1st February 1933, against appellate decree of 4th Addl. Sub-Judge, Sylhet, D/- 16th July 1930.

Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 27—Suit based not only on the ground of forcible ejection but also on tenants' own title—Limitation under S. 27 does not apply.

Where a suit for recovery of occupancy of land is based upon an allegation of illegal eviction, and for that reason the suit stands on very much the same footing as a suit instituted under S. 9, Specific Relief Act, it is a suit of summary character, and such a suit is saved from the limitation provided in S. 27, Act 8 B. C. of 1869. Therefore even though no such suit is instituted, as is contemplated by S. 27, the tenant, who has been dispossessed may well rely on his own title and on the strength of that, sue to recover possession of the lands under the provision of the general law, just in the same way as a person who has been dispossessed may institute a suit to recover possession under the general law without taking recourse to the summary procedure provided by S. 9, Specific Relief Act.

Where the suit by an occupancy tenant was based on his title by inheritance, and possession for 12 years conferring title to be in occupation as also on allegation of wrongful and illegal dispossession:

Held: the suit was not time barred even though instituted beyond a year from date of dispossession. [P 782 C 1,2]

* *Hemendra Kumar Das*—for Appellants.

Paresh Lal Shome—for Respondent.

Judgment.—Some of the principal defendants are the appellants in this appeal which has arisen out of a suit which was instituted by the plaintiff for recovery of khas possession of certain lands on declaration of his jote right thereto. The plaintiff's case was that

such right had been acquired by him by inheritance and by virtue of his possession for over 12 years. His case was that the defendants were the landlords of the lands in suit together with other lands and that they had dispossessed the plaintiff.

The plaintiff further alleged that upon such dispossession there were proceedings under S. 144, Criminal P. C., in the course of which a compromise was entered into between the parties but that eventually the said compromise was not given effect to by the defendants, with the result that the plaintiff was obliged to institute the present suit. Some of the defendants contended that they had no connexion whatsoever with the suit land and they did not contest the plaintiff's claim. The contesting defendants however alleged that the plaintiff's predecessor was a chakran tenant in respect of the lands for a long series of years and used to hold the suit lands as tenant at a nominal rent. The plaintiff's title as tenant was disputed and it was further alleged that the lands had been abandoned and that thereafter possession had been taken by the said defendants. Several issues were framed one of which was whether the plaintiff had his alleged title to the lands in suit and another was whether the plaintiff was entitled to get khas possession. There were other issues also on the question of limitation, estoppel, maintainability of the suit and on other matters. The Courts below have decreed the suit declaring the plaintiff's right of occupancy in the suit lands and ordering that he would recover khas possession of the same on eviction of the defendants. In the appeal which the defendants have filed the only ground that has been urged is the question of limitation. It has been argued that in view of the provisions of S. 27, Act 8, B. C. 1869, the suit must be regarded as barred inasmuch as it was a suit to recover the occupancy of a land instituted by a tenant against his landlord. The Courts below, it may be said, have overruled this contention. The grounds upon which the said Courts have overruled the said contention were somewhat different, the trial Court holding that the suit was taken out of the purview of that section for three reasons: Firstly, because the landlords contested about the origin of

of the plaintiff's tenancy and that they denied in their defence the plaintiff's allegation of acquisition of title by inheritance from his predecessors; secondly, that although the defendants had admitted the plaintiff's possession they denied his occupancy; and thirdly, that the defendants in their written statement had raised a contention that the suit lands and some other lands did not form one holding as was alleged in the plaint. The trial Court held that the case was one in which the declaration of plaintiff's title was necessary before it could be held that he was entitled to succeed in recovering possession from the defendants. The Subordinate Judge differed from the Munsif as regards the grounds on which it should be held that the suit was not to be governed by the provisions of S. 27, Act 8, B. C. of 1869, but held that upon the authorities it was clear that the section aforesaid will apply only to possessory suits and not to suits in which a question of title was involved. He therefore disagreed with the Munsif in so far as the other reasons which the latter had given were concerned but held that the suit nevertheless was not barred because it could not be regarded as a mere possessory suit.

Several decisions have been cited on behalf of the appellants in order to establish the position that the present suit was a suit for recovery of occupancy of land which the plaintiff had instituted as against the defendants who were the landlords. It had been argued that what was alleged on behalf of the defendants was that the plaintiff, though previously he had been a tenant in respect of the land, had abandoned it and the defendants therefore came to be in occupation of the same. These being the facts it has been argued that the suit comes well within the words of S. 27, the said words being

"all suits to recover the occupancy of any land, from which a tenant has been illegally ejected by the persons entitled to receive rent for the same, shall be commenced within the period of one year from the date of accruing of the cause of action, and not afterwards."

I am reading only that part of the section which is at all relevant for the purpose of the present suit. Now, it must be conceded that if the words to which I have just referred be treated as laying a rule of limitation analogous to

what is to be found in Sec. 3, Art. 3, Ben. Ten. Act, which says:

"Suits to recover possession of land claimed by the plaintiff as a raiyat or an under-raiyat have to be governed by two years' limitation running from the date of dispossession."

"Then the appellants have a very strong case. In other words, if it can be maintained that any suit, no matter on what ground it may be based, the object of which is to recover possession from a defendant who is the landlord and which is instituted by the plaintiff who is a tenant, must be instituted in all circumstances, within one year from the date of the cause of action, then the present suit, it is obvious, should be regarded as having been instituted beyond the time the law has prescribed for it. That however does not seem to me to be the interpretation that is to be put upon S. 27, Act 8 of 1869. It is not necessary for the purpose of the present case to consider the other part of the section and to find out whether a suit relating to such reliefs as the other part of the section contemplates, if it is not instituted within one year from the date of the cause of action, will be maintainable or not under the general law. Probably, such suits would not be maintainable and would be treated as being entirely barred, because it is difficult to conceive of grounds other than those that are set out in the section itself as forming grounds for the reliefs which are dealt with in such other parts of the section. But so far as the recovery of occupancy land is concerned, it is quite clear that a claim thereto may be based entirely upon an allegation of an illegal ejectment by a person entitled to receive rent and it is also conceivable that apart from such illegal ejectment the tenant may plead his own title and on the strength of that ask that he should be put back in possession. The view that has been taken by this Court, all along as regards the meaning to be attributed to the words quoted above, seems to be this: that where a suit is based upon an allegation of illegal eviction and for that reason the suit stands on very much the same footing as a suit instituted under S. 9, Specific Relief Act, it is a suit of summary character and such a suit is saved from the limitation provided in S. 27, Act 8, B. C. of 1869. The necessary consequence of this interpretation would be that even though no

such suit is instituted as is contemplated by S. 27, the tenant who has been dispossessed may well rely on his own title and on the strength of that sue, to recover possession of the lands under the provisions of the general law, just in the same way as a person who has been dispossessed may institute a suit to recover possession under the general law without taking recourse to the summary procedure provided by S. 9, Specific Relief Act. The reported decisions to which my attention has been drawn seem to me to suggest that this is the view that should be taken of S. 27, Act 8 B. C. of 1869. So far as the present suit is concerned the tenant has not made the forcible eviction which he alleged in his plaint, his sole ground for the relief which he asked for in the suit. He relied on his title by inheritance, he relied on possession for 12 years as conferring on him a title to be in occupation of the land and on the strength of these two assertions, as also on the allegation that he has been wrongfully and illegally dispossessed, he sought to recover possession. I cannot see how it can be said that such a suit was not maintainable or was time-barred even though it was instituted beyond a year from the date of dispossession. In this view of the matter I am of opinion that the Courts below were right in holding that the suit as framed was not barred by limitation. The result is that in my opinion the appeal fails and must be dismissed with costs.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 782

MITTER AND M. C. GHOSE, JJ.

Midnapur Zamindari Co., Ltd. — Appellant.

v.

Priyabala Dasee—Respondent.

Appeal No. 197 of 1932, Decided on 1st March 1933, from appellate order of Sub-Judge, Midnapur, D/- 16th January 1932.

(a) Bengal Tenancy Act (8 of 1885 as amended by Act 4 of 1928), S. 174 — Application to set aside sale — Whether second appeal is permissible under S. 174—*Quaere*.

Quaere.—Whether under the provisions of S. 174 (8), Ben. Ten. Act, as amended by Bengal Act 4 of 1928, no second appeal is permissible and whether the law allows only one appeal.

[P 783 C 2]

(b) Bengal Tenancy Act (8 of 1885 as amended by Act 4 of 1928), Ss. 174 and 185 —

S. 18, Lim. Act, applies to application under S. 174—Limitation Act (1908 as amended by Act 10 of 1922), Ss. 18 and 29 (2).

In all cases, which are not mentioned in S. 185, Ben. Ten. Act, has to be read with reference to the provisions of S. 29 (2), Lim. Act of 1922. Hence having regard to provisions of S. 29 (2) (a), Lim. Act, S. 18 applies to applications to set aside sale under S. 174, Tenancy Act. [P 781 C 1]

U. N. Gupta and Manmathanath Das Gupta—for Appellant.

Bijaykumar Bhattacharjya and Panchanan Ghosh—for Respondent.

Mitter, J.—This is an appeal by the Midnapur Zamindari Co., Ltd., who are the decree-holders in a certain suit for rent. The appeal arises out of proceedings taken under S. 174, Ben. Ten. Act, to set aside the sale held in execution of a rent decree obtained by the Midnapur Zamindari Co., Ltd. The respondents, who are judgment-debtors 1 to 3, challenged the sale on three grounds: (1) that there was no service of sale proclamation or any process in the execution case, (2) that the judgment-debtors 2 and 3 were not properly represented in the execution case and (3) that there were great irregularities in the publication and conduct of the sale.

The case of the judgment-debtors was that the processes in execution were fraudulently suppressed by the officers of the decree-holders, and that they came to know of the sale some time in Bhadra or Ashwin, which would correspond to September, and the application to set aside the sale was made on 12th November. The decree-holders contested the application of the judgment-debtors. They traversed all the allegations about non-service of sale proclamation and denied that there had been irregularities in the publication of the sale proclamation. They also contended that the judgment-debtors have not suffered substantial injury and they further said that the decree in execution of which the property was sold was not a nullity, in so far as the infant judgment-debtors are concerned, it being their case that they were not minors. The Munsif found on the question of fraud against the judgment-debtors and he accordingly dismissed the petitioner's application, being of opinion that the application was barred by limitation. An appeal was taken to the Court of the Subordinate Judge, who has taken a contrary view and has set aside the sale.

Against this decision, the present appeal has been brought, and a preliminary objection to the hearing of the appeal has been taken by the respondents on the ground that, under the provisions of S. 174 (3), Ben. Ten. Act, as amended by Bengal Act 4 of 1928, no appeal is permissible and that the law allows only one appeal. The question arose before us on a previous occasion, but there has been no final determination of this question. On the present occasion also, as we are against the appellants on the merits of the appeal, it is not necessary to deal with the preliminary objection. The main contention which has been raised on behalf of the decree-holders by their learned counsel, Mr. U. N. Sen Gupta, is that the provisions of S. 18, Lim. Act, do not apply to the present case and that, as admittedly the application was not made within six months of the date of the sale as is required by the provisions of S. 174 of the amended Bengal Tenancy Act, the lower appellate Court has committed an error of law in holding that the application was not barred by time. The question therefore which we have to decide in this appeal is as to whether the provisions of S. 18 apply to applications under S. 174 of the amended Bengal Tenancy Act; and it is conceded that, if S. 18, Lim. Act, govern the present case, the application is within time on the findings arrived at by the lower appellate Court, that the judgment-debtors came to know of the sale within a few days of the date of the application to set aside the sale.

In order to decide this question, two Acts have to be considered. First of all, the Bengal Tenancy Act provides, under S. 174, a special period of limitation to set aside a sale held in execution of a rent decree and the period fixed by the amendment of Bengal Act 4 of 1928 is six months from the date of the sale: S. 174 (3). It is contended that, as, under S. 185, Ben. Ten. Act, the provisions of sub-S. (2), S. 29, Lim. Act, have been held not to apply to all suits, appeals and applications, specifically mentioned in the schedules to this Act, it must be taken that the intention of the legislature was to ignore the existence of sub-S. (2), S. 29, Lim. Act, as it existed in 1908, even with regard to cases which are outside the purview of S. 185. In other words, it is said that S. 185 is

to control proceedings which are not specified in Sch. 3 annexed to the Bengal Tenancy Act. The proceedings, which are not specified in Sch. 3, Ben. Ten. Act, may really be divided into two classes: (1) those, of which limitation period is provided for in sections of the Bengal Tenancy Act, for instance, Ss. 104(H), 105, 167 and 174, with which we are at present concerned, (2) those, of which the limitation periods are not at all provided for in the Act, as for instance, cases of ejectment of under raiyats, cases of execution of decree for money exceeding Rs. 500. To the former class of cases, which come under class (1), as stated above, the provisions of Ss. 9 to 18 and S. 22, Lim. Act, in our opinion, apply, if they are not expressly excluded by the provisions of the Bengal Tenancy Act. It becomes necessary to consider the language of S. 29 (2), Lim. Act of 1908 as amended by Act 10 of 1922. Cl. (2) of that section runs as follows:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by Sch. 1, the provisions of S. 9 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—(a) the provisions contained in S. 4, Ss. 9 to 18, and S. 22 shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law."

Therefore in all such cases, which are not mentioned in S. 185, viz. the two classes of cases, to which we have just referred, the Bengal Tenancy Act has to be read with reference to the provisions of S. 29 (2), Lim. Act of 1908, as amended by the Act of 1922. If that is the correct view, as we hold that it is, then, having regard to the provisions of sub-Cl. (a), Cl. (2), S. 29, it appears clear that S. 18, Lim. Act, applies, as there is nothing in the Bengal Tenancy Act which expressly excludes the application of the section. We are unable to agree with Mr. Sen Gupta that, because the legislature has made S. 29 (2) inapplicable to the cases mentioned in S. 185, it must also have been intended to exclude the application of S. 29 (2), Lim. Act, to cases outside the classes of suits, appeals and applications specified in the schedule annexed to the Act. That would be giving a larger effect to the section than what is suggested by its plain language.

We are therefore of opinion that the view taken by the lower appellate Court is right. This appeal is accordingly dismissed with costs. We assess the hearing fee at one gold mohur. It is not necessary to make any order on the application in the alternative.

M. C. Ghose, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 784

GUHA, J.

Mohamed Ismail and another—Defendants—Petitioners.

Lal Mia (Muktear)—Plaintiff—Opposite Party.

Civil Rule No. 1142 of 1932, Decided on 15th February 1933, against decree of Second Additional Sub-Judge, Noakhali, D/- 20th August 1932.

(a) Bengal Tenancy Act (8 of 1885), S. 26-J—Claim for transfer fee can only be by application under S. 26-J.

A claim by the landlord for transfer fee should be made by application under S. 26-J and not by suit. [P 784 C 2]

(b) Provincial Small Causes Courts Act (1887), S. 27—Small Cause Suit tried in ordinary file by Munsif invested with Small Cause Court powers is not appealable.

Where a Munsif who is invested with powers of Small Cause Court tries a suit which is cognizable by a Court of Small Causes in his ordinary file his decision is not appealable. [P 784 C 2; P 785 C 1]

Jitendra Kumar Sen Gupta—for Petitioners.

Bhagirath Chandra Das—for Opposite Party.

Judgment.—The first point raised in this case that the opposite party should have proceeded by way of an application under S. 26-J, Ben. Ten. Act, and that no suit as framed was maintainable, is covered by authority of decisions of this Court, and must be decided in favour of the petitioners. The second point arising for consideration in this case, which is one of the grounds on which this Rule was granted, is that no appeal lay against the decision of the learned Munsif passed in the case, and that the decision of the Court of appeal below, reversing that of the learned Munsif, was without jurisdiction.

In view of the fact that the suit was one cognizable by a Court of Small Causes, and that the Munsif who was invested with the powers of a Judge of the Court of Small Causes was competent to try the suit as a Small Cause Court

Judge, the appeal against the decision of the Munsif was incompetent and the decision of the appellate Court was therefore without jurisdiction: This point seems also to be concluded by authority, so far as this Court is concerned. In view of the fact that the suit as framed was not maintainable, and in view of the fact that no appeal could possibly lie to the Court of appeal below, this Rule must be made absolute. The decision and decree passed by the learned Subordinate Judge of Noakhali reversing those of the Munsif, First Court, Sudharam, dated 18th February 1932, are set aside, and the decision of the Munsif in this case dismissing the suit is restored and affirmed on this basis only that the suit as instituted by the opposite party was not maintainable; an application under S. 26-J, Ben. Ten. Act, was necessary for the purpose of obtaining the relief that was claimed in the suit which was not maintainable. The fact that this Rule is made absolute would not stand in the way of the opposite party applying to the Munsif under S. 26-J, Ben. Ten. Act. I make no order as to costs in this Rule.

K.S.

*Rule made absolute.***A. I. R. 1933 Calcutta 785**

MUKERJI, J.

Muhara Bibi and another—Defendants Appellants.

v.

Maharulla Mondal and others—Defendants—Respondents.

Appeal No. 766 of 1930, Decided on 12th July 1932, from appellate decree of Dist. Judge, Dinajpur, D/- 2nd November 1929.

(a) Mahomedan Law—Gift—Possession as the nature of subject of gift is capable of is sufficient—Equity of redemption in usufructuary mortgage can be subject of valid gift.

By possession is meant in Mahomedan law of gift, such possession as the nature of the subject of the gift is capable of. Hence the equity of redemption in usufructuary mortgage can be subject of a valid gift even though delivery of actual physical possession cannot be made to the donee. In such cases intention of the parties must be inquired into. [P 785 C 2]

A father made the gift of an equity of redemption of a usufructuary mortgage to his daughter who was living with him, by executing a document with the requisite formalities and getting it registered. He was managing the properties on her behalf:

Held: that even though there was no actual delivery of possession of property, the gift was valid: *A I R 1932 Cal 422, Ref.* [P 785 C 1]

(b) Mahomedan Law—Gift—Gift may be validated by obtaining possession subsequent to gift.

A gift, invalid for want of delivery of possession at the time, may be validated by obtaining possession subsequent to the gift. [P 785 C 1]

Naresh Chandra Sen Gupta and Bama-prasanna Sen Gupta—for Appellants.

Gour Hari Mitra—for Respondents.

Judgment.—The only question in this appeal relates to the validity of a hebanama which is alleged to have been executed by one Sanjia in favour of his daughter Jharimai Bibi. The trial Court found that though there are some circumstances throwing an amount of suspicion on the transaction on the ground that the donor was not a person of sound or sufficiently strong mind and was also unduly influenced, those circumstances are not enough to pronounce against its validity. It held however that it had not been proved that there was any delivery of possession accompanying the gift, and on that ground it held that the alleged heba was invalid. The District Judge agreed with the trial Court so far as the first of the two findings aforesaid, but as regards the second finding he differed from the trial Court observing as follows:

"Having regard to the fact that even after the hebanama Sanjia was living with his daughter, and that his acts and management, which are admitted, can be construed, in my opinion, as acts done on behalf of the daughter to whom the legal title had, it is alleged, been transferred, I do not agree with the learned Munsif that the hebanama was ineffective for want of delivery of possession."

It has been argued on behalf of the appellants that as under the Mahomedan law no gift is valid unless accompanied by delivery of possession. The above observations of the learned District Judge are not sufficient to sustain the validity of the gift in the present case. The broad proposition that equity of redemption cannot be the subject of a valid gift under the Mahomedan law, when the property is in possession of a mortgagee, can no longer be maintained: see *Tara Prasanna Sen v. Shandi Bibi* (b). And so it has not been and cannot be argued that because the property in the present case was under a usufructuary mortgage it could not be the subject of a valid mortgage. Intention has in the first place to be inquired into. Of this there can hardly be any room for doubt; a document with requisite formalities was

1. A I R 1921 Cal 422=62 I C 481=49 Cal 68.

executed and it was duly registered on the donor's admission, and there is nothing very much to show that there was a motive for a benami, while on the other hand there are enough materials indicating that a real transaction was meant.

The donor had been badly treated by his wife who had gone to jail in consequence of such treatment, the donee was his daughter, a widow, who had nursed and looked after him and he was living with her and at her house. As regards possession, delivery thereof should have accompanied the gift, though a gift invalid for want of delivery of possession at the time may be validated by obtaining possession subsequent to the gift. The question has to be decided upon the peculiar facts of each individual case because by possession in connexion with Mahomedan law is meant such possession as the nature of the subject of the gift is capable of. Here the land was in the possession of a usufructuary mortgagee and so no delivery of actual physical possession could be made; the subject matter was a half-share, though demarcated, of certain plots forming one holding or more, and so mutation of the donee's name in the landlord's sherista was not possible. The evidence of the donor and the donee having divided the produce subsequent to the gift has not been believed. But the donor was living with the donee, and on such evidence as there is it is not altogether unreasonable to hold, as the District Judge has held, that the donor was managing the property on behalf of the donee. On the whole I am not prepared to disagree with the view which the District Judge has taken. The appeal is dismissed with costs.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 786

PEARSON, J.

Khantamoni Dassi and another — Petitioners.

v.

Biswa Nath Pal and others—Opposite Parties.

Civil Rule No. 161 of 1933, Decided on 25th April 1933, from order of First Court, Munsif, Howrah, D/- 17th January 1933.

(a) Registration Act (1908), Ss. 17 and 49—Unregistered bond—Promisee can rely on personal covenant in the bond—But immov-

able property covered by the bond will not be affected.

Even though a bond, which ought to be registered, is not registered, the promisee can rely on the simple contract contained in the bond for personal covenant to repay; but the suit on such simple covenant cannot affect the immovable property which is the subject matter of the bond, even though such property can be proceeded against to satisfy the decree in the suit by reason of the general provisions of law. [P 787 C 1]

(b) Civil P. C. (1908), S. 115 — Interest allowed by trial Court according to contract of parties—High Court will not interfere in absence of clear evidence justifying interference—Civil P. C. (1908), S. 35.

In the absence of clear evidence justifying interference, the High Court will not interfere in revision with the contract between the parties and the discretion of the trial Judge in the matter of interest. [P 787 C 1]

Apurba Charan Mukerji — for Petitioners.

Sambhu Nath Banerjee—for Opposite Parties.

Judgment.—This suit was originally brought as a Small Cause Court suit upon a bond. But the formality of registration which was essential was not complied with. Various points were raised, amongst others, that the suit was not maintainable having regard to the fact that the bond was not registered, that the rate of interest was very high and so on. A point was taken before me to the effect that there was no proper finding as regards the execution of the document on the part of the defendants. This however, in my opinion, is not borne out by the defence because the evidence shows that the document was proved which means that the signatures were identified. As regards the question of the bond what the learned Judge did was to say:

"It is true that the bond cannot be admitted in evidence as it has not been registered, but it can be admitted in evidence for proving the admission of the defendant."

Now, reference has been made before me to the case of *Skinner v. Skinner* (1). Reliance is placed on the passage in the judgment which, after citing S. 49, proceeds to say:

"If an instrument which comes within S. 17 as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to affect the property, and it is not to be received as evidence of any transaction 'affecting' the property."

This, it is said, is an authority for saying that the plaintiff in the present case

1. AIR 1929 P C 269=56 I A 869=51 All 771=119 I C 683 (P O).

is not to be permitted to rely on a simple contract contained in the bond for personal covenant to repay. In my opinion the authority just cited does not go so far as that. Emphasis there is laid upon the principle that the document cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered, and the effect which is referred to there is obviously intended to be "affecting" the immovable property. The suit on the simple covenant does not affect the immovable property which is the subject-matter of the earlier part of the bond. It is true that the immovable property may subsequently be called upon to satisfy the decree in the suit. But that is by reason of the general provision of law and not because of any particular stipulation to that effect in the contract itself. I am of opinion therefore that there is no substance in this contention.

On the other question, which was argued before me namely, the interest which has been allowed at the rate of Rs. 37-8-0, it is said that this is extremely burdensome and ought to be interfered with. Before doing that which would really be to interfere with the contract between the parties and the discretion of the Judge, one would have perfectly clear evidence upon which such action will be justified. I am not able to say that the facts in the case are such as would warrant interference. I do not know what the value of the property is relative to the amount advanced or as to the margin of the security. That is hardly a matter one would go into as it is not definitely recited or laid down or appearing in the evidence or the judgment. In this matter also I am unable to assist the petitioner. The result is that the rule must be discharged. No order is made as to costs.

K.S.

*Rule discharged.***A. I. R. 1933 Calcutta 787****GUHA AND BARTLEY, JJ.***Harendra Nath Chaudhury* — Defendant 2—Appellant.*Dwijendra Nath Banerji and others* — Respondents.

Appeal No. 2838 of 1930, Decided on 5th April 1933, against decree of Special Judge, 24-Parganas, D/- 4th June 1930.

Bengal Tenancy Act (8 of 1885), S. 106— Under S. 106 entire body of landlords are necessary parties to suit and appeal therefrom — After partial abatement of appeal, appeal is not competent — Civil P. C. (1908), O. 41, Rr. 4 and 33.

Order 41, R. 4 has no possible application to a case, where the tenants by a suit under S. 106, Ben. Ten. Act. pray for correction of entries in the Record of Rights which the landlords, defendants in the suit, want to maintain. In view of the nature of the relief sought in the suit under S. 106, Ben. Ten. Act., the entire body of landlords against whom relief is sought are necessary parties to the suit and to an appeal arising out of the suit; and after the partial abatement of the appeal, the appeal can no longer be held to be competent. Hence the provisions contained in O. 41, R. 4, Civil P. C., cannot be invoked in aid of one of the defendants-appellants. [R 188 G 1]

Surendra Nath Basu (Sr.) — for Appellant.

Hira Lal Chakravarty, Anilendra Nath Roy Choudhury and Prem Ranjan Rai Choudhury — for Respondents.

Judgment. — This is an appeal by defendant 2 (one of the several co-sharer landlords of a tenancy), in a suit under S. 106, Ben. Ten. Act., instituted by the tenants plaintiffs, for correction of entries in the finally published Record of Rights. The Assistant Settlement Officer who tried the suit directed the correction of entries as mentioned in his judgment; and the decision of the Assistant Settlement Officer was affirmed by the learned Special Judge of the 24-Parganas, on appeal. The appeal before the Special Judge preferred by the appellant in this Court was dismissed on the ground that it was time-barred in respect of respondent 7, and that rent could not be altered in the absence of some of the co-sharer landlords. The learned Judge in the Court below has held that the appeal before him had abated so far as respondent 7, one of the co-sharer landlords, was concerned owing to the non-substitution of the heirs of that respondent within the time allowed by law.

Respondent 7 was made a party to the appeal before the Court below; it has however been contended before us that the said respondent was not a necessary party to the appeal, and that in view of the provisions contained in O. 41, R. 4 and R. 33, Civil P. C., relief could be granted to all the defendants in the suit on an appeal preferred by one only of the defendants, and that the non-substitution of the heirs of one of the defen-

dants-respondents in time was therefore wholly immaterial. The proposition sought to be substantiated, so far as its applicability to proceedings under S. 106, Ben. Ten. Act, is concerned, is against the authority of decisions of this Court of which the decision in the case of *Naimuddin Biswas v. Maniruddin Laskar* (1), is typical. As has been held in *Naimuddin Biswas* case (1), with the principle followed in which, we are in entire agreement, O. 41, R. 4, Civil P.O., has no possible application to a case like the present, where the tenants by a suit under S. 106, Ben. Ten. Act, prayed for correction of entries in the Record of Rights which the landlords, defendants in the suit, wanted to maintain; and the provisions contained in the Code of Civil Procedure gave no power to the Court to vary or reverse a decree in favour of a person who was dead, and whose legal representatives had not been brought on the record. Furthermore, it could not be denied that in view of the nature of the relief sought in the suit under S. 106, Ben. Ten. Act, the entire body of landlords against whom relief was sought were necessary parties to the suit, and to an appeal arising out of the suit; and after the partial abatement of the appeal, the appeal could no longer be held to be competent. In that view of the matter, the provisions contained in O. 41, R. 33, Civil P. C., could not be invoked in aid of one of the defendants-appellants. It is hardly necessary to point out the difficulty and anomaly that might arise from allowing an appeal arising out of proceedings for correction of entries in a finally published Record of Rights in which the entire body of landlords and tenants were not represented. In our judgment therefore the dismissal of the appeal by the Court below was fully justified, and we see no reason to interfere with the decision arrived at by that Court.

It may be mentioned that on the findings arrived at by the learned Special Judge in the case before us, regard being had to the materials placed before the Court, which, on the face of the judgments of the Courts below go to support the case for the tenants, by whom the suit under the section of the Bengal Tenancy Act was instituted, and regard being also had to the very inconclusive nature

of the decision arrived at by the learned Special Judge in his judgment, we are inclined to hold that no case was made out before the Court of appeal below for an interference with the decision arrived at by the primary Court on the merits of the case. On the facts stated in the judgment of the learned Special Judge, we are in a position to express the opinion that the decision of the Assistant Settlement Officer in favour of the tenants, plaintiffs in the suit, was correct.

The appeal fails on the grounds stated by the learned Special Judge, as also for the reason that the findings arrived at by the Court of appeal below on the merits of the case do not justify a reversal of the decision arrived at by the Assistant Settlement Officer. In the result the appeal is dismissed with costs to the plaintiffs-respondents.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 788

MITTER, J.

Bhupendra Nath Roy Choudhury—
Petitioner.

v.

Jatindra Nath Ray Choudhury and
others—Opposite Parties.

Civil Rule No. 57 of 1933, Decided on 11th April 1933, from decision of Offg. Sub-Judge, 1st Court, Barisal, D/- 7th December 1932.

Civil P. C. (1908), O. 21, R. 90—Purchaser after attachment and before sale is "person whose interest has been affected."

A person who has purchased a property after it has been attached and before it has been sold, is a person whose interest has been affected by the sale within the meaning of O. 21, R. 90: *A I R 1927 Mad 445, Rel. on.* [P 789 C 1]

Profulla Kumar Roy—for Petitioner.

Satindra Nath Roy Choudhury—for
Opposite Parties.

Judgment.—The only point which has been raised by this rule is as to whether a person who has purchased a property after it has been attached and before it has been sold is a person whose interest has been affected by the sale within the meaning of O. 21, R. 90, Civil P. C. The Munsif took the view that such a person has no locus standi to set aside the sale under O. 21, R. 90. The Subordinate Judge takes the contrary view. The question in this rule is which view is right.

It appears that the petitioner brought a money suit against opposite parties Nos. 2 and 3 and on 20th September

1930 attached before judgment certain immovable properties belonging to them. The suit was decreed on 29th January 1931, and the attachment was made final on that date. On 29th October 1930, opposite party No. 2 executed a mortgage in respect of the property attached in favour of one Sarat Jamini Devi, and on 19th June 1931 opposite party No. 1 purchased the mortgage security from Sarat Jamini. In execution of the money decree the property was sold on 24th February 1930 and was purchased by the petitioner. Opposite party No. 1 applied under O. 21, R. 90, to set aside the sale on the grounds of material irregularity and fraud in conducting the same. The Munsif threw out the application on the preliminary ground that petitioner No. 1 has no locus standi and could not maintain the application. On appeal the Subordinate Judge being of a contrary opinion set aside the order of the Munsif and has directed him to hear the application on the merits. Hence the present rule.

It is contended for the petitioner that under S. 64, Civil P. C., the transfer by way of mortgage in favour of opposite party No. 1 is void as against all claims enforceable under the attachment. The effect of this section may be that if the sale is confirmed the purchaser may get the property freed from mortgage in favour of Sarat Jamini which has been transferred to opposite party No. 1, but it does not mean that such a person cannot challenge the sale before it is confirmed; for the auction-purchaser knows that he does not acquire the title merely by paying his amount of the bid and he knows further that the sale is subject to the confirmation by the Court and is liable to be set aside if the judgment-debtor pays the money under O. 21, R. 89, or anyone whose interest is affected by sale applies to set aside the sale on the ground of irregularity or fraud.

The mortgage is good as between the parties to the same and it can hardly be said in this view that his interest is not affected by the sale. In this view I am of opinion that the Subordinate Judge is right and this rule must be discharged with costs. The view I take receives support from a decision of the Madras High Court in the case of *Pandiri Vi-*

ranna v. Grandhi Sattiraju (1). I assess the hearing fee at 1 gold mohur. The records are to be sent down at once.

K.S. Rule discharged.

1. A I R 1927 Mad 445=100 I C 82.

A. I. R. 1933 Calcutta 789

MALLIK AND JACK, JJ.

Dwipendra Nath Chattopadhyaya—Defendant—Appellant.

Mahendra Nath Biswas—Plaintiff—Respondent.

Appeal No. 2380 of 1930, Decided on 9th March 1933, from appellate decree of Addl. District Judge, Jessore, D/- 9th June 1930.

Bengal Tenancy Act (1885), S. 111-A—Suit for correction of entry under general law is not barred by six years' limitation—Record of Rights.

A suit for the correction of the Record of Rights which is really one under the general law (Specific Relief Act) does not come under S. 111-A nor under any other section of the Act, and is not barred by six years' limitation.

[P 789 C 1]

Pyari Mohan Chatterjee and *Hari Charan Banerjee*—for Appellant.

Satindra Nath Mukherjee and *Har Krishna Pramanik*—for Respondent.

Jack, J.—This appeal has arisen out of a suit for correction of a certain entry in the Record of Rights and also for enhancement of rent and for additional rent under S. 30 and S. 52, Ben. Ten. Act. The suit was dismissed in the Court of first instance on the ground that the plaintiff was a cosharer landlord and his cosharers were not joined either as plaintiffs or defendants in the suit under S. 188, Ben. Ten. Act, and the prayer for the amendment of the plaint making his cosharers party defendants was also rejected. The lower appellate Court held that the amendment of the plaint should have been allowed so as to enable the plaintiff to join the cosharer landlords as defendants and therefore remanded the suit for trial on the merits. In this appeal it is contended on behalf of the defendant, appellant that, in any case, having been brought before the amendment of S. 188 of the Act which was brought into force in February 1929, the suit by a cosharer landlord for enhancement of rent and for additional rent under S. 30 and S. 52, Ben. Ten. Act, was not admissible, and further that since the amendment of the plaint was allowed after the

period of six years' limitation, the suit for the correction of the Record of Rights was also barred. It appears however that the suit for the correction of the Record of Rights is really one under the general law (Specific Relief Act). It does not come under S. 111-A, Ben. Ten. Act, nor does it appear to come under any other section of the Act; therefore the suit is not barred by six years' limitation.

As regards the suit for enhancement of rent and for additional rent, it is not barred by limitation, and if the amendment is allowed the plaintiff is entitled to bring it. We think that the learned Judge in the circumstances of the case was right in allowing the amendment of the plaint. It was mentioned in the plaint, in the first instance, that a suit was pending in the High Court in which it might be held that the defendants were cosharers landlords and in that case the plaintiff would apply for the rent of his share only. In these circumstances we think that the amendment should have been allowed and that being so, the suit both as regards the correction of the Record of Rights and as regards the enhancement of rent and additional rent is maintainable. This appeal is therefore dismissed and the order of the learned District Judge remanding the suit to the Court of first instance for trial on the merits should stand. The parties will bear their own costs throughout.

Mallik, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Calcutta 790

PANCKBRIDGE AND PATTERSON, JJ.

Uma Kanta Chatterjee—First Party.

v.

Kalipada Chowdhury and another—Second Party.

Criminal Ref. No. 188 of 1933, Decided on 7th March 1933.

Criminal P. C. (1898), Ss. 133, 137 & 139-A—Denial of public right in respect of land in question—Magistrate should hold enquiry under S. 139-A—He can proceed under S. 137 only if he finds that there is no reliable evidence in support of such denial.

Where in proceedings under S. 133, Criminal P. C., the opposite party denies the existence of a public right in respect of the land in question, it is the duty of the Magistrate to hold an enquiry under S. 139-A with a view to ascertaining whether there is any reliable evidence in support of the denial on the part of the opposite party, and to record a clear finding on the point

before proceeding further. If his finding is to the effect that there is reliable evidence in support of the denial of the opposite party, he is bound to stay proceedings until the matter of the existence of the alleged public road has been decided by a competent civil Court. If, on the other hand, he finds that there is no reliable evidence in support of the denial of such a right, then, and then only, is he entitled to proceed further and to deal with the matter under the provisions of S. 137. He cannot make his original order absolute under S. 137 without recording any finding under S. 139-A.

[P 790 C 2; P 791 C 1]

Probodh Chandra Chatterjee—for First Party.

Susil Chandra Sen and Santimoy Majumdar—for Second Party.

Patterson, J.—The subject-matter of the case to which this reference relates is a strip of land which has been described in the proceedings drawn up under S. 133, Criminal P. C., as

"the northern flank of the road in plot No. 1811 used by the public as a right of way at Dakshineswar."

The alleged obstruction consists of certain huts which have been erected on the said land by opposite party 2 as a lessee under opposite party 1 who is the Secretary of the Board of Trustees of the Dakshineswar Debuttar Estate. The first party is the owner of a plot of land situated immediately to the north of plot No. 1811, and his main grievance as set forth in his petition is that the erection of the huts in question has obstructed his road frontage. In the police report on the petition of the first party it is further stated that the public visiting the Dakshineswar temple are in the habit of using the road in plot No. 1811, and that the erection of huts by opposite party 2 on the flank of the road has caused inconvenience to them in certain respects. Opposite party 1 in his petition showing cause has denied the existence of any public right in plot No. 1811, and it is further stated in that petition that although the public visiting the temple are in the habit of passing over a portion of the land in plot No. 1811, they only do so with the leave and license of the trustees of the Debuttar Estate, and not as of right. In these circumstances, it was the duty of the Magistrate to hold an enquiry under S. 139-A, Criminal P. C., with a view to ascertaining whether there was any reliable evidence in support of the denial on the part of the opposite party of the existence of any public right in respect

of the land in question and to record a clear finding on the point before proceeding further. If his finding was to the effect that there was reliable evidence in support of the denial of the opposite party, he was bound to stay proceedings until the matter of the existence of the alleged public road had been decided by a competent civil Court. If on the other hand he found that there was no reliable evidence in support of the denial of such a right, then and then only was he entitled to proceed further and to deal with the matter under the provisions of S. 137, Criminal P. C. What the learned Magistrate actually did was to examine the papers produced by both sides and then, without recording any finding under S. 139-A, to make his original order absolute under the provisions of S. 137, relying mainly on an entry in the Record of Rights to the effect that plot No. 1811 was a public road. It is not clear whether the Magistrate thought that he was holding an inquiry under S. 139-A, but even if he did it seems to me that the inquiry made by him was not a sufficient compliance with that section. He did not arrive at any finding to the effect that there was no reliable evidence in support of the denial of the existence of any public road by the opposite party and in my opinion the materials before him were not sufficient to justify such a finding. The whole of plot No. 1811 has been recorded as the property of the Dakshineswar Debutter Estate, and whatever may be the legal position with regard to the portion of the plot which is actually used as a road, it is clear that the mere fact that the whole of the plot had been recorded as a public road is not of itself sufficient to rebut the presumption that the trustees were (at any rate so far as the roadside land was concerned) entitled to exercise their full rights as proprietors and to deal with the land in question in whatever manner they thought fit. Be that as it may, it appears that no proper inquiry was held under S. 139-A, and that no finding was recorded under that section, and this being so the order made under S. 137 must be held to have been made without jurisdiction.

In these circumstances, I would accept the reference and set aside the order made by the Magistrate under S. 137,

Criminal P. C., as recommended by the learned Sessions Judge.

Panckridge, J.—I agree.

K.S.

Reference accepted.

A. I. R. 1933 Calcutta 791

PANCKRIDGE AND PATTERSON, JJ.

Emperor

v.

Sarafat Hossain and another — Accused.

Criminal Ref. No. 15 of 1932, Decided on 18th November 1932, from order of Dist. Magistrate, Howrah.

Criminal P. C. (1898), S. 438 — Appeal to Sessions Judge against conviction of Magistrate dismissed — Reference by District Magistrate to High Court for enhancement of sentence should not be entertained.

An appeal from a conviction by a Magistrate was dismissed by the Sessions Judge. Then the District Magistrate referred under S. 438 for enhancement of sentence.

Held: that, though the District Magistrate had power to call for the record from the Magistrate under S. 435 or to make a report to the High Court under S. 438, still it was not desirable that the High Court should entertain the matter of reference, as the facts of the case had been brought to the notice of the Sessions Judge on appeal. [P 792 C 1]

Nirmal Chandra Choudhury — for the Crown.

Asaduzzaman, Abdul Ali and Imam Hossain Choudhury — for Accused.

Judgment.—This matter has been referred to us under S. 438, Criminal P. C., by the District Magistrate of Howrah. It appears that the opposite parties were convicted under S. 9, Opium Act of 1878, of being in illegal possession of a large quantity of opium. The Magistrate has convicted them and sentenced them each to pay a fine of Rs. 1,000 or in default to suffer six months' rigorous imprisonment. The opposite parties appealed against their conviction and sentence to the Sessions Judge of Howrah who dismissed the appeal. The District Magistrate, for the reasons which he gives in his letter of reference, considers the sentence inadequate and he recommends its enhancement. The learned advocate who appears for the opposite parties has submitted that inasmuch as the District Magistrate is inferior to the Sessions Judge for the purposes of S. 435, Criminal P. C., we cannot or at any rate should not interfere. He has cited various authorities to us which lay down limitations on the powers of the District Magistrate to call for the records and to

report to the High Court in cases where the matter has already been dealt with by a Sessions Judge. None of these cases is directly in point because, as is conceded, the Sessions Judge, in dealing with the opposite parties' appeal had no power to do what we are asked to do, namely to enhance the sentence passed on the opposite parties. It therefore cannot be said that the District Magistrate has reported the case to us with a view to our reversing the order of dismissal made by the Sessions Judge sitting in appeal.

While we do not feel justified in holding that in the circumstances of the particular case the District Magistrate had no power to call for the record from the Deputy Magistrate's Court under S. 435, Criminal P. C., or to make a report to the High Court under S. 438, Criminal P. C., we feel that it is not desirable that we should entertain the matter on a letter of reference addressed to us by a District Magistrate when the facts of the case have already been brought to the notice of the learned Sessions Judge in the appeal. It was suggested to us that as the matter came before the Sessions Judge in his appellate jurisdiction he had no power himself to report the case for orders under S. 438. We understand that that contention is not now pressed and we certainly are not disposed to accept it. In the circumstances, having regard to the way that the case has been brought to our notice, we do not consider that we should take any action. The reference is therefore rejected.

K.S. *Reference rejected.*

A. I. R. 1933 Calcutta 792

C. C. GHOSE, AG. C. J. AND

S. K. GHOSE, J.

Nrisingha Chandra Ghose — Petitioner.

v.

Emperor—Opposite Party.

Criminal Rev. Pctn. No. 1059 of 1932,
Decided on 30th March 1933.

(a) Press Emergency Powers Act (23 of 1931), S. 17—Search and seizure without search-warrant are illegal—Magistrate cannot pass forfeiture order on report of such search.

Where the police officer, for the purpose of seizing the press under S. 17 of the said Act, has not been armed with a search warrant as is contemplated in S. 17, the search and the seizure of the press are illegal and that being so, the

Magistrate cannot make the order forfeiting the press under the provisions of S. 17 (3).

[P 792 C 11]

(b) Press Emergency Powers Act (23 of 1931), S. 16—Order of forfeiture should not be passed in absence of person who has custody and control of press.

Where an order declaring the press to be forfeited to His Majesty is passed in the absence of the person who has the custody and control of the press in question, it must be set aside.

[P 793 C 11]

Debendra Narain Bhattacharjee and
Satindra Nath Chatterji—for Petitioner.
Kundkar—for the Crown.

Order.—The facts involved in the case, out of which this Rule has arisen, shortly stated, are as follows: It appears that certain unauthorized news-sheets or unauthorized newspapers were being produced at premises No. 9, Sibrain Das Lane, in the town of Calcutta. These unauthorized news-sheets or news papers were being produced from an undeclared press. The police acting under the provisions of S. 16, Indian Press Emergency Powers Act (23 of 1931), entered into the said premises and seized the said unauthorized news-sheets or unauthorized news papers. As a result of the seizure certain persons, whose names are not material, were prosecuted and convicted by the Magistrate and sentenced adequately. The police on the date of the entry into the premises, without obtaining a warrant as contemplated in S. 17 of the said Act, proceeded to search the said premises with a view to seize the press from which the unauthorized news-sheets or news papers were being produced. The police officer making the search made a report of the search and the Magistrate being of opinion that the press seized by the police officer in the circumstances stated above was an undeclared press made an order declaring the press forfeited to His Majesty. It is against this order that the present Rule has been directed.

Mr. Bhattacharjee who appears in support of the Rule has urged two contentions before us: His first contention is that the police officer for the purpose of seizing the press under S. 17 of the said Act had not been armed with a search warrant as is contemplated in S. 17 and that therefore the search and the seizure of the press were illegal and that, that being so, the Magistrate could not make the order which he did under

the provisions of S. 17 (3) of the Act. In the second place Mr. Bhattacharjee has contended that the order forfeiting the press to His Majesty was made in the absence of the petitioner who had the press under his custody and control; in other words, Mr. Bhattacharjee has contended that as soon as the proceeding under S. 16 of the Act was brought to a termination the Magistrate then and there made an order forfeiting the press to His Majesty under the provisions of S. 17 (3). We have examined the record and heard the learned Deputy Legal Remembrancer against the Rule and Mr. Khundkar with his customary frankness has admitted that the proceedings under S. 17, sub Ss. (1) and (2), were, in the circumstances of this particular case, irregular; in other words, Mr. Khundkar had made it clear that the police had no search warrant authorizing them to seize the press in question and that the police officer who made the report of the search had not, as is indicated above, any authority from the Magistrate to seize the press. Mr. Khundkar has not also challenged the accuracy of Mr. Bhattacharji's contention that the order declaring the press to be forfeited to His Majesty was not passed in the presence of the person, i. e. the petitioner who had the custody and control of the press in question.

In the circumstances it follows as an irresistible conclusion that the entire proceedings on the part of the police in this case were irregular and unauthorized in the eye of the law. That being so, we have no other alternative but to set aside the order of the Chief Presidency Magistrate. The result therefore is that the order of forfeiture made by the Magistrate is set aside. Any consequential order which follows from the order just made will no doubt be made by the Magistrate on a proper application being made to him.

K. S.

*Order set aside.***A. I. R. 1933 Calcutta 793**

MUKERJI, J.

Hari Nath and others—Appellants.

v.

Kulesh Chandra Ghose—Respondent.

Appeal No. 1749 of 1930, Decided on 14th November 1932, against appellate decree of First Court Sub-Judge, Bakarganj, D/- 24th January 1930.

Civil P. C. (1908), S. 11 — Tenant allowing decree for rent for entire holding to be passed in simple rent suit is not barred by res judicata from raising plea of dispossession subsequently in another suit — Landlord and Tenant.

Where in a simple suit for rent, the tenant puts forward a plea of dispossession and allows a decree to be passed for the entire rent, it should not be held that he was bound to take this plea of dispossession and since he has not done so, it should be treated as barred by the doctrine of constructive res judicata in a subsequent suit.

[P 794 C 9]

Bijan Kumar Mukerji — for Appellants.

Amarendra Nath Bose, Girija Prossanna Roy Choudhury and Annada Charan Karkoon—for Respondent.

Judgment.—Plaintiffs are the appellants in this appeal. The appeal has arisen out of a suit which the plaintiffs instituted for recovery of rent for the years 1331-33, B. S. Rent was claimed at the rate of Rs. 65 with cesses and damages. The contention of the defendant was that he had been dispossessed from a portion of the land and on that account he was entitled to suspension of the entire rent. The Munsiff decreed the suit overruling this contention of the defendant and gave him a decree though not for the entire amount but making certain deductions on account of the cesses that were claimed. On appeal preferred by the defendant the Subordinate Judge set aside the trial Court's decree and allowed the plaintiffs a decree for rent at a rate to be ascertained by comparison of the kabuliyat which formed the basis of the tenancy with the settlement records which, according to the learned Subordinate Judge, showed that the defendant was in possession of lands less than what was covered by the kabuliyat.

The facts necessary to be stated are the following: The tenancy was created by a kabuliyat dated 1879. In 1902 there was a decree for rent obtained by the plaintiffs against the then tenant and in execution of that decree the holding was put up to sale and purchased by the defendant. The kabuliyat purported to create a tenancy in respect of three annas share of certain lands included in certain defined boundaries. After the defendant's purchase there was a suit for rent instituted by the plaintiffs against him for the years 1309-12 and it appears that in that suit a decree was obtained by the plain-

tiffs for rent at the rate mentioned in the kabuliyat. It would appear that at that time it was not contended on behalf of the defendant that he was in possession of the entire lands of the tenancy. The present suit was instituted, as already stated, for the rent of the years 1331-33. The Munsiff held that there was no evidence to show that there was any dispossession by the plaintiffs of the lands of the tenancy since the decree which the plaintiffs obtained against the defendant for the years 1309-12, and he was inclined to take the view that the defendant was in possession of the entire quantity of lands. The Subordinate Judge on the other hand has, on a reference to the settlement records and the evidence which the defendant as well as the son of the giver of the kabuliyat gave in this case, come to the conclusion that the defendant in fact got much less land than the three annas of the lands included within the kabuliyat boundaries and that the remaining lands which the defendant ought to have got were recorded in the settlement records as khas lands of the plaintiffs and their cosharers in superior taluki right.

His finding amounts to this: that in point of fact the defendant is not in possession of the land which he ought to be in possession of under the kabuliyat. The Subordinate Judge appears to have believed that from the very beginning, when the defendant came to be in possession, he could not get all the lands of the kabuliyat. In those circumstances the only point of law which may be urged and indeed has been urged by Dr. Mukerji on behalf of the appellants, is that the defendant should be held to be precluded by reason of the doctrine of constructive res judicata from pleading that he was not in possession of the entire lands of the tenancy and that he was not therefore liable to pay the entire rent, by reason of the fact that in the previous suit for rent for the years 1309-12 this defence was not taken, whereas it might and ought to have been taken within the meaning of S. 11 of the Code. I am of opinion that this contention ought not to be allowed to prevail. No doubt it was quite open to the defendant to take this plea in defence if he so chose and therefore it was a defence which might have been taken in suit.

But I do not think it can be said that it ought to have been taken. I am not prepared to hold that in a simple suit for rent, where the tenant puts forward a plea of dispossession and allows a decree to be passed for the entire rent, it should be held that he was bound to take this plea of dispossession and since he has not done so it should be treated as barred by the doctrine of constructive res judicata.

Upon the facts which the learned Subordinate Judge has found, namely that the defendant was not in possession of the entire lands of the tenancy and that the remaining lands are in his possession of the plaintiffs and their cosharers, the decree which the learned Subordinate Judge has made is, in my opinion, correct. The appeal accordingly fails and must be dismissed with costs.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 794

MUKERJI AND GUHA, JJ.

Upendra Nath Das and others — Petitioners.

v.

Daksha Yani Debya and others—Opposite Parties.

Civil Rule No. 1330 (t) of 1932, Decided on 25th May 1933.

(a) Civil P. C. (1908), O. 32, R. 11—Guardian appointed not appearing in appellate Court—Appellate Court can appoint fresh guardian in his place—Though appointment of fresh guardian means removal of former guardian it is better to record formal order to that effect.

Where the guardian appointed on behalf of a minor in the lower Court fails to appear in the appellate Court, the latter Court can appoint a fresh guardian in his place. And though the appointment of a fresh guardian necessarily means the removal of the previous one, still it is better to have a formal order of removal of former guardian recorded before the order of appointment is made. [P 795 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 148—Court has discretion either to resort to special procedure or to adopt the procedure under O. 32, Civil P. C.

The Court has, under the wording of S. 148(h), a discretion either to resort to this special procedure or not; that is to say, it is quite open to the Court, even in a suit for rent, to adopt the normal procedure which is laid down in O. 32, Civil P. C. [P 795 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 148 (h)—Special procedure under S. 148(h) is available only to trial Court and at suit stage.

The special procedure, under S. 148 (h), is not available to any Court other than the trial Court or at any stage other than the suit stage.

[P 796 C 1]

Surendra Nath Das Gupta II for
Petitioners

S. C. Basak—for the Crown.

* *Order*.—Besides the two questions which have been formulated in this reference, another question has arisen upon the arguments that we have heard. That question is of a general nature and has from time to time been raised, namely, whether, when a guardian has been appointed in respect of a minor in any of the Courts below and that guardian does not appear in this Court in a proceeding in connexion with which a notice has been served on him, he must be regarded as continuing and as a guardian in whose place a fresh guardian cannot or ought not to be appointed by this Court, on the view that his appointment enures for the whole list. There are decisions which lay down that if a guardian has been appointed by the Court his appointment continues for all purposes of the suit and that so long as no other guardian is appointed he and he alone is competent, in case the suit ends in a decree, to prefer an appeal from that decree and is also competent generally to represent the minor in such proceedings as may be taken after the passing of the decree and in connexion with it. This however is so only so long as no other person has been appointed guardian in respect of the minor. The cases do not lay down that a guardian appointed by the Court has an indefeasible right to continue for ever. When a guardian appointed in any of the Courts below does not appear in this Court, it is not possible for this Court to ascertain whether he is not appearing because he thinks that he would better serve the minor's interest by not appearing or because he has not been put in possession of funds to enable him to appear or for any other cause. And if, in order to safeguard the interests of the minor, this Court, on the failure of such guardian to appear, appoints another guardian in this Court, namely the Deputy Registrar, it hardly lies in the mouth of the appellant or the petitioner, as the case may be, to say that such an order cannot be made because it may be that the said guardian is not appearing for the reason that he thinks that by not appearing he would better serve the minor's interest. There can be no question that under O. 32,

R. 11, the Court may, for sufficient reason, remove a guardian. The law does not say what may or may not be a sufficient reason for this purpose. We are of opinion that it would generally speaking be a sufficient ground for the removal of the guardian and for the appointment of the Deputy Registrar in his place when the Court finds that such guardian has not put in any appearance in this Court, so that the Court is not in a position to judge whether the minor's interest is being really looked after. The only thing that may possibly be said is that there should be a formal order for removal. Here again, the law does not say that a formal order should be recorded. An appointment of a fresh guardian necessarily means the removal of the one previously appointed. But it would perhaps be better, where the Deputy Registrar is to be appointed guardian in circumstances stated above, to have a formal order for removal recorded before the order of appointment is made.

The questions formulated in the reference depend upon the meaning of S. 148, Cl. (b), Ben. Ten. Act. That clause lays down that notwithstanding anything contained in R. 4, sub-R. (3), O. 32, in Sch. 1, Civil P. C. of 1908, the Court in a suit for rent is competent to resort to a special procedure. It should be noted at the outset that the Court has, under the wording of this clause, a discretion either to resort to this special procedure or not; that is to say, it is quite open to the Court, even in a suit for rent, to adopt the normal procedure which is laid down in O. 32, Sch. 1, Civil P. C., 1908. Under what special circumstances the Court would be justified in adhering to the normal procedure is not a matter which we need consider here. But the special procedure that is prescribed is a notice in a special form, and this form has got to be strictly adhered to in order that the result contemplated by this clause may be achieved. If this special procedure is observed, the result will be that the person upon whom the notice contemplated by this clause is served shall, unless the Court otherwise directs, be deemed to be the duly appointed guardian of the minor defendant "for all purposes of the suit." It may be conceded that the words "for all purposes of the suit"

would include proceedings in continuation of the suit, namely, proceedings in appeal or such other proceedings as may directly arise out of the suit. It follows therefore that if such guardian prefers an appeal from the decree or appears as respondent in an appeal, which the plaintiff prefers from it, he continues as such guardian. But the question is what is to happen if he does not appear in the appellate Court, or what is an appellate Court to do if a minor becomes a respondent in rent appeal. The argument is twofold. It is said in the first place, that because the appointment of the natural guardian as guardian under S. 148, Cl. (b) of the Act is "for all purposes of the suit," no other guardian can or should be appointed, even if he does not appear. So far as this matter is concerned there is no reason to treat a rent appeal on a different footing from any other appeal, and the expediency of appointing the Deputy Registrar as guardian in such circumstances has already been explained. It is argued nextly that by reason of what has been said in S. 148, Cl. (b) of the Act, when notice of the appeal is to be given, a notice should be given in the form prescribed in this clause so that, even if the guardian does not appear, he will be deemed to be the guardian. We are of opinion that such an interpretation cannot possibly be given to Cl. (b), S. 148, which expressly prescribes a procedure which the trial Court only can follow upon the express terms of that clause.

As the guardian appointed by the Court below has not appeared in answer to the notice served on him by this Court he is removed, and the Deputy Registrar will be appointed such guardian on the petitioners depositing the necessary costs and the indemnity bond within three weeks from today. As regards the questions raised in the reference, the answers we give are: (1). The word "suit" means the suit in the suit stage; and the expression "for all the purposes of the suit" include appellate stage or stages of the suit. (2). The usual notice under the normal procedure has to be given to the guardian. S. 148, Cl. (b), cannot be interpreted as meaning that the special procedure, which it prescribes, is available to any Court other than the trial Court or at any

stage other than the suit stage. These two answers would show that, in our opinion, even in cases in which the special procedure was resorted to in a rent suit, an appeal or a revision case arising out of it should be dealt with in this Court on the same footing as all other appeals and revision cases.

K.S.

Reference answered.

A. I. R. 1933 Calcutta 796

C. C. GHOSE AND S. K. GHOSE, JJ.

Benodini Chaudhurani—Defendant—Petitioner.

v.

Jagabandhu Roy and others—Opposite Parties.

Civil Rule No. 699 (F) of 1932, Decided on 18th November 1932, from original decree of Sub-Judge, Murshidabad, D/- 29th February 1932.

(a) Limitation Act (1908), Art. 156—Appeal from preliminary decree.

Time for filing an appeal from a preliminary decree runs from date of the preliminary decree and not from that of the final decree.

[P 796 C 2]

(b) Limitation Act (1908), S 5—Memorandum of appeal filed without stamp and out of time by 21 days—Time should not be extended, even though litigant was pardanashin lady.

A memorandum of appeal was filed without any stamps and out of time by 21 days:

Held: that even though the litigant was a pardanashin lady, extension of time ought not to be granted.

[P 797 C 1]

Bijan Kumar Mukerji and Joy Gopal Ghose—for Petitioner.

Sarat Chandra Jana—for Opposite Parties.

Judgment.—In this case according to one view the memorandum of appeal was presented nine days out of time. But according to the view presented on behalf of the respondent, the memorandum of appeal was presented 21 days out of time. It appears that the appeal is directed against a preliminary decree in a mortgage suit. The date of the preliminary decree is the 2nd March 1932. The final decree was passed on 19th March 1932. It is said on behalf of the appellant that the pleader in the Court below advised the appellant that there would be appeal only against both the final decree and the preliminary decree and that therefore time for filing the appeal would run from the date of the final decree. The advice was of course incorrect and when the papers reached the learned advocate in

this Court, Mr. Joy Gopal Ghose, it was discovered that the time for preferring the appeal against the preliminary decree had already expired.

The present appeal was presented on the 11th June. The memorandum of appeal did not bear any stamp. The grounds were written out or typed on a piece of blank paper. It is true that the appellant came to the learned Judges taking first appeals and obtained an order for extension of time for putting in deficit court-fees. That order was made in the absence of the other side and without hearing them. Dr. Mukherji for the appellant has drawn our attention to what has been done in cases where there has been a question of deficit court-fees and where extension of time has been granted. It is to be noticed however that all these cases were cases where the memorandum of appeal bearing some stamp or other was presented in time and it was then discovered that the court-fees were insufficient and thereafter further time was allowed to put in the deficit court fees. The present case is however different. I am not aware of any case where the memorandum of appeal was presented out of time without any stamp whatsoever and where such presentation has been considered as if it were that of a proper memorandum of appeal. As far as one can make out, the net result of this case is that the memorandum of appeal was presented out of time by 21 days. The question is whether having regard to the circumstances and being not unmindful of the fact that the litigant is a pardanashin lady, we should be prepared to exercise our powers under S. 5, Lim. Act, and grant extension of time not merely for nine days but for as much as 21 days. In my view this would be a dangerous precedent if we were to allow such an extension; and taking all circumstances into consideration such extension of time ought not to be granted. The result is that the rule is discharged and it is directed that the memorandum of appeal be not registered. The rule is discharged with costs, hearing fee being assessed at three gold mohurs.

S. K. Ghose, J.—I agree.

K.S.

Rule discharged.

A. I. R. 1933 Calcutta 797

PEARSON, J.

Debendra Nath Basu—Petitioner.

Atmananda Bhattacharjee and others—
Opposite Parties.

Civil Revn. Petn. No. 1159 of 1932,
Decided on 12th April 1933, from order
of 2nd Addl. Sub-Judge, 24-Parganas,
D/-16th July 1932.

Bengal Tenancy Act (8 of 1885), S. 153—
Decision on question whether defendant
should pay drainage cess direct to Govern-
ment or to his landlord is not appealable.

Plaintiff landlord claimed that defendant
should pay drainage cess to him, whereas the
defendant contended that he was paying it
direct to Government. The Court decided that
Government had the preferential right to the
cess :

Held : that the decision was not appealable,
as no question, relating to title or any interest
in land between the parties having conflicting
claims, was decided : 8 C W N 484, *Dist.*

[P 797 C 2 ; P 798 C 1]

Hemendra Chandra Sen — for Peti-
tioner.

*Hiralal Chakrabarti and Shyamadas
Bhattacharjee*—for Opposite Parties.

Judgment.—The plaintiff sued to re-
cover arrears of drainage cess for the
years 1334 to 1387, and for damages. He
is the proprietor of estate No. 376 of
the 24-Parganas Collectorate and has to
pay drainage cess to Government. The
Record of Rights shows the drainage
cess as recoverable by plaintiff from
defendant.

The defence is that defendant claims
to hold the lands as pishkar lands ap-
pertaining to lakhraj No. 386-B and
that defendant pays drainage cess direct
to Government and not to the plaintiff.
The Munsiff referred to the entry in the
Record of Rights and said that the
question was whether it had been re-
buted. He went into the question
whether on the evidence it was shown
that the holding in suit belonged to
lakhraj No. 386-B, and he finds that it
does and that Government has the pre-
ferential right to the drainage cess. On
appeal before the Subordinate Judge, it
was contended that no appeal lay under
S. 153, Ben. Ten. Act, because no ques-
tion had been decided relating to title to
land or to any interest in land as be-
tween parties having conflicting claims
thereto, and the Court upheld that con-
tention.

As against this the appellant relies on
the principle of *Sita Nath Pal v. Kartick*

Gharmi (1), where it was held that an appeal did lie in a case where plaintiff and defendant both claimed under the same landlord, and the plaintiff alleged that defendant was his sub-tenant; it was therefore a case of an interest in land between parties having conflicting claims thereto. In the present case I think no such question can be said properly to arise. The defendant was admittedly the lakherajdar; his title in that respect is not denied. The only question for determination was whether the cess should be paid direct to Government or through the plaintiff. This can hardly be said to raise a question between the parties of the nature referred to in the section. The rule is discharged with costs, one gold mohur.

K.S.

Rule discharged.

1. (1904) 8 O W N 484.

A. I. R. 1933 Calcutta 798

S. K. GHOSE, J.

Harihar Prosad Das—Appellant.

v.

Umesh Chandra Das Mohapatra and others—Respondents.

Appeal No. 2909 of 1930, Decided on 2nd February 1933, against appellate decree of 2nd Court Sub-Judge, Midnapur, D/- 5th August 1930.

(a) Mortgage—Application for final decree is not application in execution proceedings—Practice.

An application for a final decree is really an application to enforce a judgment and not in the nature of an application in an execution proceeding: 38 Cal 918 and AIR 1914 P C 150, *Ref.*

[P 799 C 1]

(b) Mortgage—Final decree based on valid and operative preliminary decree cannot be void.

A preliminary decree was obtained by impleading the widow of the mortgagor as his heir. The widow remarried, but in ignorance of this fact a final decree was obtained by impleading her.

Held: that as the preliminary decree was valid and operative, the final decree following thereon was not void but only voidable at the instance of the heir of the mortgagor: *Case law referred.*

[P 799 C 1; P 660 C 1]

Panchanan Ghose and Saroj Kumar Maity—for Appellant.

Satcouripati Roy and Bireswar Chatterjee—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of possession of certain land on a declaration of the plaintiff's title thereto under the following circumstances: The land originally belonged to one Kuran Samal who mort-

gaged it to the plaintiff on 15th Aghayan 1315. The plaintiff brought a mortgage suit, No. 870 of 1917, and as Kuran Samal was then dead, he made his widow Balaram Dasi a defendant as also one Guina Samal who was a subsequent transferee in respect of a portion of the mortgaged property. He obtained a preliminary decree on 9th September 1917 and thereafter the final decree. He put the decree into execution and himself purchased the property and took delivery of possession through Court on 31st May 1927. He was dispossessed on 28th November 1927 by defendant 1 who alleged that he had purchased the property from two persons who were the reversionary heirs of Kuran Samal. The plaintiff repudiated this allegation and brought the suit to recover possession as aforesaid and, in the alternative, he made the prayer that if defendant 1 be held to have acquired any title, then he should be made to redeem the mortgage on the footing of the mortgage decree.

The suit was contested by defendant 1 and his bhag tenant, defendant 2. They raised various defences challenging the mortgage decree itself and one of their defences was that Balaram Dasi, defendant 3, had entered into a second marriage with one Kailas Jana after the death of her husband Kuran Samal, that therefore she was not the heiress of Kuran Samal at the time of the mortgage suit, and that consequently the mortgage decree was a nullity. The learned Munsif held that the plaintiff's mortgage was a genuine transaction; but he found that although at the time of the preliminary decree Balaram Dasi might have been correctly represented as the widow and heiress of the deceased mortgagor Kuran Samal, she got married to another person before the passing of the final decree and therefore before that decree she had lost her character as heir to the deceased mortgagor and must be considered to be dead in the eye of the law. In that view he held that the final decree in the mortgage suit was a nullity. Accordingly he dismissed the plaintiff's suit. The plaintiff appealed and the question arose whether, in the circumstances, the learned Munsif was right in holding that defendant 3, Balaram Dasi, was not the heiress of Kuran Samal at the time of the mort-

gage suit. The learned Judge agreed with the Munsif both as to his finding of fact and as to his view of the law and so he dismissed the appeal. Hence this second appeal by the plaintiff.

The point of law upon which the decision of this appeal turns is the question whether in the aforesaid circumstances the final decree in the mortgage suit is a nullity, it being taken for granted that the preliminary decree was a valid one. It was pointed out that an application for a final decree is really an application to enforce a judgment and not in the nature of an application in an execution proceeding: see the case of *Amlook Chand v. Sarat Chunder* (1) which was confirmed by the Judicial Committee in the case of *Munna Lal v. Sarat Chunder* (2). According to the explanation to sub-S. (2) of S. 2, Civil P. C., a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of and it is final when such adjudication completely disposes of the suit. And so it was held by a Full Bench of this Court in the case of *Taleb Ali v. Abdul Aziz* (3), that a final decree is dependent on and subordinate to the preliminary decree in a mortgage suit. This being the case, where the basis of the final decree, viz. the preliminary decree, is valid and operative, it is difficult to see how the final decree following thereon can be held to be void and not merely voidable for some such defect as is complained of now. The case of *Lachmi Narain v. Balmukund* (4) was a suit for partition in which there was a preliminary decree. Thereafter the plaintiff failed to appear before the trial Court and the suit was dismissed for want of further prosecution.

It was held by the Judicial Committee that the trial Court had no jurisdiction to make the order, since after a decree had been made in a suit, the suit could not be dismissed unless the decree was reversed. This decision of the Judicial Committee has been relied on in a number of cases where it has been held that once a preliminary decree has been correctly made, it does not abate by

reason of the death of a party: see for instance, the case of *Bhatu Ram Modi v. Fagal Ram* (5) and the decision of a Full Bench of the Madras High Court in the case of *Perumal Pillay v. Perumal Chetty* (6). This case was followed by a Division Bench of this Court in the case of *Nazir Ahmmed v. Tamijuddi Ahmmed* (7) and by the Patna High Court in the case of *Mt. Bhatia v. Abdus Shakur* reported in *A. I. R. 1931 Pat. 57*. No doubt all these are cases in which the final decree had not actually been made, and the question arose at the time of the application for the final decree following on the preliminary decree. But I do not see that that makes any difference with regard to the principle which I am considering now. This case is almost exactly similar to the one which was decided by my learned brother Patterson J., in *S. A. No. 2873 of 1929* on 5th February 1932. There the plaintiff based his title upon an auction purchase in execution of his mortgage decree. In the mortgage suit, after the preliminary decree, the defendant died and his two infant heirs were substituted without any guardian being appointed in their behalf and thereafter a final decree was obtained. It was pointed out by the learned advocate for the respondent in the appeal before me that in any case that decree was voidable at the instance of the minors on attaining majority, but Patterson, J., did not proceed on that assumption.

On the contrary, he assumed that a decree originally made against the minors not being properly represented would amount to a nullity; but he held in the circumstances before him that where the preliminary decree had been properly made, the final decree being in its nature dependent and subordinate did not amount to a nullity, simply because the defendants were not properly represented in the latter decree. The test is whether the Court had jurisdiction to pass the final decree. Obviously, it had, and if that is so, it cannot be said that the decree would amount to a nullity, because the defendant was not properly represented: see the case of *Malkarjan v. Narhari* (8).

1. (1911) 88 Cal 918=11 I O 948.

2. A I R 1914 P O 150=27 I O 688=42 I A 88=42 Cal 776 (PC).

3. A I R 1929 Cal 689=128 I O 305 (FB).

4. A I R 1924 P C 198=81 I O 747=51 I A 221=4 Pat 61 (PC).

5. A I R 1926 Pat 141=99 I O 629=5 Pat 223.

6. A I R 1928 Mad 914=112 I O 116=51 Mad 701 (FB).

7. A I R 1929 Cal 430=122 I O 303=57 Cal 285.

8. (1901) 25 Bom 337=27 I A 216 (PC).

For the respondent reliance has been placed on certain cases which occurred before the decision in *Lachmi Narain Marwari's* case (4) referred to above; for instance the case of *Bhutnath Jana v. Tara Chand Jana* (9), which was expressly dissented from in *Nazir Ahamed's* case (7). The learned advocate for the respondent has also referred to the case of *Digambar Suthar v. Suajan* (10). But that decision does not give any help, because there the equity of redemption was not represented in the suit at all and there was no question as between the preliminary decree and the final decree. In my judgment, in the circumstances of the present case, the final decree which the plaintiff obtained in the mortgage suit was not void, but it was only voidable at the instance of the heirs of the deceased mortgagor. These heirs would be bound by the doctrine of *lis pendens* and it is found for a fact that the plaintiff himself did not know that the widow had entered into a second marriage. The point therefore must be decided in favour of the plaintiff.

The plaintiff himself asked that if defendant 1 be found to have acquired any title, he should be made to redeem the mortgage on the footing of the mortgage decree. There is no question that defendant 1 did purchase from the reversionary heirs of the deceased mortgagor. The decree was for a sum of Rs. 100. The preliminary decree was obtained on 23rd August 1917; the interest was allowed to run at 6 per cent per annum. Having regard to the lapse of time since then, I consider in the circumstances of this litigation that defendant 1 should be given the option to redeem the mortgage debt on payment of Rs. 180 in full satisfaction of that debt within three months from this date. If such payment is made, the mortgage debt would be considered to be satisfied and the plaintiff's claim for khas possession would be dismissed. If such payment is not made within the time as aforesaid, the plaintiff's suit will be decreed. The appeal is, accordingly, allowed with costs in this Court.

K.S.

Appeal allowed.

9. A I R 1921 Cal 551=59 I O 177.

10. A I R 1929 Cal 238=120 I O 97.

A. I. R. 1933 Calcutta 800

LORT-WILLIAMS AND HENDERSON, JJ.

Major Robert Stuart Wauchope—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 501 of 1933, Decided on 24th August 1933.

(a) Criminal Trial—Presumption of innocence—Guilt of accused must be established by relevant evidence by prosecution—Onus of proving general issue never shifts from prosecution.

Every accused must be presumed to be innocent unless and until he has been proved beyond reasonable doubt to be guilty, and his guilt must be established by relevant evidence before he can be convicted. In criminal cases the onus of proving the general issue never shifts. It always lies on the prosecution to prove beyond reasonable doubt the guilt of the accused. *Case law referred.* [P 801 C 1]

(b) Criminal Trial—Magistrate should discountenance methods by prosecution adopted to obtain conviction by hook or crook.

It is no part of the prosecution's duty to try by hook or crook to obtain convictions. And it is the duty of the Magistrate sternly to discountenance such methods, which are but a travesty of justice. [P 803 C 2]

(c) Penal Code (1860), S. 409—Prosecution must prove misappropriation—Onus never shifts.

In cases of criminal misappropriation, the prosecution must always prove misappropriation. It is not enough if it proves that the accused had received the money. The onus of proof never shifts from prosecution. [P 807 C 2]

A. N. Chaudhury and Suresh Chandra Talukdar—for Appellant.

D. N. Bhattacharjee—for the Crown.

Lort-Williams, J.—The appellant, Major Robert Stuart Wauchope, O. B. E., Indian Army, has been convicted by the Chief Presidency Magistrate of criminal breach of trust under S. 409, I. P. C., in respect of two sums of Rs. 1,500 each alleged to have been received by him on 4th March and 1st July 1929, respectively, from the Government of the Nizam of Hyderabad, in his official capacity as officer in charge of No 6 Survey Party of the Government of India, with headquarters at Bangalore and field headquarters at Secunderabad, and sentenced to six months' imprisonment and a fine of Rs. 1,000 on each of two counts, the sentences of imprisonment to run concurrently.

The appellant is the son of the late Col. Wauchope, C. B., C. M. G., C. I. E., of the Survey of India, and is an officer of 27 years' standing. He joined the army in 1906, and was appointed to the Survey of India in 1910. Between 1914

and 1921 he was again employed on military duty, during which period he was appointed Assistant Director of Works at Waziristan, was mentioned in despatches, and received the honour of the O. B. E., in recognition of his services. In 1921 he returned to the Survey of India and later became officer in charge of No. 6 Survey Party. In 1929 he became Superintendent of Surveys. These survey parties worked under a Director of Survey at Bangalore. In 1929 the Director, Col. Brown died and the appellant acted in his place. In 1930 he was appointed Assistant Surveyor-General and was stationed in Calcutta. Since May 1932 he has been suspended in connection with these alleged misappropriations, as a result of the findings of a Departmental Committee of Inquiry. He is a married man with two children and is entitled to a pension of £530 as Major. In the normal course he would have been promoted Lt. Col. in August 1932 with a pension of £800, and with reasonable expectation of being promoted Col. eventually with a retiring pension of £900 per annum.

In dealing with this case, I regret to find it necessary once again to draw attention to certain fundamental principles of law, which there seems to be an increasing tendency either to disregard or to overlook, on the part of both Judges and Magistrates, as well as by those who appear to prosecute on behalf of the Crown. The first is that every accused person must be presumed to be innocent, unless and until he has been proved beyond reasonable doubt to be guilty, and the second is that his guilt must be established by relevant evidence before he can be convicted. In view of the appellant's past record, if for no other reason, he had every right to expect that these fundamental principles would be strictly observed throughout his trial. In the present case the Magistrate in his judgment has made frequent reference to certain printed hand-books of rules and instructions purporting to have been issued by order of the Surveyor-General of India and others, and to other facts which do not appear to have been proved in evidence and which are not included in the record or in the list of exhibits. For this reason alone these statements must be

disregarded, apart from the fact the evidence of the witnesses for the prosecution shows that the alleged rules did not apply, or applied only very partially to the particular circumstances in which, and the period when, the survey work of the appellant was done. Further, the Magistrate's judgment seems to show that he assumed that all that the prosecution had to do to establish criminal misappropriation was to prove that the appellant had received the two sums alleged, and had failed to account for them.

Only five witnesses were called on behalf of the prosecution and they sought to establish the following facts: The appellant's Ordinary field survey work was carried on during the cold weather, and extended to June or July. His field headquarters were at Secunderabad. The main survey headquarters were at Bangalore, and were, in charge of a Director of Survey—Col. Brown. At the end of the field season the appellant's survey party used to move to Bangalore. The appellant had under his control a head clerk named Chetty, an Assistant Clerk, a Jamadar and Peons and a large number of field surveyors. During the field season appellant had to do a great deal of touring. Periodical returns of work, finance, etc., were made to the Director and other superior officers. The appellant was ultimately responsible for these returns, and for cash and accounts, though the clerical work, naturally was done by his staff.

A cash chest was kept with two keys. The appellant had one and the jamadar the other. When on tour, appellant's key was held by Chetty, who used to make all necessary disbursements, often amounting to many thousands of rupees. Appellant and Chetty each kept a cash account book, but it is obvious from inspection, and admitted by the complainant that appellant's book was generally a mere copy of Chetty's. Disbursements were made under three heads: (1) pay; (2) travelling allowance and contingencies; (3) miscellaneous. The accounts show that receipts consisted of money received from Government, and from numerous other sources, such as sales of materials and maps, payments for survey work received from Indian States, Government Departments and private firms or individuals, rents, freight and

so on. No attempt was made by any of the witnesses to explain these accounts or to show what the various items of receipt or expenditure referred to. The Courts both here and below have been left to discover what is possible from a cursory examination. Major Meade, who was the complainant and a member of the Court of inquiry, purported to explain the nature of the work done and the system followed, or which ought to have been followed. But he admitted that he had no knowledge of the facts, beyond what he was able to obtain from the official records and papers. Consequently his evidence was of little, if any, value, and did not carry the case beyond what could be obtained by inspection and perusal of the documents.

The clerk Chetty appeared anxious to disclaim all knowledge of the facts, beyond those which he thought sufficient to absolve him from any charge of being implicated in the alleged misappropriation. According to Major Meade's evidence, for what it was worth, the ordinary work of the Survey Department is small scale mapping; but other work, called extra departmental, is undertaken for Municipalities, Indian States, and Government departments. Sanction for this must be obtained from the Surveyor-General but may be given after the work has been completed. The danger of taking into consideration facts which have not been proved in evidence is shown by the fact that the Magistrate has relied upon the printed rules to which I have referred to establish that the appellant acted dishonestly in undertaking such work without first obtaining sanction, and by omitting to pay the price into the treasury, when the admitted evidence establishes without shadow of doubt that such rules had no application, and the appellant acted quite properly in accordance with recognized practice. The rule upon which the Magistrate specifically relies was not even in existence when the work was undertaken, out of which the present charges arise.

This work was undertaken by the appellant at the request of the Hyderabad Government, and consisted of a survey of two forts. The negotiations are contained in letters and conversations between the appellant and the witness, Mr. Yazdani, during the cold weather

season of 1928-29. It was agreed that Rs. 3,000 should be put at the appellant's disposal by the Nizam's Government, and payment was made to the appellant by two warrants for Rs. 1,500 each on 4th March and 1st July 1929 respectively. This was not an isolated instance. The cash account-books of the appellant and Chetty contain numerous references to work done for, and large payments made by the Hyderabad Government to the appellant in 1927, 1928 and 1929, as well as other extra departmental work and payments similarly dealt with. In view of this and other evidence it is idle to suggest that the appellant ought to have transmitted these sums direct to the Government treasury, and that his omission to do so, ought to be regarded as evidence that he intended to appropriate them to his own use.

All that we know is that these warrants were cashed, and that neither the appellant nor anyone else has been able to point to any specific entry of these amounts in the cash account-books. On the other hand there is nothing whatever to show that the proceeds were appropriated by the appellant. There is no entry in his Bank pass book, nor any other evidence to suggest that he was any better off at or after the time when these warrants were cashed. The endorsement on the first warrant was written by Chetty and the money collected by one of the peons. Chetty says that he gave it to the appellant. The appellant says that so far as he has any recollection of the matter after three years, he placed it in the cash chest, and used it for contingent expenditure. That he wanted it for this purpose is confirmed by his letters, written to Mr. Yazdani, asking for payment.

If he wanted to keep the matter secret and misappropriate the money, it is difficult to understand why he gave the warrant to Chetty to endorse, and to a peon to collect. Still more difficult to appreciate is Chetty's explanation about why he omitted to enter the payment in his cash account-book. When this witness was first asked about this payment he said that he recollected nothing, which may have been true. But if this evidence is to be accepted, similar belief should be accorded to the appellant when he admits the same for-

getfulness. Upon being confronted with his endorsement on the warrant Chetty purported to recollect that he received this money from the peon, and handed it to the appellant. We have only his word for this. But it is not necessary even to suggest that his statement may not be true, it is sufficient to observe that the evidence on this point is as consistent or otherwise with Chetty's guilt or innocence as with that of the appellant, and no more.

Chetty explained that he did not enter the payment in his cash account-book because he thought that it was personal to the appellant. The Magistrate has accepted this as a reasonable explanation. In my opinion his evidence was transparently false. The warrant was made out to the appellant in his official capacity as officer-in-charge of No. 6 party, Survey of India, and was so endorsed by Chetty. It was on the official printed form of the Nizam's Government. Many similar payments had been made to the appellant by this Government, and had been entered by Chetty in the cash account-book, though he had the hardihood to say that he thought that these also were personal. He has suggested no reason for treating this payment differently. The most charitable view to take of his evidence is, that his omission was due merely to carelessness, which he cannot now afford to admit. The second warrant was received at the end of June and cashed by the appellant personally on 1st July 1929. At that time the whole staff had moved to Bangalore, and the appellant himself was leaving that morning, and was making his final round of visits to officials in Hyderabad. These circumstances not only explain why this warrant was not endorsed and collected by members of his staff as before, but they afford a very natural explanation why this receipt was overlooked, and why it was not entered in the cash account-books of either the appellant or Chetty.

The prosecution has relied very much upon the appellant's alleged omission to mention this Hyderabad extra departmental work in the returns made by him to the Director in January and April 1929, and this seems to have impressed the Magistrate strongly. It was suggested that this omission confirmed

the truth of the allegation that the appellant intended to conceal this work, in order to enable him to misappropriate these payments. Such patent torturing of the evidence by the prosecution was unpardonable. "It is a hard thing to torture the laws so that they torture men." Those who appear on behalf of the prosecution must be made to realise that it is no part of their duty to try by hook or by crook to obtain convictions. And it is the duty of the Magistrate sternly to discountenance such methods, which are but a travesty of justice. It is hardly conceivable that such arguments should have been allowed or accepted by the Court, when I find that so early as 1st June 1929, the appellant informed the Director that negotiations to undertake extra departmental work for the Nizam's Government were in progress, and that on 15th July he supplied the Director with details stating the work and the cost, and said that sanction would be applied for later on. In the August return further details were given, and in October the work was included in a long list of surveys for which sanction was required. It appears from the correspondence between the appellant and Mr. Yazdani that the work was estimated to occupy six months, did not commence until March 1929, and was still in process of revision in March 1930, when further work on this survey was required by the Hyderabad Government. These facts are sufficient to dispose of the suggestion that this work ought to have been included in earlier returns, and even the witness Chetty could not be prevailed upon to say so.

Further upon this allegation of concealment, it must be observed that every one of these letters and documents, or copies of them, were either kept on the appellant's files or forwarded to the Director or other appropriate Government Department. It has not been suggested that the appellant destroyed or concealed a single relevant document. But Major Meade very fairly and frankly admitted that if the appellant had wished to suppress all mention of the survey of the fort, he could have done so and submitted a blank return. Moreover he admitted that if the appellant had paid this money into the Treasury at any time during 1930 or 1931, noth-

ing further would have been heard of the matter.

Yet both the prosecution and the Magistrate have relied upon these documents to prove his guilt. Thus it was proved that, on 18th November 1929 the appellant described the Hyderabad survey as paid-for work, and in the same letter said that Rs. 2,000 was the final amount to be recovered from the Nazam's Government before 31st March 1930. Apparently this sum was intended to cover Rs. 1,500 for the second fort and Rs. 500 for some extra work which had been estimated originally at Rs. 600. In Ex. 39 the appellant said that other work had been done in connexion with Warangal Fort, but was included in the sum of Rs. 3,000, because the work on the two first forts had been over-estimated. This had caused some errors in accounting, and it was uncertain whether some items were outstanding or not. Mr. Yazdani being on leave in England, he had been unable to clear these matters up. But the maps of the two first forts ought to have been supplied, because the Hyderabad Government had obviously paid for them, and the accounts required further examination and adjustment. In October 1930 appellant came to Calcutta as Assistant Surveyor-General and Mr. Kenny succeeded him as officer-in-charge of No. 6 party. The sum of Rs. 600 was paid into the treasury in this month. In March 1931 appellant wrote to Mr. Kenny saying that there were one or two outstandings with the Hyderabad Government for which he was responsible, one being the Rs. 500 already mentioned, and which the appellant apparently thought was still unpaid. There was further correspondence throughout 1931, upon the subject of the recovery of outstandings, which were stated to amount to Rs. 2,000, and the appellant said that he would take steps to recover them. In February 1932 the appellant wrote to Mr. Yazdani saying that there were outstandings amounting to Rs. 2,000 for which appellant was personally responsible, and for which he had tried unsuccessfully to obtain payment during Mr. Yazdani's absence. He was writing from memory and was uncertain to which work these outstandings applied. Rs. 500 was for extra work in connexion with the first fort, and either the first

or second fort was still not paid for. Mr. Yazdani replied that both the forts had been paid for, and referred to the two cheques sent in 1929, and asked for the maps to be supplied. The appellant wrote again in May saying that he might have made some confusion in the allocation of the sums due as he was writing from memory. He reminded Mr. Yazdani about extra work at Warangal, Aurangabad and Daulatabad, and asked whether payment had been made for these. About this time Major Norman, who had succeeded Mr. Kenny, wrote a confidential letter to the Surveyor-General, and the appellant sent an explanation (Ex. 39) to which I have referred already. As a result there was the Departmental enquiry and the appellant was suspended. From these facts, the prosecution submitted and the Magistrate agreed, that the only possible inference to be drawn was that the appellant had been trying to cover up his traces, and to create an atmosphere of confusion in order to put off the evil day, when he would have to admit that he had received this money. His forgetfulness of the facts and incidents, and his attempts to recover the money were a mere pretence. In fact the Magistrate went so far as to say that once the prosecution had proved that the appellant had received the money, and the appellant was unable to show from his accounts that, and how, he had used it for public work, the conclusion that he had misappropriated it was inevitable.

It was inevitable only upon the assumption that an accused person must be presumed to be guilty, unless and until he proves himself to be innocent. I have already referred to this fallacy. But Mr. Bhattacharjee on appeal has again attempted to argue that in such circumstances the onus of proof is shifted to the accused. He has referred to one or two cases in which this unusual and erroneous contention has been accepted and approved. I dealt fully with this matter in *Emperor v. Ganesh Prasad Tewary, Appeal No. 206 of 1929 (Calcutta)*, but as that case was not reported it is necessary for me to repeat some of my observations contained in that judgment.

In criminal cases the onus of proving the general issue never shifts, and it lies upon the prosecution to prove be-

yond reasonable doubt the guilt of the accused. In this case the prosecution had to prove dishonest misappropriation by the appellant, and unless and until they could point to a state of facts which led inevitably to the conclusion that the appellant was guilty, they failed to discharge the onus which lay upon them. If there is one maxim of criminal jurisprudence which is better established and more fundamental than any other, it is that an accused person must always be presumed to be innocent until he is proved to be guilty. It is true that the burden of establishing any special issue raised by the accused rests upon him, but there is always the burden of the general issue as to the guilt of the accused person which always rests upon the prosecution. I am quite sure that the case of *Harendra Kumar Ghose v. Emperor* (1) was wrongly decided. The learned Judges there said that

"the Courts below have found that the petitioner was a tax daroga and cashier of the Municipality, that the amounts which he is said to have embezzled were received by him and he failed to account for them. These being the findings we think that all the elements constituting an offence under S. 409, I. P. O. have been found."

They go on to say:

"The burden was initially placed on the prosecution and when the prosecution succeeded in proving the receipt by the petitioner of the several amounts it was for the petitioner to show that he had not converted them to his own use. In these circumstances we do not think that the burden was wrongly placed on the petitioner."

In my opinion, the statements to which I have referred are in direct conflict with the elementary principles of the criminal law. The same criticism applies to the case of *Emperor v. Kadir Baksh* (2). In that case the learned Sessions Judge had said:

"The prosecution ought to have shown by some evidence that the amount with the embezzlement of which he has been charged had in reality been appropriated by him to his own use and that his defence was groundless."

The learned Judge in the Court of appeal said:

"In our opinion the learned Sessions Judge is quite wrong in the proposition which we understand him to lay down in this paragraph of his judgment . . . It is entirely wrong to suggest that it lay on the prosecution to prove the actual mode of misappropriation of the money. . . . when they proved that he had not returned the money in accordance with his duty, when he returned the summonses unserved, the

Crown had proved their case, and it lay on the accused to prove his defence."

It is true that the prosecution need not prove the actual mode of misappropriation, but they must prove dishonest misappropriation. The onus, as I have said, is always upon the Crown. It never shifts to the prisoner. In Woodroffe's Law of Evidence, Edn. 8, p. 691, it is stated as follows:

"The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The onus never changes. For every man is to be regarded as legally innocent until the contrary be proved, and criminality is never to be presumed."

In Phipson's Law of Evidence, Edn. 6, p. 33, it is stated as follows:

"Generally in criminal cases (unless otherwise directed by statute), the presumption of innocence cast on the prosecutor the burden of proving every ingredient of the offence even though negative averments be involved therein."

In the case of *Gunananda Dhone v. Santi Prokash Nanley* (3) Mukerji, J., states at p. 435 (of 29 C W N) as follows:

"Indeed this must be so in many cases, for the offence (which was an offence under S. 405, I. P. C.) necessarily involves secrecy, and the exact manner, point of time or place where the misappropriation, conversion, user, disposal or sufferance takes place, remains more often than not, a matter within the special knowledge of the accused himself. In this class of cases the overt act of the accused showing his dishonesty is essentially necessary to be proved to establish the offence, and till the time arrives when that act is done it cannot be said with certainty that the offence was committed. A very common case of this kind is where the accused received the money for the prosecutor and failed to account for it. Mere retention of the money would not necessarily raise a presumption of dishonest intention, but it is only a step in that direction."

It is true of course that the legislature sometimes specifically relieves the prosecution of proving certain essential facts among the necessary ingredients of a crime, e. g., with regard to the crime of receiving stolen goods, well knowing them to have been stolen, where goods recently stolen are found in the possession of anyone, according to English law, the jury may convict that person of the offence unless he gives some explanation of his possession. A similar provision is made in India by Illus. (a), S. 114, Evidence Act. Even in this type of case the onus is not shifted, that is to say, the onus of proving the guilt of the prisoner still remains on the Crown, with the result that if the prisoner gives an

1. AIR 1927 Cal 409=101 I C 597=28 Cr L J 469.

2. (1911) 83 All 249=8 I C 687.

3. AIR 1935 Cal 618=86 I C 213=26 Cr L J. 725=29 C W N 432.

explanation which may reasonably be true, even though it is not believed by the Judge or the jury, he or they must acquit the accused, because in such circumstances the onus of proving the guilt of the accused has not been discharged. That was decided in a very well-known case *R. v. Schama—R. v. Abramovitch* (4). That decision has been followed in this Court in the case of *Satya Charan v. Emperar* (5), part of the headnote of which is:

"Held also, that the statement to the jury that the burden of proof has shifted was a serious misdirection as the onus on the prosecution to prove guilt never changes."

The learned Judges (Newbould and Mukerji, JJ.) referred to the case of *Hakim Mondal v. King-Emperor* (6) in which the learned Chief Justice pointed out that in a criminal case the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused and that the onus never shifts. They also referred to the case of *R. v. Abramovitch* (4) under the reference, *R. v. Isaac Schama* (7). They went on to say "that the law in India is similar to the law in England in this case is clear from the words used in *Illus. (a)* to S. 114."

Moreover even where the legislature has put upon the accused the burden of proving certain matters he is in a much more favourable position than the prosecution. As is stated in Phipson's Law of Evidence (*supra*) p. 34:

"When the burden of the issue is on the prosecution, the case must be proved beyond a reasonable doubt . . . when, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt, or in default to incur a verdict of guilty; it is sufficient if he succeed in proving a *prima facie* case, for then the burden of such issue is shifted to the prosecution, which has still to discharge its original and major onus that never shifts, that is, that of establishing, on the whole case, guilt beyond a reasonable doubt" *R. v. Cavendish* (8) and *R. v. Stoddart* (9).

Again on p. 35 it is stated:

"It is not however for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse (*R. v. Lewis*) (10); and if an explanation be given which the Jury think may be true, though they are not convinced."

4. (1914) 84 L J K B 896=119 L T 480=79 J P 184=81 T L R 88=59 S J 288=24 Cox C C 591.

5. A I R 1925 Cal 666=88 I C 515=26 Cr L J 1155=52 Cal 228.

6. A I R 1920 Cal 842=56 I C 849=21 Cr L J 545.

7. (1914) Cr App. 45.

8. 8 C L 178.

9. (1909) 25 T L R 612.

10. 14 Cr App. 38.

ed that it is, they must acquit, for the main burden of proof (i. e. beyond reasonable doubt) rests throughout upon the prosecution, and in this case will not have been discharged."

There are two other cases which are sometimes referred to, *Queen-Empress v. Hari Dagdu* (11) and *Queen-Empress v. Ram Chandra* (12). Both are authority for the proposition that the onus never shifts to the accused.

The appellant submitted a long and very full and frank statement to the Court of inquiry (Ex. 7) in which he denied emphatically that he had misappropriated the money, and maintained that it had been used for his work, though, after the lapse of three years, he was unable to point to specific relevant items in the accounts. He said that he had no recollection of the actual payments, though he assumed that they had been paid, and were put into the cash chest and used for contingencies. That there were many factors which would tend to obscure his recollection of details, the chief being the very large programme both of routine and extra-departmental work on which the party was engaged, over very difficult terrain, and involving a large amount of touring over a wide area, and continual absence from headquarters. This is confirmed by his journals. The appellant describes at length the great pressure of work, both field and clerical, the necessity for large sums for contingent expenditure, for which sanction was sometimes delayed, the constant discussions with his superior officers, the shock caused by the illness and death of the Director who was a great friend of the appellant, the necessity for acting temporarily in his place, and the heavy matter of adjusting his affairs. He submits that all these multifarious duties and distractions and the inevitable dislocation of routine work were sufficient to explain the possibility of some oversight and negligence.

The Magistrate has seen fit to describe this full statement as "absolutely no explanation." In my opinion this explanation rings true, is reasonable, probable, and ought to have been accepted. Against it, there is the bald statement of the clerk, whose veracity I have already given good reasons for distrusting, that this money was not

11. (1862-98) Rat. Un. Rep. Cr O 872.

12. (1862-98) Rat. Un. Rep. Cr O 860.

used for survey work, and that the work on the forts was paid for out of the ordinary budgetted funds of the party. But he did not attempt to point to a single item in the cash account books as being attributable to this work, and it is a reasonable inference that he was unable to do so. There is no evidence to show that this money ever reached the pocket or the bank account of the appellant, though the Magistrate thought fit to make this assertion, regardless of lack of testimony.

Finally he seems to have felt that some explanation was necessary to show why a senior officer of 27 years' standing should have done anything so desperate and foolish as to misappropriate what he describes as the comparatively trifling sum of Rs. 3,000 when his whole career, pension and reputation as a gentleman and an officer would be jeopardised. I am not surprised that he was puzzled, but I cannot help expressing astonishment and indeed incredulity at the explanation which he thought was sufficient to dispose of his dilemma. He says that the explanation was that the appellant was desperately hard up, that at the end of February 1929, he owed his Bank the sum of Rs. 56, and the position was the same in July 1929.

What the Magistrate meant by this, I find it difficult to understand, unless it be that he was determined at any cost to find some justification for the conviction which he intended to make. The appellant's pass-book shows that he was in credit to the extent of sums ranging up to over Rs. 1,100 odd, throughout the whole of the months of March, April, May and June, at end of which month there was a debit of Rupees 23. By 10th July he was again in credit, which ranged up to Rs. 1,200 odd throughout all the following months of that year up to 30th December, when there was again a debit of Rs. 10. To pick out two items, over a period of 12 months and of paltry sums such as these, is so unpardonable, that I regret to have to say, that in my opinion it savours of unfairness. If the Magistrate considered Rs. 3,000 to be a comparatively trifling sum, in what category did he place sums such as Rs. 56 and Rs. 23? Moreover the appellant was permitted by his bankers to overdraw without security to the extent of Rs. 9,000, and

was in receipt of a salary ranging from Rs. 1,300 odd in 1929 to Rs. 2,300 in 1932.

But this was not all; the prosecution were so desperately hard pressed for material to secure a conviction at any cost, that they went to the length of giving evidence of six Calcutta Small Cause Court decrees which the Magistrate describes as showing that in 1930, 1931 and 1932 the appellant was "hopelessly involved financially and owed money all round." Now the first thing to observe is that this evidence was wholly irrelevant being subsequent to the material dates, and I have no doubt whatever that the prosecution knew perfectly well that this was so and introduced it for the purpose of prejudice. In fairness to the Magistrate I must assume that he also knew that the evidence was irrelevant, and in spite of this knowledge admitted it. One plaint was for three months' rent due up to March 1932, one was the balance of an English decree dated June 1931 of which a large part had been paid off in December 1931, one was for goods supplied between 13th July 1929 and February 1930, one was for goods supplied between December 1930 and January 1932, one was for goods supplied between December 1931 and April 1932 and one was for goods supplied between May 1931 and June 1932. Most of this expenditure was due in all probability to increase in cost of living in Calcutta.

It is upon such trumpery and such irrelevant facts that this officer has been convicted. Lest I be tempted to use harsh words in criticising this procedure, I will content myself only with saying, that this is neither the manner nor the spirit in which a prosecution ought to be conducted, or a trial held under the British Crown. I am satisfied with the explanation which the appellant gave and I believe it to be true. The appeal is allowed, the convictions and sentences are set aside and the appellant is acquitted. The fines, if paid, must be refunded. The appellant is discharged.

Henderson, J.—I agree with what has fallen from my learned brother with regard to the burden of proof. If the learned Judges who decided the case reported in *Harendra Kumar v. Emperor* (1) intended to lay down that as soon as

the prosecution prove that the money was in the possession of the accused, he must be convicted unless he can show what happened to it, that is a proposition from which I must express my respectful dissent; it means that a burden is placed on the accused which in many cases it is impossible for him to discharge. In my judgment it is not a question of the shifting of onus but a question of influence. The prosecution must always prove misappropriation; but they may do so either directly (e.g., by showing that the notes were paid into the account of the accused) or indirectly by circumstantial evidence. No doubt in the latter case the fact that the accused has failed to show what has happened to the money coupled with other circumstances may justify an inference that he misappropriated it. But that does not mean that the burden of proof has shifted from the prosecution to the defence.

The present case depends upon circumstantial evidence. In such a case the prosecution always tend to view everything which the accused does with suspicion. But, inasmuch as the accused is presumed to be innocent, acts capable of an innocent interpretation should be so interpreted: and it is only acts which are suspicious in themselves which require an explanation from the accused. My learned brother has dealt with the circumstances on which the prosecution rely to establish misappropriation in this case. As far as I can see, the only action of the appellant which is suspicious per se is his demand that the money should be sent to him instead of being paid into the treasury. But according to the evidence of Chetty this particular procedure was always adopted by the appellant and was not confined to these two payments; it cannot therefore be inferred from this that the appellant adopted this procedure in order to make it easy for him to misappropriate these two sums. On the other hand the entire absence of any circumstantial evidence at the time of the transactions to suggest a theory of misappropriation strongly corroborates the defence. This is not a case of systematic fraud. As far as I have been able to understand the prosecution case, the suggestion is that the appellant yielded to a sudden temptation to take the money as a tem-

porary loan. It is not the prosecution case that he was addicted to dissipation or extravagance. The only explanation of such conduct would be that he was hardly pressed at the time. If in fact creditors had been pressing him for immediate payment and threatening to report him to his superior officer, and if these pressing claims had been discharged immediately after the receipt of the money, the prosecution could easily have discovered it. No attempt was even made to prove that such was the case. It appears from the appellant's pass book that he was able to borrow from his bank.

There is therefore no reason why he should have embezzled these two sums. Having failed to prove the existence of financial embarrassment at the time of the transactions, the prosecution ought not to have introduced evidence to show that decrees were obtained against the appellant at subsequent dates; it is clear that such evidence can throw no light whatever on the only matter which has to be determined in this case. There can be no question that if the appellant is innocent, he cannot possibly remember what was done with the money. He stated that, so far as he could remember it was spent in connexion with the work; he also hazarded a suggestion that it might have been included in one of the various refunds. This explanation could only be tested by an examination of the various vouchers. If it appears that any of the expenditure in connexion with the work is not entered in the cash book, it would at once be clear that Chetty's statement on this point is not true. It may be that this matter cannot be tested without a lengthy or laborious inquiry which the department are not prepared to undertake. But the inquiry is one which might lead to the demonstration of the innocence of the appellant. In these circumstances it seems to me that, if the department are not prepared to carry out such an investigation, they should accept the appellant's explanation.

Lastly, I am of opinion that some weight should have been given to the past character of the appellant. No doubt, if the prosecution had been able to prove misappropriation by direct evidence, no amount of evidence with regard to character would have been of

any avail. But the present case depends upon circumstantial evidence and the question is what inference is to be drawn from circumstances, which may be given either an innocent or a sinister interpretation. It is exactly in a case of this kind that evidence of good character becomes important and it would be unreasonable to hold that there is no difference between a member of an honourable service with an unblemished record and an old thief with previous convictions. In conclusion I need only say that I entirely agree with my learned brother that this appeal must be allowed. But although I find myself unable to agree with the decision of the learned Magistrate, I see no reason to suppose that in convicting the appellant as he did, he was not satisfied that the prosecution case was properly proved by legally admissible evidence.

K.S.

*Appeal allowed.***A. I. R. 1933 Calcutta 809**

MITTER AND HENDERSON, JJ.

Nabin Kishori Choudhury — Judgment-debtor—Appellant.

v.

Jagneswar Sanyal and others — Respondents.

Appeals Nos. 26 and 66 of 1931, Decided on 8th May 1933, against original orders of Second Court Sub-Judge, Pabna, D/- 19th September 1930.

(a) Civil P. C. (1908), S. 47 — Question between decree-holder and his representative—Whether covered by S. 47 (*Quære*).

Quære.—Whether S. 47 (3) is wide enough to cover a question between the decree-holder and his representative so that decision thereon may be appealable : 25 Bom 681 ; 31 All 82 and 26 Mad 264, *Ref.* [P 810 C 1]

(b) Company—Meeting—Notice served on all share-holders — Absentee share-holders are bound by resolutions passed by majority.

Where the meetings of the share-holders are convened with notice to all the share-holders, but some of them do not choose to appear, they must be held to be bound by the resolutions passed by the majority. [P 810 C 2]

(c) Companies Act (1913), S. 231 — "Preference" implies act of free will.

The use of the word "preference" in S. 231 implies an act of free will, and that would, by itself, make it necessary to consider whether pressure had or had not been used : *Sharp v. Jackson*, (1899) A C 419, *Ref.* [P 810 C 2]

(d) Companies Act (1913), S. 231—Debtor considering himself bound or compelled to transfer — Transfer does not amount to "fraudulent preference."

The test to see whether a transfer is a fraudulent preference within the meaning of S. 231 is that where the proper inference to draw from the

facts is that the dominant motive actuating the debtor is that, in making the transfer to his creditor, he (the debtor) is doing what he felt himself bound or compelled to do, the case is not of fraudulent preference within the statute : AIR 1928 P C 77, *Rel on.* [P 810 C 2]

(e) Companies Act (1913), S. 171—Objection as to want of leave not taken in Court of first instance cannot be raised in appeal—Practice.

An objection as to want of leave under S. 171, which was not taken in the Court of first instance, should not be allowed to be raised in appeal. [P 811 C 1]

Bejoy Kumar Bhattacharji, Dinesh Chandra Roy, Nirode Bandhu Roy, Atul Chandra Gupta and Satya Ranjan Majumdar—for Appellant.

Narendra Chandra Bose, Bireswar Bagchi, Jotindra Nath Sanyal and Bejali Bhusan Sanyal—for Respondents.

Mitter, J.—(In No. 66). This is an appeal on behalf of the Pabna Dhana-bhandar Co. Ltd. (in liquidation) against the order of the Subordinate Judge of Pabna dated 18th September 1930 by which he disallowed an objection of the appellant to the assignment of a decree made by the said company in favour of the respondents. A preliminary objection has been raised to the hearing of this appeal. In order to understand the soundness or otherwise of the preliminary objection it is necessary to state a few salient facts. The Pabna Dhana-bhandar Co. Ltd., had a decree against the judgment-debtor Nobinkishori Choudhury and another. The respondents had certain deposits in the company. On 5th June 1929 they conveyed the decree to Jagneswar Sanyal, the respondents to the present appeal. On 8th July 1929 an application was made by one of the creditors of the bank for winding up. On 18th November 1929 the High Court, on its original side, passed the winding up order. On 5th July 1929 the respondents assignees applied to execute the decree. The petition for execution is to be found at pp. 35 and 37 of paper-book in M.A. 26 of 1931. The liquidators of the bank put in a petition of objection to the assignment (see p. 1 of paper book 66 of 1931) and a miscellaneous case was started. The objection in substance was that the transfer was a fraudulent preference and is not valid.

The Subordinate Judge negatives this objection of the liquidators and it is against that order that the present appeal has been brought. It is said that

there is no appeal to this Court as the question arises between the decree-holder and his representative. The appellant contends that S. 47, Cl. 3, Civil P. C., is wide enough to cover such a question and an appeal would therefore lie. The respondent has relied on several cases in support of the preliminary objection. There is a decision of Sir Lawrence Jenkins in the case of *Magan Lal v. Doshi* (1), where the learned Chief Justice of Bombay was of opinion that a question between the judgment-debtor and his representative is not a question between the party in suit and his representative within the meaning of S. 244 of the Code of 1882. A similar view has been taken by Banerjee, J., in *Bhagabati v. Banwari Lal* (2). On the other hand the appellant has relied on a decision of the Madras High Court in the case of *Bommanapati v. Chintakunta* (3) in support of the opposite view. It is not necessary to decide finally on the preliminary objection as we are of opinion that the appeal should fail on the merits.

It appears that by a resolution of the share-holders and depositors of the company passed on 28th February 1926 it was resolved by the majority that if a depositor happens to be a debtor then the said sum may be set off and that the bank should not go into liquidation and that every attempt will be made to sell it. On 7th March 1926 there was another resolution in a special general meeting of the share-holders and depositors of the Pabna Dhanabhandar Co. Ltd., and it was resolved by a majority that any depositor shall be competent to have his dues set off against the debt of any debtor, and on 14th March 1926 at a meeting of the directors this resolution was confirmed. It is argued by the appellant that an attempt by the directors and depositors of making an arrangement or set-off can only be done under S. 153, Companies Act. This special procedure was not followed in the present case and that therefore the resolutions are ultra vires.

It is to be noticed however that this objection was not taken in the petition of objection of the liquidators and nothing was said with regard to the regularity or otherwise of the meetings of the bank.

1. (1901) 25 Bom 691=3 Bom L R 255.

2. (1903) 31 All 82=1 I C 416 (F B).

3. (1903) 26 Mad 264.

We are unable therefore to give effect to this objection raised for the first time in appeal. If the objection had been taken in the Court below some answer might have been forthcoming. The meetings of the share-holders were convened with notice to all the share-holders and if some of them did not choose to appear they must be held to be bound by the resolutions passed by the majority. It is next argued that the assignment is hit by the provisions of S. 231, Companies Act, and must be deemed to be a fraudulent preference.

The test of fraudulent preference has been laid down authoritatively in several decisions and it is said that the use of the word "preference" implies an act of free will and that would by itself make it necessary to consider whether pressure had or had not been used: see *Sharp v. Jackson* (4). It has been argued in this case that the Subordinate Judge was wrong in holding that there was pressure from the creditors, seeing that the notice given on 9th January 1929 (Ex. E) referred to a realization of current deposits and deposits without interest of much smaller sum than Rs. 23,000 for which the assignment of the decree was made, and that a fixed deposit for two years of Rs. 5,000 had not become due on 14th May 1929, the date of Ex. B. The test is whether there was an overriding intention to prefer one particular creditor or creditors even if the bank had committed the mistake of making the assignment in favour of a particular creditor under the impression that unless that particular creditor was paid the company would go into liquidation. It cannot be said that the act was done by the company's free will and volition. We are of opinion therefore that the Subordinate Judge was right in holding that there was real pressure when the company made the assignment as opposed to colourable pressure.

The test is, as has been laid down by the Privy Council in a recent case of *Sime Darby & Co. v. Official Assignee* (5) that where the proper inference to draw from the facts was that the dominant motive actuating the debtor was that, in making the transfer to his creditor, he, the debtor, was doing what he felt

4. (1899) A C 419=68 L J Q B 866=6 Manson 264=15 T L R 418.

5. AIR 1928 P C 77=107 I O 238 (P C).

himself bound or compelled to do, the case is not of fraudulent preference within the statute. Here the object of the company was to save the company from liquidation. For all these reasons the appeal must be dismissed. There will be no order as to costs.

Appeal from Original Order No. 26 of 1931. This appeal is on behalf of the judgment-debtors and arises out of proceeding taken in connexion with the assignment of a decree with reference to which the facts have been stated in the judgment which we have just delivered in appeal from Original Order No. 66 of 1931. It is not therefore necessary to recapitulate the facts in this appeal. The objections taken on behalf of the judgment-debtors are three in number. In the first place it is contended that the proceedings relating to the execution should not have been allowed to go on in view of the provisions of S. 171, Companies Act, which requires that leave must be obtained after a winding up order has been made to commence any suit or other legal proceeding against the company. It is contended on behalf of the judgment-debtors that such leave not having admittedly been obtained the execution proceedings cannot go on. It appears however that this objection was not taken by the judgment-debtors in the Court of first instance and this objection, in our opinion, does not lie in the mouth of the judgment-debtors. The objection was taken by the Pabna Dhana Bhandar Co. Ltd. (in liquidation) but was disallowed by the Court of first instance. Whether it was abandoned or not it does not appear, but it was not pressed in this Court by the Pabna Dhana Bhandar Co. Ltd. (in liquidation). It would not be right in our view that the judgment-debtors not having taken the point in the Court below should be allowed to raise this contention now. The irregularity complained of is an irregularity in the matter of procedure and it does not matter to the representatives of the judgment-debtors whether they pay the money to the Pabna Dhana Bhandar Co. Ltd., or to their assignees. There is therefore no substance in this objection.

The second objection turns on the construction of the compromise decree at p. 4 of the paper-book. It is argued that as no time was given for the pay-

ment of the second and the third instalments of Rs. 6,663 and that in these circumstances the decree should be liberally construed, and it should be held that those sums have not yet become due, that would be a very unreasonable construction to put upon the decree. The decree recites that the plaintiff will receive in four equal instalments a sum of Rs. 6,663 the first instalment being payable in December 1928 and the last instalment in December 1931. It is obvious that what was intended was that the other two instalments were payable in December 1929 and in December 1930 respectively and the execution proceedings have been started in July, 1930 after the third instalment had fallen due. There is therefore no substance in this objection, and it was not even raised in the Court below. It was admitted that the third instalment fell due.

The last objection is founded on the provisions of S. 67, T. P. Act, read with S. 99, as it stood before the amendment of the act by which S. 99 was repealed. It is said that from the provisions of para. 4 of the consent decree at p. 4 of the paper book it is clear that the execution proceedings could not terminate in the sale of the properties mentioned in para. 4 unless a suit was brought as contemplated by S. 67. This point was not taken in the Court below nor was it taken originally in the grounds of appeal, but that ground was served on the respondent only a short time before the hearing of the present appeal. It appears clear also from para. 3 of the petition of compromise at p. 4 of the paper book that there was a distinct provision that the plaintiff would be at liberty to proceed against the defendants by executing the decree. There does not seem to be any substance in this objection. The result is that all the three objections urged in this appeal fail and the appeal must be dismissed with costs. The respondents are entitled to get costs from the judgment-debtors appellants. We assess the hearing fee at five gold mohurs.

Henderson, J.—I entirely agree,

K.S.

Appeals dismissed.

A. I. R. 1933 Calcutta 812

MUKERJI, J.

Radhika Mohon Gope—Defendant—Appellant.

v.

Hari Bashi Saha and others—Respondents.

Appeal No. 450 of 1931, Decided on 16th March 1933, from appellate decree of Fourth Sub-Judge, Dacca, D/- 9th September 1930.

(a) Transfer of Property Act (1882 as amended in 1929), S. 53—Suit which is not meant to be for benefit of all creditors is not one within S. 53.

If a suit challenging a transfer as fraudulent is not meant to be for the benefit of all the creditors, though the claim in it proceeds on the principle enunciated in S. 53, it is not a suit within that section: *A I R 1921 Pat 58 and 84 Cal 999, Ref.* [P 812 C 2]

(b) Limitation Act (1908), Art. 91—Art. 91 has no application where deed challenged is neither executed by plaintiff nor by one under whom he claims—But it applies where he has to set it aside before getting any relief.

Article 91 can possibly have no application where the deed which the plaintiff challenges is one which was not executed by him or by one under whom he claims, and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But there is no doubt that it does apply to a case in which it is not possible for the plaintiff to get any relief until the instrument is set aside: *15 Cal 68 (PC); 25 All 1 (PC) and 34 Cal 829 (PC), Ref.* [P 813 C 1]

Surendra Mohan Das—for Appellant.

Rupendra Kumar Mitter—for Respondents.

Ramendra Mohan Majumdar for *Biraj Moham Majumdar*—for Deputy Registrar.

Judgment.—In 1915 plaintiff obtained a decree for money against the husband of defendant 2. In 1918 the plaintiff in execution of the said decree purchased three properties and took symbolical possession thereof through Court. In 1928 defendant 1 applied for getting his name registered in respect of two of the properties on the allegation that he purchased them from defendant 2 who had obtained them from her husband under a deed of gift. The plaintiff also applied for mutation of his own name in respect of all the three properties. The result of the proceedings was that the name of defendant 1 was recorded in respect of the two properties that he had purchased, and the name of defendant 2 remained recorded as regards the third one. Thereafter the two defendants caused obstruction to the plain-

tiff's possession. On the above facts the plaintiff sued for declaration of title and for recovery of possession of all the three properties. He challenged the gift by defendant 2's husband in favour of defendant 2 as a fraudulent and a benami transaction. The Courts below have decreed the suit. Defendant 1 has appealed. The first ground urged is that the present suit in so far as it challenged the gift as fraudulent was really a suit under S. 53, T. P. Act, and as such should have been brought by or on behalf of all the creditors of defendant 2's husband. Reliance for this contention is placed on the observations of Mookerjee, J., in the case of *Hakim Lal v. Mooshahar Sahu* (1) at p. 1007. The observations are perfectly correct if the suit is one for the benefit of all the creditors; but if it is not meant to be for that end, though the claim in it proceeds on the principle enunciated in S. 53, T. P. Act, it is not a suit within that section. I entirely agree with what Das, J., has said as regards these observations in the case of *Sri Thakurji v. Narsingh Narain Singh* (2).

The second contention is that the suit in substance is one for cancelling the deed of gift and so is one governed by Art. 91, Sch. 1, to the Limitation Act, and that it has been instituted more than three years after the plaintiff came to be aware of it. There is a considerable conflict of judicial opinion on the question of the exact scope of this article and the circumstances which attract its operation. But such conflict as there is in this matter relates to two questions, namely, first whether the article applies only to cases where the only relief asked for is the setting aside or cancellation of an instrument, or also to cases in which the said prayer is only ancillary or incidental to some other relief which is also asked for; and second whether the article has any application at all to suits for recovery of immovable property which are expressly governed by other articles of the Act. It is unnecessary to go into the decisions bearing upon this conflict, because the one feature of the present case which at once brings it within the purview of the article is a matter on which there is no

1. (1907) 34 Cal 999=11 O W N 889=6 C L J 410.

2. *A I R 1921 Pat 58*=68 I C 788=6 Pat L J 48.

difference of opinion. The article can possibly have no application where the deed which the plaintiff challenges is one which was not executed by him or by one under whom he claims, and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But there is no doubt that it does apply to a case in which it is not possible for the plaintiff to get any relief until the instrument is set aside: see *Janki Kuar v. Ajit Singh* (3). In other words, if the instrument is binding upon the plaintiff, then even though the plaint may have been made to look as much like a suit for recovery of lands as possible, the plaintiff in order to get any such relief must have the instrument cancelled or at any rate have a declaration of its invalidity as against him: see *Raja Rampal Singh v. Balbhaddar Singh* (4).

In neither of the cases just cited however was the instrument concerned executed by a judgment-debtor, whose interest the plaintiff subsequently purchased at an execution sale, as is the case here. And in the case of *Bejoy Gopal Mukerji v. Krishna Mahishi Debi* (5), their Lordships held that the plaintiff stood in no need for a declaration of the above character or for cancelling or setting aside the instrument because the instrument which had been executed by a widow had become inoperative, on the death of the widow, as against the plaintiffs, who were her husband's heirs. The real question therefore is, was the gift binding on the plaintiff. This question, I think, I must answer in the affirmative. The gift was made by the husband of defendant 2. If it offended S. 53, T. P. Act, it was voidable but not necessarily void. So long as it was not avoided it bound the husband of defendant 2, and, in my opinion, the plaintiff who purchased the interest of the latter in a money execution sale was equally bound by it. It requires to be set aside or, in any event, a declaration of its inoperative character is essential, before the plaintiff can succeed in getting possession of the property. The question as to whether the plaintiff would be entitled to a declaration that the deed is not binding on him will therefore have to be approached from the

point of view of Art. 91 of the Schedule to the Limitation Act. In other words, the learned Judge will have to decide the question as to whether the plaintiff's prayer in that respect is barred by limitation or not, upon a consideration of the question as to whether he has instituted the suit within three years from the date on which the facts entitling him to have the instrument cancelled or set aside became known to him.

There is also another part of the case which has not yet been dealt with by him though it was found against the defendants in the trial Court, I mean the question of benami, which, if found in plaintiff's favour, will also entitle the plaintiff to a decree, irrespective of any question of limitation. The appeal is allowed, the decree of the Subordinate Judge is set aside and the case is remanded to the Court of appeal below in order that it may be dealt with in the light of the observations made above. Costs of this appeal will abide the result. Leave to appeal under the Letters Patent is asked for but it is refused.

K.S. *Appeal allowed.*

A. I. R. 1933 Calcutta 813

RANKIN, C. J. AND MUKERJI, J.

Bayatulla Mandal—Appellant.

v.

Purnendra Narayan Roy Deb Barman and another—Respondents.

Appeals Nos. 5 and 6 of 1932, Decided on 1st March 1933, against judgment of Patterson, J., Calcutta, D/- 11th January 1932.

Bengal Tenancy Act (8 of 1885), Ss. 105 and 107—"Fair and equitable rent."

Decision of settlement officer, that a certain rate is a fair and equitable rent, cannot be impeached. [P 814 C 1]

Atul Chandra Gupta and Subodh Chandra Sen—for Appellant.

Sarat Chandra Basak and Asita Ranjan Ghose—for Respondents.

Rankin, C. J.—These are two Letters Patent appeals from the judgment of my learned brother Patterson, J. The question that arises in the two rent suits is what the annual rate of rent payable for the tenancies is. It appears that there was a S. 105 proceeding between the landlord and the tenants and the case made is first of all that though for a great many years prior to that proceeding rent had been paid at a certain rate being the rate mentioned in the

3. (1887) 15 Cal 59=14 I A 148=5 Sar 92 (PC).
4. (1902) 25 All 1=29 I A 208=8 Sar 340 (PO).
5. (1907) 34 Cal 329=34 I A 87 (PO).

kabuliat, that rate was greater than the amount legally payable because the kabuliat rate represented an enhancement which was not permissible under S. 29, Bengal Tenancy Act. It is not doubted or disputed that the Settlement Officer proceeded upon the rate that had been paid under the kabuliat for many years. It is not disputed that he made up his mind that a fair and equitable rate would be arrived at by enhancing that rate by 3 annas in the rupee and it is clear from the proceedings that he applied that enhancement to the kabuliat rate and directed in the result that a certain figure, which is the figure now sued for by the plaintiff, should be the fair and equitable rent.

The first question is whether upon showing that there was no dispute before the Settlement Officer as to whether the Kabuliat rate was a legally valid rate, the tenants can now in these rent suits go behind the judgment of the Settlement Officer as to what should be the fair and equitable rent for the future. In my judgment it is clear enough upon the face of S. 105 that whatever process of reasoning be adopted and whatever method of approach be adopted what the Settlement Officer has to do in such a case is to settle a fair and equitable rent and that the provisions of S. 107 say that the Revenue Officer shall adopt the procedure of the Code and that his decision shall have the force of a decree of a civil Court and subject to the provisions of S. 103 and S. 109-A shall be final. All that is addressed, as it would usually be addressed if one was dealing with the judgment of a Court, to the ultimate result declared or defined by the judgment. It is not intended to make the reasoning final, it is not intended to make mere intermediate inferences final. What is made final is the ultimate decision which is "so much is the fair and equitable rent to be paid for the future." I think therefore that so far as the particular years and particular tenancies are concerned, it is not open to the tenants, for the reasons which they give, to impeach the decision of the Settlement Officer. There was another allegation based upon an allegation of fraud. But it appears to me that there are very sufficient pleadings to define what the allegation of fraud is and that the evidence is altogether insufficient to impeach the solemn

proceedings. The result is that these two Letters Patent appeals fail and are dismissed with costs.

Mukerji, J.—"I agree."

K.S.

Appeals dismissed.

A. I. R. 1933 Calcutta 814

MALLIK AND JACK, JJ.

Kamini Kumar Choudhuri—Decree-holder—Petitioner.

v.

Sasanka Sekhar Choudhuri and others—Decree-holders—Opposite Parties.

Civil Rule No. 168 of 1933, Decided, on 14th March 1933, from order of 3rd Sadar Munsif, Chittagong, D/- 7th January 1932.

Civil P. C. (1908), S. 73, and O. 21, R. 52—Custody Court has no power to make rateable distribution, unless it happens to be the attaching Court as well.

A custody Court, under O. 21, R. 52, has no authority to make any rateable distribution, unless it be the attaching Court as well. Under that rule it can only determine the question of priority and thereafter act under the instructions of the attaching Court : 44 Cal 1072, *Expl.* [P 814 C 2; P 815 C 1]

Chandra Sekhar Sen—for Petitioner.

Mallik, J.—This rule is directed against an order made by the 3rd Munsif, Chittagong, whereby he refused to vacate an order made by him making rateable distribution of some money which was lying in his Court. What happened in the case was this : There were some surplus sale proceeds lying in the Court of the Munsif. This property was attached by several decree-holders in execution of their decrees. The learned Munsif made a rateable distribution of the money in his Court. Soon after that distribution had been made, the petitioner who obtained the present rule and who also was a decree holder wanted to attach the money in execution of his decree and in that application he asked the learned Munsif to vacate his order for rateable distribution which he had already made. This application however was rejected by the learned Munsif ; and that refusal order has given rise to this present rule.

This rule should, in my opinion, succeed. The Court of the 3rd Munsif of Chittagong was only a custody Court, and being a custody Court, under O. 21, R. 52, Civil P. C., it had no authority to make any rateable distribution. Under that rule it could only determine the question of priority and thereafter act

under the instructions of the attaching Court. The case of *Thakurdas Motilal v. Joseph Iskender* (1) no doubt approves of a rateable distribution made by a custody Court. But in that case the custody Court happened to be the attaching Court as well. The order of the Munsif making a rateable distribution will therefore be set aside and the rule made absolute. There will be no order as to costs as there has been no opposition to the rule.

Jack, J.—I agree.

K.S. Rule made absolute.

1. (1917) 44 Cal 1072=41 I C 516.

* A. I. R. 1933 Calcutta 815

MALLIK AND JACK, JJ.

Hira Lal Saha—Decree-holder—Petitioner.

v.

Akshoy Kumar Saha and others—Auction purchasers—Opposite Parties.

Civil Rule No. 158 of 1933, Decided on 7th March 1933, from order of Dist. Judge, Dacca, D/- 10th December 1932.

* Civil P. C. (1908), O. 21, R. 90—"Interest" includes contingent liability—Defaulting auction purchaser has locus standi to apply under O. 21, R. 90.

The term "interest" in O. 21, R. 90 is wide enough to include all kinds of "interest," including a contingent liability also. [P 815 C 2]

As a defaulting auction purchaser is liable to make up any deficiency in price which might happen, on the resale, he has a contingent liability even before the sale, and hence has locus standi to apply to set aside a resale held after his default: *A I R 1918 Pat 636* and *A I R 1928 Cal 828, Dist.* [P 815 C 2]

Nripendra Chandra Das and Nabadvip Chandra Saha—for Petitioner.

Santosh Kumar Basu and Biraj Mohan Roy—for Opposite Parties.

Mitter, J.—The facts which have given rise to the present Rule are briefly these: There was an auction sale held in execution of a decree obtained by the petitioner and the property put up to sale was purchased by one Ashoy Kumar Saha, the opposite party before us, for Rs. 3,005. The earnest money was deposited by Akshoy Kumar, but Akshoy failed to pay the balance with the result that the property was resold and purchased by the petitioner, the decree-holder, for Rs. 1,510, and Akshoy was directed to put in the deficiency, viz. Rs. 1 495. Thereupon Akshoy filed an application under O. 21, R. 90, Civil

P. C., for setting aside the sale at which the decree-holder had purchased the property for Rs. 1,510. The learned Subordinate Judge rejected the application on the preliminary ground that Akshoy had no locus standi to file the application. This order was reversed by the learned District Judge and the learned District Judge directed the first Court to decide the case on its merits, holding that Akshoy had locus standi. Against this order of the District Judge, the present Rule is directed. The only point for determination in this case is whether Akshoy, who was the defaulting auction purchaser, had locus standi to apply under O. 21, R. 90. On a consideration of the facts of the case I am clearly of opinion that he had.

On behalf of the petitioner our attention was drawn to a decision of the Patna High Court in *Khetra Mohan Dutta v. Sheikh Dilwar* (1), and also a decision of this Court in *Surendra Nath Das v. Alauddin Mistry* (2), where it was held that the word 'interests' in O. 21, R. 90, refers to interest existing prior to the sale but not interest in the property acquired at the sale. I do not see how this decision can be of any help to the petitioner in the present case. In the present case the petitioner Akshoy was a defaulting auction-purchaser and as such he was under the provisions of O. 21, R. 71 of the Code liable to make up any deficiency of any price which might happen on a resale of the property. He had therefore a contingent liability, even before the sale; and as the term 'interests' in O. 21, R. 90, has been held to include all kinds of interest it is, in my opinion, wide enough to include a contingent liability also. That being so the learned District Judge was, in my opinion, right in holding that the defaulting auction purchaser Akshoy had locus standi to apply under O. 21, R. 90. The result is that the Rule is discharged with costs one gold mohur.

Jack, J.—I agree.

K.S.

Rule discharged.

1. *A I R 1918 Pat 636*=46 I C 614=8 Pat L J 516.

2. *A I R 1928 Cal 828*=116 I C 166.

A I. R. 1933 Calcutta 816

RANKIN, C. J. AND COSTELLO, J.
Menaka Bala Dasi—Defendant—Appellant.

v.

Hiralal Govindlal and another—Plaintiffs—Respondents.

Appeal No. 49 of 1932, Decided on 10th February 1933.

Words and Phrases—"Adjourned sine die" means adjournment to a date not fixed at the moment.

"Adjournment sine die" differs altogether from discontinuance. It is after all an adjournment; an adjournment to a date that is not at the moment fixed. [P 817 C 2]

L. P. E. Pugh and *Laha*—for Appellant.

S. N. Banerjee (Jr.) and *S. C. Ghose*—for Respondents.

Rankin, C. J.—In my opinion this appeal fails and must be dismissed. The appeal is by the widow of the original defendant in a mortgage suit *Satyasadhan Dutt*. The suit was of 1924. In 1925 a preliminary decree for sale was made whereunder the Registrar reported that a sum of Rs. 76,000 would be due on a given date, namely, 9th September 1926, and on that date the plaintiffs became entitled for the first time to apply for a final decree for sale. By the practice of this Court such application is made by a notice of motion which comes on before the Judge as a matter listed on the daily cause list. The plaintiffs had three years from 9th September 1926, within which to bring the motion and that gave them time until 8th September 1929. Now it appears that on 26th January 1927, the plaintiffs brought a notice of motion against the then defendant, *Satyasadhan Dutt*. The matter came before the learned Judge as a listed motion and was adjourned for a month. It had been served on the defendant's attorney and it does not appear for a single moment that the attorney had refused—indeed he could not refuse—to accept service of this notice of motion brought in a suit in which he was acting for the defendant. The notice of motion when it came on was adjourned for a month and at the end of that month the attorney said that he wanted further adjournment because his client turned out to be insane.

It is somewhat important to consider what exactly was done. It turned out that the question whether the client was insane in January 1927 was quite a

serious question and the wife brought a suit in the name of her husband in January 1928 asking for a declaration that the mortgagor *Satyasadhan Dutt* was insane even at the time he executed the mortgage and that all the proceedings in the mortgage suit were bad. This suit was dismissed in May 1929 and an appeal against this decision was pending when in March 1930 *Satyasadhan Dutt* died. The appeal was continued by the widow and on 24th July 1930, the appeal was dismissed, so that the suit which began in January 1928 was got rid of in July 1930. In the meantime there was not very much practical good sense in endeavouring to bring to a hearing the application for a final decree for sale. Immediately thereafter, namely, on 15th August 1930, the mortgagees gave a notice of motion asking for a final decree. They had not taken the necessary steps in the suit to get the widow substituted in view of *Satyasadhan's* death in the previous March, so they took out a summons to get the abatement set aside and the substitution made. At the same time they applied against the widow for a final decree and at the time they did that they also gave notice to the Registrar asking him to reinstate the motion of 26th January 1927. Before coming to the exact question now before us it may well be just to complete the history of the plaintiffs' trouble. The learned Judge on the original side dismissed the application to set aside the abatement so that the application for a final decree fell to the ground. That matter however was taken on appeal and by an order of this Court in March 1931 it was held that the abatement should have been set aside and the widow would have been substituted. Thereupon the motion of 15th August 1930 came up for consideration in 1932 before Lord-Williams, J.

The question before him was purely a question of limitation. If the application for a final decree must be treated as being made on 15th August 1930, the application was out of time, that being more than three years from September 1926. If however the learned Judge in the circumstances was entitled to regard the application with which he was dealing as the application made on 26th January 1927 then the application, whatever other merits there might have been,

could not be dismissed on the ground of limitation. It turns out that the application of 26th January 1927 which, as I have said, was adjourned for a month, and was then met by a statement on behalf of the mortgagor's attorney that his client was insane having been adjourned once or twice was before the Court on 25th May 1927. The minute by the officer of the Court is in existence which says that on that date it was adjourned by consent for one month. In the ordinary course therefore it would become the duty of the officers of the Court to see that that motion appeared that day month in the cause list as an adjourned motion. Investigation has been made and it does not appear that any trace of it can be then found and no trace of this motion has been found in the Court's record since the entry of 25th May 1927.

It would seem therefore *prima facie* probable merely upon the face of the Court's record that some order had been made which has not been traced adjourning the matter *sine die* or else disposing of the motion. The matter however does not rest there, because in January 1928 the plaint brought by the widow deals with the position of the plaintiff's claim for a final decree. It says that:

"On 31st January 1927, the defendant firm applied for a final decree in the said suit but such application stands adjourned *sine die* on the ground that the plaintiff has become of unsound mind."

It does not say that the order for adjournment *sine die* was made on 25th May 1927, but it says that that was the position in January 1928. There being, it is true, no trace of a minute by the Court officer whereby the motion was adjourned *sine die* the first question is whether the learned Judge has in all the circumstances rightly inferred that the motion was adjourned *sine die*. That it was adjourned *sine die* was the statement of the present appellant at the time and a very solemn statement in her plaint, and I cannot think that the learned Judge's order ought to be inferred when he says that he is satisfied that in that motion, no trace of an order disposing of the motion being found was adjourned *sine die*.

If therefore I am right so far the next question is whether or not there is any reason for saying that the motion

of 26th January 1927 does not save limitation. It has been contended before us by Mr. Pugh that the proper indication of the phrase "adjourned *sine die*" is that it is really a discontinuance. But whatever may be the old authorities on that point, I have no doubt myself that with us today "adjournment *sine die*" differs altogether from discontinuance. It is after all an adjournment, an adjournment to a date that is not at the moment fixed. If that motion was therefore made and was not disposed of but was adjourned and all that remained was to fix a date for its hearing, the next question is, does it matter at all that Satyasadhan died in March 1930 with the result that the present application has to be brought against his widow, the proper person to be substituted in his place and the person who has been substituted in his place. The course taken not without just reason by the plaintiff's attorney seems to me to be a very reasonable one. He reinstated the old motion against Satyasadhan and he brought another motion along with it which had the effect of stating the same claim against the party who in the altered circumstances is the proper party. It may be that it would have been more proper to call his second motion an application for the amendment of the first. But from the moment he brought that motion he brought it on the footing of the first motion without pretending that it had an independent validity.

In my judgment the plaintiffs have not in the events that have happened, been deprived of their right to a final decree. The decision of the learned Judge is correct and this appeal is dismissed with costs.

Costello, J.—I agree.

K.S.

Appeal dismissed.

* A. I. R. 1933 Calcutta 817

MITTER AND M. C. GHOSE, JJ.

Gopal Chandra Poddar—Appellants.

Lakshmi Kanta Saha—Respondent.

Appeal No. 104 of 1931, Decided on 27th March 1933, against appellate order of First Class Sub-Judge, Tippera, D/- 17th September 1930.

* Contract Act (1872), S. 23—Agreement to refer to arbitration in consideration for dropping non-compoundable criminal proceedings—Agreement and award on such re-

ference are both opposed to public policy and illegal—Arbitration.

An agreement to refer to arbitration in consideration for dropping a criminal proceeding in respect of a non-compoundable offence is opposed to public policy and illegal; and therefore the award, as the outcome of the illegal reference, is also invalid and cannot be acted upon: *AIR 1980 P C 100, Rel on.; Jones v. Marionethshire Permanent Benefit Building Society*, (1892) 1 Ch 178, Ref. [P 818 C 2]

Gopal Chandra Das and Probas Chandra Chatterjee—for Appellant.

Surendra N. Das Gupta for Bimal Chandra Das Gupta—for Respondent.

Mitter, J.—This is an appeal on behalf of the plaintiff and arises out of a suit brought by him to enforce an award on an arbitration without the intervention of the Court. The Subordinate Judge has dismissed the suit mainly on the ground that the agreement for reference to arbitration on which the award is founded is opposed to public policy and is illegal under the provisions of S. 23, Contract Act. It appears that a criminal proceeding was pending against the defendant Lakshmi Kanta Saha under S. 408, I. P. C. A settlement was reached in the course of that proceeding on 20th December 1928. A petition was made on behalf of the accused in which the terms of the settlement were set forth. That petition discloses that under orders of the Court the house of the defendant was searched and an iron safe with documents, unused stamps, and articles of gold and silver within it and also documents, pledged articles etc., found outside the safe were brought to the Court. It was stated in that petition that Gopal Chandra Poddar who is the plaintiff and who was the complainant in that case had brought a case against the defendant claiming the said articles and papers as his own. It is further stated in that petition that depending on the sense of justice and award of Gopal Chandra Poddar and his youngest brother Rai Mohan Poddar so far as regards his claims and ownership in respect of the iron safe and all the documents and pledged articles found within the safe were concerned, possession was given up in respect of those articles which had been recovered on search in favour of the complainant.

It is further stated that Lakshmi Kanta Saha would be bound to abide by whatever decision Gopal Chandra Poddar and his youngest brother Rai Mohan

Poddar would come to in respect of his claims of ownership in these articles and in respect of a cloth business owned by the complainant, now defendant and managed by him as his gomostha. The award of these two persons, it was further stated, would be completed within 90 days, and if it was not completed within the said 90 days on account of the laches of the complainant and his brother, then the accused would not be bound by any term of settlement. A further reference was made to a mortgage suit to which it is not necessary to refer having regard to the fact that the plaintiff has already got the mortgage decree in respect of his claim. On this petition being filed, on the same day the criminal proceedings which were started under S. 408 the said proceedings were dropped. It is to be noticed that an offence under S. 408, I. P. C., is a non-compoundable offence. The award was duly made by the two arbitrators and it is to be found at p. 19, part 11 of the paper book. Upon that the plaintiff filed the award in Court on 28th August 1929 and wanted to have a decree on the said award. Defendant 1 filed a written statement on 19th November 1929. Amongst the numerous defences to the suit it is necessary to notice the defence which was founded on the illegality of the agreement for reference to arbitration, and the issues based on the other defences have all been found in favour of the plaintiff. The Subordinate Judge on this issue, with regard to the illegality of agreement for reference to arbitration, came to the conclusion that it was opposed to public policy and it was illegal under S. 23, Contract Act, and therefore the award as the outcome of an illegal reference was also invalid and found that the award cannot be acted upon. He accordingly dismissed the suit.

Against this decision the plaintiff has brought this appeal and it is contended on his behalf that the Subordinate Judge has committed an error of law in treating the agreement to refer to arbitration as void under the Contract Act. It is contended that as there was a civil liability independent of the liability for an offence under S. 408, I. P. C., the agreement cannot be said to be one which is contrary to public policy. It is difficult to accept this contention in view of

the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Kamini Kumar Basu v. Birendra Nath Basu* (1). In that case, as in the present, the real question involved was as to whether any part of consideration for the reference to arbitration was illegal. It appears clear from the facts which had already been stated that it was an implied term among other terms of the settlement to refer to arbitration that the complaint under S. 408, I. P. C., would not be further proceeded with. As a matter of fact the order sheet of the same case leaves no room for doubt that the proceeding was dropped in consideration of the fact that the accused who is the present defendant agreed to refer the question of ownership of the several articles to arbitration. That being so the facts fall within the purview of the decision of the case which has been referred to. It is necessary to quote a few lines from the judgment of their Lordships of the Judicial Committee which was delivered by Sir Benode Mitter. Sir Benode Mitter observed thus :

"If it was an implied term of reference under the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama as the case may be is unlawful and the award or the ekrarnama was invalid quite irrespective of the fact whether any prosecution in law had been started."

In support of this view Sir Benode Mitter referred to the decision of *Jones v. Merionethshire Permanent Benefit Building Society* (2). In that case the secretary of a building society, who had made default in accounting for money paid to him and was threatened by the society with a prosecution for embezzlement, applied for assistance to the plaintiffs, and they gave a written undertaking to the society to make good the greater part of the debt due from the society, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes and some deeds of collateral security to the society. The plaintiffs in giving the undertaking were actuated by the desire

to prevent the prosecution and that was known to the directors of the society ; but no promise was made that there should be no prosecution. The society brought an action on the promissory notes in the Queen's Bench Division, and the plaintiffs brought an action in the Chancery Division to set aside the promissory notes and the collateral securities on the ground that they were made for illegal consideration. It was held by the Court of appeal in this state of facts that it was an implied term of the agreement that there should be no prosecution ; that the agreement was therefore founded on an illegal consideration and void, and that the society could not recover on the promissory notes or enforce the securities ; and the society not opposing, they were ordered to be delivered up to the plaintiffs. This decision shows that the Court could not support the agreement which was intended to avoid prosecution. As I have already stated the policy underlying this is that an agreement to stifle prosecution is distinguishable from the lawful compounding of compoundable offences. As the offence is not compoundable under the law the compounding of it must be held to be illegal and opposed to public policy.

The effect, in my view, of the agreement in the present case was to take the administration of law out of the hands of the Judges and to put it into the hands of private individuals to determine what is to be done in a particular case and as such it is opposed to public policy. Reliance has been placed by the learned advocate for the appellant on a decision of my learned brother Guha, J., and my learned brother M. C. Ghose, J., who was also, a party to that decision. That was the case of *Deb Kumar Roy v. Anath Bandhu Sen* (3). It is sufficient to say for the purposes of the conclusion to which I have reached that the case is distinguishable from the present one as it has been pointed out at p. 28 of the said report that in that case there was a pre-existing civil liability based upon an adjudication of accounts between the parties concerned. That fact is wanting in the present case. Therefore this decision cannot govern the present case. For this reason I am of opinion that the Subordi-

1. AIR 1930 P C 100=128 I O 187=57 I A 117=57 Cal 1802 (PG).

2. (1892) 1 Ch 178=61 L J Ch 188=65 L T 688=40 W R 278=17 Cox C O 889.

3. AIR 1931 Cal 421=181 I O 188.

nate Judge has reached a correct conclusion. This appeal must therefore be dismissed. As has been pointed out by the Judicial Committee in the decision referred to above, the defence in the case cannot be commended, but we are compelled to give effect to it on the ground of public policy. In these circumstances we do not think it right to allow any costs to the present respondent.

M. C. Ghose, J.—I agree that this appeal should be dismissed. The defendant was a servant of the plaintiff. The plaintiff's case was that the defendant as his servant dishonestly misappropriated the funds of the plaintiff which came to his hands. The plaintiff instituted a suit against the defendant in the Court of the Subordinate Judge of Comilla. At the same time he made a complaint before the Magistrate of Comilla under S. 408, I. P. C., and the defendant was brought before the Magistrate in Court to answer the charge of embezzlement. His house was searched and an iron safe and various properties were seized and they were brought into the Magistrate's Court. It is on those circumstances that the defendant agreed with the plaintiff to refer the dispute between the parties to an arbitration. I am clearly of opinion, having regard to the decision in the case of *Kamini Kumar Basu v. Birendra Nath Basu* (1) and *Jones v. Merionethshire Permanent Benefit Building Society* (2), that in this case the plaintiff cannot succeed as it was clearly an agreement to stifle the criminal proceeding and the defendant was not a free agent but entered into a contract under threat of a criminal conviction.

K S.

Appeal dismissed.

A. I. 933 Calcutta 820

BUCKLAND, J.

F. J. Eugster—Plaintiff.

v.

E. O. Gammeter—Defendant.

Civil Suit No. 616 of 1932, Decided on 11th January 1933.

(a) *Executor*—Executor accepting probate does not divest himself of that office after estate has been made over to beneficiaries.

An executor, who has accepted probate, continues until his death to be the legal representative of the testator. He may be *functus officio* after the estate has been made over to the beneficiaries in the sense that he has no duty to perform after that, but it cannot be said that if occasion

arises for him to assume the role of executor he cannot do so: *Nixon v. Smith* (1903), 1 Ch 176. [P 821 C 2]

(b) *Executor*—Debtor appointed executor and acceptance of office by him on death of testator—Debtor is discharged from debt but it forms an asset of estate.

Where a debtor is appointed as an executor, and he accepts the office on the death of the testator, he is discharged from the debt, but the debt becomes an asset forming part of the estate of the deceased. [P 821 C 1]

(c) *Executor.*

One executor may sue another executor: *Peake v. Ledger*, (1849) 8 Hare 818, *Ref.* [P 821 C 2]

(d) *Executor*—Assets not included in affidavit of assets coming into hand of executor after grant of probate cannot be said to be comprised in grant.

Where assets, which are not included in the affidavit of assets, come into the hands of an executor, after probate has been granted, such assets cannot be said to have been comprised in the grant, as a further duty is payable on them. [P 821 C 2]

M. R. Westmacott and *D. C. Ghose*—for Plaintiff.

L. P. Pugh and *S. K. Gupta*—for Respondent.

Judgment.—In this case the plaintiff sues for an account to be taken of the amount due from the defendant to the estate of Adolph Meyer deceased and for a decree for the amount found to be due on an account being taken.

Adolph Meyer, a gentleman who I understand had business in India and interests in Switzerland, died on 1st December 1929, leaving a will dated 26th October 1927. In respect of his estate in Europe by his will he appointed two gentlemen of the name of Wegmann and Pfister as his executors, and, as his executors to administer his estate in this country, he appointed the plaintiff and defendant. On 16th March 1930 probate of the will was granted to the Indian executors.

On 22nd March 1922 the defendant had borrowed from the testator the sum of £8000 which by his promissory note bearing that date and made at Calcutta he promised to repay to the testator with interest at the rate of 7 per cent per annum. The interest, it has not been disputed, was paid up until 31st December 1930.

On 12th November 1930 there was executed by the widow and daughters of the testator in favour of the Indian executors a release to which Wegmann, the executor for Europe, was also a party. The plaintiff now sues the defendant to recover the amount due to

the estate on the promissory note of 22nd March 1922.

The defences preferred appear from the following issues submitted by learned counsel for the defendant and accepted:

(1) Did the plaintiff cease to function as executor prior to suit, and if so, is he entitled to sue? (2) Was not the promissory note a part of the European assets of the testator and not of the Indian assets of the testator? (3) If the promissory note was part of the Indian assets, has it by the deed of release been transferred to the beneficiaries, and has the function of both the Indian executors ceased? (4) Is the present suit barred by the release? (5) To what relief, if any, is the plaintiff entitled?

There are no facts in dispute nor do I understand can there be any question as to the amount due, though it may be necessary to order an account. Correspondence which passed between the parties or their solicitors prior to the suit has been read with the object of showing that the Indian executors were functi officio and that only the beneficiaries or Wegmann, the European executor, are entitled to sue, but that cannot be the case if, as is submitted, the debt is an Indian asset due to the estate, for to recover such an asset the Indian executor would be the proper person entitled to institute proceedings. It is contended that there is no question of the executor being functus officio upon the authority of *Solomon v. Attenborough* (1) (at p. 458), in which Fletcher Moulton, L. J., observed:

"I perfectly agree with the learned Judge that one can put no limit of time to the office of executor; nor do I think it can be said that an executor has ceased to be an executor because he has passed his accounts. Some claim might turn up and it would find him an executor not to recreate him an executor."

I conceive that an asset might turn up and it would also find him an executor who should institute proceedings on behalf of the estate.

I have also been referred to *Nixon v. Smith* (2) in which Kekewich, J., observed:

"Of course, in the strict sense of the word, they never cease to be executors. Having accepted probate, they are, during the rest of their lives, the legal representatives of the testator."

tor; but after a certain time they have no duties as executors to perform, and can no longer be said to be doing anything *virtute officii*."

An executor may be functus officio in that sense, once the estate has been made over to beneficiaries, but it is clear upon the authorities that he has not thereby divested himself of that office, so that if occasion arises for him again to assume the role of executor he cannot do so.

The debt appears to have been originally a European asset in that it was entered in the testator's books in Zurich, and the promissory note was held in Europe; but on the death of the testator the debt was discharged by the appointment of the debtor as executor under the will and his acceptance of the office: *Freakley v. Fox* (3). That being so, it was contended, and in my view rightly, that as a debt due from a person resident in India on a promissory note made in Calcutta, the debt became and was an Indian asset forming part of the estate of the deceased.

It has not been contested that one executor may sue another, but if authority for the proposition is wanted, I have been referred to *Peake v. Ledger* (4). The real difficulty in the case arises out of the deed of release. Does it completely and effectually bar this claim or was it limited to that which was comprised in the grant to the Indian executors? This debt finds no place in the affidavit of assets filed in this Court. Where assets come into the hands of an executor, after probate has been granted, which are not included in the affidavit of assets, a further sum is payable by way of duty, and were such assets deemed to be comprised in the grant of administration that would not be the case. For fiscal purposes at all events this debt cannot be said to have been comprised in the grant.

Now, the release states, omitting superfluous words, that:

"in consideration of the premises, the beneficiaries with the consent, privity and knowledge of the said Carl Wegmann as such executor for Europe, do and each of them do hereby release the said Ernest Otto Gammeter and Fred Eugster from all action, suits, accounts, duties, debts, reckonings, claims and demands whatsoever which the beneficiaries have or any of them hath or might at any time hereafter have claimed, challenge or demand upon or against

1. (1912) 1 Ch 451=31 L J Ch 242=106 L T 87=38 T L R 225=56 S J 370.

2. (1902) 1 Ch 176 at 182=71 L J Ch 138=55 L T 17=51 W R 104.

3. (1892) 9 B & O 180=4 Man & Ry 18=7 L J (C.S.) C.P. 149.

4. (1849) 6 Hare 313.

the said Ernest Otto Gammeter and Fred Eugster as such executors for India for or in respect of the administration, disposition of application by the said Ernest Otto Gammeter and Fred Eugster of the estate and effects of the said Adolph Meyer deceased comprised in the grant of Administration made to them."

Later there follows an indemnity clause, but that is not relied upon on behalf of the defendant.

It is contended that it was not intended to release the defendant from this debt, and in that connexion the circumstances have been referred to. But I must ignore them and confine myself to the words of the instrument. It has not been put forward, but it occurs to me that it may be an argument in favour of the plaintiff that the defendant in his capacity of debtor to the estate cannot rely upon the release executed in his favour as executor. Be that as it may, the words of the instrument itself limit it to claims in respect of the estate and effects of the testator comprised in the grant, and as I take the view that this asset was not comprised in the grant, the plaintiff is entitled to judgment.

The prayer is for an account, but an account should be unnecessary as the amount is admitted and interest has been paid up to 31st December 1930, and the only questions to be determined are as to the amount of interest now due and the rate at which the total amount due should be converted into Indian currency for the purpose of the decree. This should be further considered, for to order an account would only put the defendant to unnecessary expense. The matter may be again mentioned on Friday morning when I will consider the form the decree should take.

This suit was again mentioned to me on Friday 13th January last, when the parties had not come to any agreement as to the figures. I accordingly directed that the suit should again be put into the list for hearing when, if necessary, evidence could be taken as to the rates of exchange and I would hear argument as to the date at which the rate was to be taken for the purpose of converting the amount due into Indian currency. The case has now come on again and I am glad to find that the parties have agreed as to the figures. It has been agreed that the sum of Rs. 1,05,748-11-4

shall be taken as the equivalent of £8,000, the amount of the promissory note. Interest has been paid up to 31st December 1930. Interest must be calculated upon Rs. 1,057,48-11-4 at the rate of 7 per cent per annum, the rate mentioned in the promissory note, from 1st January 1931 until 18th March 1932 and the plaintiff is entitled to judgment for that amount. As against these sums the plaintiff will give credit to the defendant for Rs. 582-7-0 in respect of payments made on account of income-tax. The plaintiff will also have interest on the principal amount at the rate of 6 per cent pending suit. Costs and interest on judgment at 6 per cent. There will be no order as regards the costs of today.

K.S.

Order accordingly.

A. I. R. 1933 Calcutta 822

GUHA AND BARTLEY, JJ.

Asutosh Pramanik and another — Defendants—Appellants.

v.

Jibandhan Ganguly — Plaintiff—Respondent.

Appeals Nos. 729 and 730 of 1931, Decided on 9th August 1933, against appellate decrees of Second Court Sub-Judge, 24 Parganas, D/- 23rd December 1930.

(a) Bengal Tenancy Act (8 of 1885), S. 182 — Lease in respect of garden land on part of which tenant is allowed to have his dwelling place—No indication in lease that lessee is to be treated as raiyat or that lease is agricultural or horticultural — Lease is not governed by Bengal Tenancy Act.

Where the kabuliast showed that the lease was in respect of garden land, on a part of which the tenant was allowed to have his dwelling place, and where the lease contained no indication that the lessee was to be treated as a raiyat under the Bengal Tenancy Act, or that the purpose of the lease was agricultural or horticultural:

Held: the lease could not be held to be governed by the Bengal Tenancy Act, and that S. 182 could not have application whatsoever, to a portion of the garden land on which the lessee dwelt. [F 628 C 2; P 824 C 1]

(b) Landlord and Tenant—Tenant holding over for a number of years — His son claiming to be on land on payment of rent is not in position of trespasser and suit for eject-

ment is governed by Court-fees Act (1870), S. 7 (14) (cc).

A person who claims to be on the land on payment of rent, after the demise of his father who was before his death holding over, for a number of years, after the expiration of the terms of his lease, cannot be held to be in the position of a trespasser on the land, against whom the landlord has to proceed by way of getting his title established in a properly constituted suit. The landlord can maintain a suit for ejectment and such a suit will be governed by S. 7 (11) (cc), Court-fees Act. [P 824 O 1]

Sitaram Banerjee, Prosanta K. Bose, Phani Bhusan Chakravarti and Sudhansu S. Mukherjee—for Appellants.

Rupendra Kumar Mitter and Bijan Kumar Mukherjee—for Respondent.

Judgment.—(S. A. No. 729 of 1931).—

This is an appeal in a suit for ejectment after service of notice to quit. The father of defendant 1 held the land in suit under a registered lease for nine years, and, on the expiry of the term of the lease, was holding over till his death. The defendant, after the demise of his father, has been in possession as a lessee, on payment of rent. The ground on which defendant 1 was sought to be ejected was that he had, in contravention of the term of the lease, cut down trees standing on the land. The claim for eviction as made by the plaintiff was resisted by defendant 1 whose defence, so far as we are concerned with the same in this appeal, was that his father had acquired the right of occupancy in the land in suit, and that the claim for eviction was not maintainable. The Courts below have decided all the questions arising for consideration in the case, as indicated by the various issues raised in the trial Court against defendant 1 and the defendant has appealed to this Court.

The main questions on which the decision of this appeal turns are, whether the Bengal Tenancy Act governs the tenancy created by the kabuliati executed by the father of defendant 1 in respect of the land in suit; was the purpose of the lease agricultural, as has been contended for by the defendant? Had defendant 1 acquired the right to cultivate the land by virtue of the lease executed by him? The decisions of these points depend upon the construction of the kabuliati executed by the father of defendant 1 in favour of Sm. Basanta Kumari Debi, in the year 1819, B. S., Ex. 2 in the case. The document has been placed before us; and almost every word con-

tained in the same has been commented upon by the learned advocates appearing for the parties in this appeal. On a careful consideration of the terms of the kabuliati, it appears to us to be clear that the land in suit was leased out to the defendant's father, in order to enable him to live on a part of the same, which was garden land, with trees standing thereon, a list of trees standing on the land leased out, was specifically given in a schedule appended to the kabuliati. The lessee was required to take care not to injure the trees in plucking the fruits therefrom. There was a definite stipulation to the effect that if the tenant in any way injured the orchard, the tenant was liable to eviction, even within the period mentioned in the lease. There was a provision for raising crops, contained in the kabuliati—whatever that might mean—but the purpose of the lease was appropriation of fruits of the trees standing on the land, which was garden land. The clause relating to eviction on the trees being injured, and the special provision against cutting down trees, completely negatives the idea of the land leased out being agricultural, and the term of the lease made the use of the land for agricultural purposes impossible.

The Court of appeal below has held on a construction of the kabuliati, that the father of the defendant acquired the tenancy for residential purposes coupled with the right to gather the fruits and fish reared in the tank, standing on the land; and we are in agreement with that Court in coming to the conclusion, that the tenancy created by the kabuliati executed by the father of defendant 1 was not a tenancy for agricultural or horticultural purposes.

In the above view of the case, we are clearly of opinion that the contention of defendant 1, that the kabuliati gave the lessee the right to cultivate the land and grow crops on the same, cannot be allowed to prevail. In our judgment, in the case before us, where the kabuliati shows that the lease was in respect of garden land, on a part of which the tenant was allowed to have his dwelling place, and where the lease contained no indication that the lessee was to be treated as a riyat under the Bengal Tenancy Act, or that the purpose of the lease was agricultural or horticultural,

the lease cannot be held to be governed by the Bengal Tenancy Act. If the lease was not governed by the Bengal Tenancy Act, as we hold it was not, S. 182 of the said Act, on which reliance was placed on behalf of defendant 1, could not have any application whatsoever to a portion of the garden land on which the lessee dwelt. The conclusion therefore follows that defendant 1, appellant in this Court, had not, and could not have acquired a right of occupancy in the land in suit regard being had to the tenancy created in respect of the same, and regard being also had to the position that S. 182, Ben. Ten. Act, could not be held to have any application in the case before us. Defendant 1 was not therefore in a position to resist the claim for ejectment as made by the plaintiff in the suit out of which this appeal has arisen.

A question of subsidiary nature raised in support of the appeal, has to be considered next. It was argued in support of this appeal, that on the facts and in the circumstances of the case, the plaintiff was not entitled to maintain the suit without payment of ad valorem court-fees. According to the defendant, it was necessary for the plaintiff to institute a regular suit to establish his title on payment of court-fees. It was pointed out in this connexion, that defendant 1 was a minor, and that his holding over after the expiry of the term of the lease, did not make him a tenant who could be ejected after service of notice to quit; or in other words, the suit as instituted against the defendant was not a suit for ejectment as contemplated by S. 7 (11) (cc), Court-fees Act. It is only necessary to mention in this connexion that defendant 1, claiming to be on the land on payment of rent after the demise of his father who was before his death holding over, for a number of years, after the expiration of the terms of his lease, could not be held to be in the position of a trespasser on the land, against whom the plaintiff had to proceed by way of getting his title established in a properly constituted suit. The objection raised by the defendant to the non-maintainability of the suit for ejectment as instituted by the plaintiff, appears to us to be without substance, and must be overruled. In view of the conclusions

we have arrived at, on the questions arising for consideration in this appeal, the appeal fails and it is dismissed with costs. The application made by the appellant for the reception of additional evidence in this Court is rejected.

S. A. No. 730 of 1931.—In accordance with, and as a necessary consequence of our judgment in Second Appeal No. 729 of 1931, this appeal, arising out of a suit for rent brought by the plaintiff-respondent against defendant 1, appellant in that appeal, must be dismissed. The appeal is dismissed. There is no order as to costs in this appeal.

K.S.

*Appeals dismissed.***A. I. R. 1933 Calcutta 824**

MALLIK AND JACK, JJ.

Akhil Chandra Dutta — Co-defendant
—Appellant.

v.

Ramani Ranjan Dutta and others—
Respondents.

Appeals Nos. 2156 to 2159 of 1930, Decided on 7th February 1933, from appellate decrees of First Sub-Judge Backergunj, D/- 22nd April 1930.

(a) Landlord and Tenant—Suit for rent by cosharer landlord—Other cosharer refusing to be joined as co-plaintiff—Denial of plaintiff's title by both tenant and cosharer not impleaded as co-plaintiff—Question of title can be as decided.

There is no rigid rule that in a rent suit question of title should not be agitated.

[P 825 C 1]

In a suit for rent by a cosharer landlord, the other cosharer landlord refused to be joined as a co-plaintiff. The tenants denied the title of plaintiff cosharer, and pleaded that the other cosharer was the full owner, and that the rent had been paid to him. The other cosharer supported the tenants in their defence. Thereupon the question of title as between the two cosharers was decided:

Held: that the Court was justified in deciding the question of title and the decree was not vitiated: *AIR 1928 Cal 699; AIR 1931 Cal 878* and *AIR 1925 Cal 749, Ref*; 8 Cal 288, *Expl.*

[P 825 C 2]

(b) Civil P. C. (1908), S. 100—Finding of fact.

The High Court will not interfere with a finding of fact in second appeal, unless it can be shown that there is anything illegal in such finding.

[P 825 C 2]

Sarat Chandra Ray Choudhury, Hiralal Chakraborty and Nilkanta Ghose—
for Appellant.

Amarendra Nath Bose, Santimoy Majumdar and Radhika Ranjan Guha—
for Respondents.

Mallik, J.—These four appeals were heard together as had been the four suits from which they arise. The suits were for recovery of arrears of rent, brought by some cosharer landlords, the plaintiffs, on the allegation that they had an eight anna interest while the cosharer landlord, defendant Akhil, had the remaining eight anna share. The allegation also was that although the cosharer landlord Akhil had been asked to join the plaintiffs as a co-plaintiff, he declined to do so. The plaintiffs' claim in all the four suits was resisted by the tenants-defendants whose defence was that the plaintiffs were not their landlords, that Akhil was the sixteen anna landlord and that they had paid all their dues to Akhil. Akhil supported the tenants in this defence of theirs. The Courts below decreed the plaintiffs' suits, the lower appellate Court holding that the karsha within which the holdings in suits lay, belonged both to Mahim, the father of the plaintiffs, and Akhil. Akhil has appealed to this Court.

On behalf of the appellant it was first of all contended that the Courts below ought not to have gone on to and decided the question of title as between the plaintiffs and Akhil in the simple rent suits that were instituted by the plaintiffs. This contention in the circumstances of the present case does not appear to me to be well founded. In some recent decisions of this Court among which I may mention the cases in *Thinkari Bose v. Nagendra Prosad* (1) and *Ananga Mohan Ray v. Khaje Habib-ulla* (2) it has been held that there is no rigid rule that in a rent suit the question of title should not be agitated. The learned advocate for the appellant placed considerable reliance on the decision in the case of *Lodai Mollah v. Kally Dass Ray* (3). But the true import of *Lodai Mollah's* case (3) has been discussed in a comparatively recent decision of this Court in *Indra Narayan Manna v. Sarbasova Dasi* (4). *Lodai Mollah's* case (3) not only lays down that in a suit for rent a third party set up by the tenants should not be dragged in to convert it into a title suit, but it also holds that the question with regard to the plaintiff's right cannot only be raised, but

must be raised, where it is denied by the tenants defendants.

In the present case the plaintiffs claimed rent as cosharer landlords and they were bound, if they wanted to get a rent decree, to implead Akhil, the other cosharer landlord, under the provisions of S. 148-A, Ben. Ten. Act. Both the tenants-defendants and Akhil contested the plaintiffs' claim to have any share in the rent. The plaintiffs and the defendant Akhil fully understood the position and the question whether the plaintiffs had any title to the property was fully fought out by them. In these circumstances it cannot, in my judgment, be reasonably contended that the decrees of the Court below are vitiated for the reason that the question of title as between the plaintiffs and the defendant landlord Akhil was gone into and decided in the trial.

The next contention on behalf of the appellant before us, relates to the finding of the lower appellate Court to the effect that the Karsha in dispute belonged to both Mahim, the father of the plaintiffs and Akhil. This finding, that the Karsha belonged both to Mahim and Akhil, is unquestionably a finding of fact, and unless it can be shown that there was anything illegal in this finding we cannot possibly go behind it in second appeal. The learned advocate for the appellant assailed this finding, contending that from the facts found by the learned Subordinate Judge, namely that Akhil had treated the property as joint property of himself and Mahim, the inference that the property belonged to Mahim and Akhil could not be legally drawn, and in support of this contention a considerable amount of reliance was placed on an observation in Mr. Mayne's Book on Hindu Law to the effect that an intention to waive one's separate rights in a property must be established and will not be inferred from acts which may have been done merely from kindness or affection.

This observation was quoted with approval in the case of *Rajani Kanta Deb v. Bashiram Mestari* (5). But affection and kindness do not appear to have had any place in the acts of Akhil while he treated the property as joint property of himself and of Mahim. It appears that the brothers Mahim and Akhil

1. AIR 1938 Cal 699=50 Cal 807=77 I C 10.

2. AIR 1931 Cal 678=134 I C 806.

3. (1932) 8 Cal 238=10 C L R 591.

4. AIR 1925 Cal 748=87 I C 980.

5. AIR 1929 Cal 636=121 I C 409.

had each his separate loan business and each used to pay the doctor's and druggist's bills separately so far as his branch of the family was concerned. The facts therefore which the learned Subordinate Judge had before him were in my judgment sufficient in law as well as in fact, for the inference that the karsha belonged both to Mahim and Akhil, and the finding of the lower appellate Court on this point cannot, in my judgment, be successfully assailed on any ground of law. Both the contentions urged before us on behalf of the appellant must therefore fail and the appeals must accordingly be dismissed with costs.

Jack, J.—I agree.

K S.

Appeal dismissed.

A. I. R. 1933 Calcutta 826

MITTER AND HENDERSON, JJ.

Jiban Krista Kundu—Appellant.

v.

Rai Hari Nath Ghose Bahadur and another—Respondents.

Appeal No. 9 of 1930, Decided on 14th July 1933, from original decree of 2nd Court Sub-Judge, 24 Parganas, D/- 7th September 1929.

(a) Limitation Act (1908), Ss. 20 and 21—Authority need not be special one for payment of particular loan.

There is no foundation for the contention that the authority contemplated by S. 21 must be special authority given for the purposes of making payment of the particular loan : *A I R 1922 All 280, Expt; 17 All 198 (P O), Ref. [P 827 C 2]*

(b) Limitation Act (1908), S. 21—Debt due by two brothers allotted to one at partition—Payment of interest by one of them will not save limitation as against other unless such member is authorised to make such payment.

Where a debt is due by two brothers and, on a partition between them, it is allotted to one of them, payment of interest by such brother will not save limitation as against the other brother, unless there is an implied or express authority conferred by the partition arrangement to make such payment of interest : *A I R 1929 P O 297, Dist. [P 828 C 2; P 880 C 2]*

Pyari Mohan Chatterjee Bankim Chandra Ray and Dasarathi Chatterjee—for Appellant.

Radhabinods Pal—for Respondents.

Mitter, J.—This is an appeal on behalf of defendant 1 and arises in a suit brought by the plaintiff for recovery of a certain sum of money on the basis of a promissory note said to have been executed by defendant 1 Jiban and his brother Mohit Krishna Kundu on 4th

December, 1919 for a sum of Rs. 10,000. The handnote carried interest at the rate of Rs. 1-8-0 per month. The defence of defendant 1, which it is now material to mention, to the suit is that it is barred by the statute of limitation so far as he is concerned. This defence which led to the framing of issue 1 in the Court below has been rejected by the Subordinate Judge who has granted a decree against both the defendants. Defendant 1 has alone appealed.

On his behalf the only contention that has been raised is that the suit is barred by limitation. It appears that in the plaint the plaintiff alleged that the defendants on paying the interest on several debts up to 3rd October 1927 due to the plaintiff on account of the handnotes endorsed the said payment on the back of the said handnote. After deducting certain payments the amount due to the plaintiff is stated to be about Rs. 11,555 for which the present claim is laid. The question of limitation turns on the payments made by Mohit Krishna Kundu alone on 21st September 1925 for it is admitted that the previous payment of 6th October 1922 was made both by Jiban and Mohit and this also appears on the face of the endorsement in the handnote. The question in controversy in the present appeal is whether this payment of 21st September 1925 which on the face of the document appears to have been made by Mohit alone was made by Mohit for self and as agent authorized specially in this behalf for Jiban, the defendant-appellant. If this payment of 21st September 1925 be held not to have been made under the authority of Jiban, then admittedly the last payment by both the brothers having been made on 6th October 1922 the suit would be barred by limitation, having regard to the provisions of Ss. 20 and 21, Lim. Act, before its amendment by the Act of 1927. In order to take the case out of the statute of limitation the plaintiff will have to establish that Mohit Krishna Kundu when making the payment on 21st September was authorized by Jiban to make this payment which was for interest as such. The Subordinate Judge on this part of the case has relied on a general power of attorney which was executed by Jiban in favour of his brother Mohit and another person so far back as 19th Sep-

tember 1918 and he has come to the conclusion from this power of attorney that Mohit had authority to make the payment on the score of interest, for he says that the power does not appear to be limited "to some litigation, but appears to embrace acts all and sundry." The Subordinate Judge has not been unmindful of the circumstance that this case of agency has not been made in the plaint, but putting the most favourable construction on para. 4 of the plaint it may be assumed for our present purposes that the plaintiff would be able to succeed if he really establishes a case of agency at the date when the payment of interest was made. The learned advocate for the appellant has therefore addressed an argument with regard to this power of attorney which falls under three heads. He has argued in the first place that the power of attorney does not specially authorise Mohit to make the payment of interest and this contention really turns on the construction of the said power to which we shall advert presently.

The second contention is that even if this power is held to include authority to make payment of interest with reference to debts due from Jiban it is not such an authority as is contemplated by Ss. 20 and 21, Lim. Act, and his contention is that the authority contemplated by these sections really means a special authority in respect of this particular loan. The third argument with reference to this power of attorney is that there has been a fundamental misconception by the Subordinate Judge of this part of the case seeing that this power was subsequently revoked by a deed of partition between the two brothers which was executed and registered on 13th November 1923 before the payment in question was made. With reference to the first contention it appears to us clear that the power of attorney does embrace a power to deposit interest with reference to loans. The material portion of the power is as follows :

"That it has become highly necessary to appoint Am-mukhtars on my behalf in order to look after the management and for facility of business in respect of Mahals held directly under the Government and of subordinate interests and other properties and business, etc., which are now in existence and which may come into existence

positis of all sorts of money due from Jiban. The passage is as follows :

"And take receipt, etc., on depositing all sorts of money due from me and shall enter appearance in all law suits against me on my behalf as my representative and file petition and make arguments and file solenamas, rajnamas, kastinamas etc."

We have no doubt therefore that this power, if it was not revoked, was sufficiently comprehensive to give the necessary authority to Mohit to make the payment. Taking now the second branch of the argument in this behalf made on behalf of the appellant it appears to us that there is no foundation for the contention that the authority contemplated by S. 21 must be a special authority given for the purposes of making payment of the particular loan in question. Indeed the argument of Mr. Chatterjee was that with reference to every such debt owing from a particular person to another there must be a separate authority. In other words the argument is that in order to take the case out of the statute the person relying on the authority must show that the person making the payment was armed with a special authority in this behalf with reference to this particular loan. To me the proposition seems somewhat startling and indeed there is no authority nor can there be any such authority for such proposition. Reliance was placed on a decision of the Allahabad High Court in the case of *Narayan Rao Kalia v. Manni Kunwar* (1). An examination of that case will show that the case is no authority for the proposition which is contended for. There the particular power was not before the Court and the facts were that a person who was described as the mukhtaraam for the defendant mortgagees verified a wajibularz and made a statement acknowledging liability, and in such circumstances it was held by the learned Judges that it cannot be assumed that a mukhtaraam has power to acknowledge liability within the meaning of S. 19, Lim. Act, but such a liability can only be fastened upon the principal by a person duly authorized in this behalf, that is, who has been given authority to make such an acknowledgment of liability. The learned Judges were not considering in that case any question regarding the power given by a particular

and again in another place it is said that the power extends to the making of de-

document to the mukhtearnam which is the case here.

On the other hand there is a very high authority for the proposition that the question of special authority within the meaning of S. 19 or S. 20 really turns on the construction of the power-of-attorney. Reference may be made in this connexion to a decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Beti Maharani v. Collector of Etawah* (2). There the question arose with reference to payment in respect of a mortgage debt and an authority appointing one Ajodhya Prosad as the amukhtear which is quoted in the judgment of their Lordships of the Judicial Committee in extenso was produced in that case and it was contended that the acknowledgment of personal liability was justified under the authority given in the power-of-attorney or the mukhtearnama. Their Lordships on the construction of the document came to the conclusion that the mukhtearnama did not embrace the power to acknowledge liability of a personal debt of the debtor and that it was really confined to the liability in respect of certain mortgages. It seems to us to be manifestly inconvenient if the contention put forward by Mr. Chatterjee be given effect to. For, to take an illustration, a person may have very large commercial transactions and he may be under the necessity of borrowing large sums of money from different creditors. He may in view of his present and future borrowings empower a certain person to make payment in respect of payment of interest or payment of other sums in respect of these loans and give a general power to that effect to a particular person. It can hardly be said that the power being a general one in respect of debts which may be incurred and not being in respect of that particular transaction is not sufficient within the meaning of S. 20. The inconvenience of such a rule is manifest. We do not think that any authority can be found for such a proposition as this. This contention must therefore be overruled.

The next contention with reference to this power-of-attorney is a substantial one and must be given effect to. It appears that the power was revoked by the

partition deed. The question is material in this case seeing that it is not the plaintiff's case that when this payment was made he had seen the power-of-attorney. On the other hand he says that he was told of it simply by Mohit. If of course he had seen the power-of-attorney and on the strength of that power had accepted payment from Mohit further questions might have arisen as to whether notice of revocation of this power was given to the plaintiff or not. But no such question arises in the present case on the plaintiff's own evidence that he had not seen the power and had not accepted payment on the faith of such power. It seems to us therefore that the Subordinate Judge's conclusion on this part of the case is wrong as he has missed a very fundamental fact, namely, that this power had been revoked by the partition deed of 13th November 1923. Some question has been raised as to the knowledge of the plaintiff with reference to this partition. The question becomes immaterial in view of the legal position to which we have just referred. But I have no doubt on the evidence that all that the plaintiff knew about this partition was, as he himself stated, that he heard of the rumour of partition two or four years ago and that he inquired about it and could not know positively if the rumour was true. It is admitted that no notice of this partition deed was formally sent to the present plaintiff.

There is no reason to disbelieve the statement made by the present plaintiff who is a Government pensioner and medical practitioner of respectability and one does not see any reason why that statement should not be accepted. The Subordinate Judge has really rested his decision on the power-of-attorney which for the reason of its revocation cannot be regarded as furnishing the necessary authority. He has also relied on a letter sent by Hari Nath Ghose, the plaintiff, to defendant 1, appellant, on 15th August 1925; see p. 18, part 2 of the paper book, and he concludes from this that this letter which was not replied to by Jiban made the plaintiff think that Mohit's payment would be sufficient for the purpose. It is difficult to follow the Subordinate Judge in his remarks with regard to this part of the case. He states:

"This letter no doubt discloses plaintiff's apprehension that Jiban was perhaps unwilling to make the payment, and it also shows that plaintiff was in a sense aware of the fact of the partition between the brothers, but when the plaintiff positively and categorically asked Jiban to make the payment and to admit the payment to save limitation, it was certainly the duty of the defendant to make a plain assertion of his unwillingness to pay or to admit the payment purporting to have been made by Mohit. Jiban did neither answer plaintiff's notice to sue. This silence, studied and wilful, certainly led the plaintiff to think that the payment by Mohit was not denied."

This last sentence is rather ambiguous and neither of us has been able to follow the exact import: see pp. 23 and 24, part 1 of the paper book. It is difficult therefore to sustain the judgment of the Subordinate Judge on the ground on which he has rested his judgment. Dr. Pal who appears for the respondent has to some extent frankly conceded that he is unable to support all the reasons given by the Subordinate Judge in his judgment. But he supports the judgment of the Subordinate Judge on another ground, a ground not taken in the Court below and with reference to which no issue was joined. He contends from the deed of partition that Mohit was entrusted to make payment of all debts owing from him or from his brother Jiban, the appellant, or from both, and this stipulation in the partition deed was sufficient to authorize Mohit to make the payment on behalf of his brother. The material portion of the deed on which he relies is to the following effect:

"Besides this I, Mohit Krishna Kundu, the second party, alone remain wholly liable for the debts which may be found to be due in the name of the first party or in the name of the second party or in the names of both the parties, in respect of the properties up to the year 1929 B. S., i. e. up to the period during which our state was joint, and in respect of the Ultingi Arat up to Pous 1880 B. S. If anyone of the parties be compelled to pay any debt due by the other, then he shall be competent to realise the amount with legal interest from the other party amicably or through the help of the Court."

And he contends on the basis of this passage in the partition deed that this shows that Mohit at any rate had implied authority to make payment in respect of any debts owing from either of the two brothers, and in support of this contention he has relied on a recent decision of their Lordships of the Judicial Committee of the Privy Council in the case of *National Bank of Upper*

India Ltd. v. Bansidhar (3). An examination, however, of the facts of this case before their Lordships would show that the state of facts there was very different. The facts, as appear from the judgment of Sir George Lowndes who delivered judgment of their Lordships in the passage to which I shall presently refer, show that there was an implied authority in favour of the person making the payment to make the particular payment. It appears that on 22nd December 1917 respondent 1 in that case executed in favour of the National Bank of Upper India Limited a promissory note payable on demand for Rs. 20,000 and interest together with a formal receipt for the money. The bank went into liquidation and the liquidators suing in the name of the bank claimed from the respondent the money due under the hand-note. The appellant bank asserted in their plaint that the sum of Rs. 20,000 was advanced to respondent 1, and that he and his brother made various payments in respect of principal and interest upon which reliance was placed to save limitation and the suit was instituted more than three years after the date of the note. The facts which were not in dispute are as follows:

"One Bishambhar Nath, who was a director of the bank, had been allowed by the bank's manager, Ram Nath Sapru, to become indebted in a large sum to the bank, and in December 1917, in view of the approaching half-yearly audit, it was desirable that the accounts should be squared in some way so as not to show the director as the debtor to the bank. Respondent 1, who carried on business in Lucknow with his brother, respondent 2, (who was also a director of the bank), was accordingly persuaded to execute the promissory note sued on, so as to show him as the bank's debtor for Rs. 20,000, and this amount was credited in the books of the bank to Bishambhar, thus wiping out his indebtedness."

After the indebtedness of Bishambhar was wiped out he (Bishambhar) paid a sum of Rs. 900 with interest due on the bank's promissory note and the arrangement was that that sum was to be paid by Bishambhar although in the bank's books it appears that the sum was, as a matter of fact, paid by respondent 1 who took over the liability of Bishambhar. In this state of facts the Judicial Committee dealing with the question. A I R 1929 P C 297=121 I O 193=57 I A 1 (P O).

tion of limitation, after referring to S. 20, Lim. Act, said this:

"In answer to the first question, counsel for the appellant contended that even if Bishambhar could not be regarded as duly authorised by respondent 1 to make a payment of interest on his behalf, he was himself under a direct obligation to respondent 1 to satisfy the debt, and in that sense was at all events "a" person liable to pay it. In support of this contention the case of *Bradshaw Widdrington* (4), and other similar English decisions, were relied upon. Their Lordships do not think it necessary to discuss the applicability of these cases to the construction of the Indian Act. Upon what they have already held to be the true meaning and effect of the transaction of 22nd December 1917, it was agreed between Bishambhar and respondent 1 that the former would discharge the latter's debt to the bank in respect of both principal and interest, and it is clear from respondent 1's evidence that he left it to Bishambhar to do so. Under these circumstances, it being admitted that no formal authorization of the agent is required under this section, their Lordships find no difficulty in implying authority from respondent 1 to Bishambhar to pay the interest on his behalf as it became due."

In that case there was in the circumstances an implied authority in view of the arrangement between Bishambhar and respondent 1 to pay the particular interest on the particular loan. Here from the passage in the partition deed which has already been quoted all that appears is that Mohit took upon himself the liabilities in respect of debts owed by both himself and Jiban and there was also this penal clause further that if one of the parties be compelled to pay any debt due by the other then he would be competent to realise the amount with legal interest from the other party amicably or through the help of Court. It was in view of this position, it seems to me, that no reply was given by Jiban to the letter sent by the present plaintiff. It seems to be somewhat strange that notwithstanding the circumstance that the letter was not replied to by Jiban the payment made by Mohit was accepted as payment made on behalf of both. For the letter, at any rate, indicates this that there was some sort of settlement between Mohit and the present appellant and in view of that settlement the latter suggested:

"Why should both of you not sign and make a settlement between yourselves in writing."

After writing this letter it seems somewhat strange that the plaintiff

should be content to accept the payment by one shortly after this letter which was written on 15th August 1905. In this view we are of opinion that the plea raised by the defendant-appellant has been made out. This appeal must be allowed and the suit dismissed against defendant 1. The rest of the decree against defendant 2 will stand. There will however in the circumstances be no order as to costs either here or in the Court below.

Henderson, J.—I agree. With great respect to the learned Subordinate Judge it does not appear that he kept very clearly before his mind what was the question which he had to determine. The suit is prima facie barred by limitation. In order to get rid of this bar the plaintiff relied on certain payments on account of interest which he alleged had been made by the defendants. The vital payment is one referred to by an endorsement on the bond dated 21st September 1925. At the trial the plaintiff failed to prove payment by the appellant. In my judgment, when the plaintiff failed to prove the case which he made, the suit against the appellant should have been dismissed. The learned Subordinate Judge, however, gave a decree against the appellant on a finding that the payment was made by defendant 2 as his authorised agent. No such case was ever made out in the plaint. In order to support this finding the learned Subordinate Judge relied upon a power of attorney. As my learned brother has pointed out, that power had already been revoked. This finding of the learned Subordinate Judge is therefore not only against the pleadings but also against the evidence. In addition to this the learned Subordinate Judge also appears to have decreed the suit on the ground that the appellant either by his representation or conduct allowed the plaintiff to suppose that the other defendant was authorised to make payments on his behalf. This case again was never made by the plaintiff himself. In his examination-in-chief the plaintiff never even said that he thought that defendant 2 was making a payment on behalf of the appellant; in view of the letter which he had written to the appellant shortly before, it is difficult to believe that he would ever put forward such a claim.

In his cross-examination the plaintiff stated that defendant 2 informed him that it would not be necessary to insist on a signature from defendant 1 who had given a power of attorney to defendant 2.

The plaintiff admits that he never saw the power. It is quite clear that no case of misrepresentation by the appellant was made out on this evidence, even if it is true. It was also found that prior to the partition defendant 2 made payment on behalf of both the defendants. In coming to this finding the learned Subordinate Judge was confusing defendant 2 with a totally different person named Mohit Krishna Hari. Dr. Pal contended that the case was taken out of the scope of S. 21 in view of the deed of partition between the defendants. I agree with my learned brother that the facts of the case upon which Dr. Pal relies are quite different from the facts of the present case. It is quite clear that a payment by defendant 2 alone would not save limitation against the appellant. The arrangement made by the deed of partition with respect to this debt was that as between themselves defendant 2 would discharge the liability. In my opinion this would not affect the matter at all. The learned Subordinate Judge also refers to some payments which are certified by an endorsement which is unsigned and undated. There is no evidence whatever to connect the appellant with any of these payments. There is, in fact, no evidence to show who made the payments. The only evidence on the point is to the effect that the endorsement was made by one Kshetra Mukherjee who is said to be the manager of the defendant: it is not clear which of the defendants the plaintiff was referring to. There can, however, be no doubt that if the plaintiff relied upon the payment made by Kshetra Mukherjee on the ground that he was an authorized agent of the appellant he should make a specific case to that effect in the plaint.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 831

PEARSON, J.

E. A. Cohen—Defendant—Petitioner.
v.

A. M. Paruk — Plaintiff — Opposite Party.

Civil Rule No. 1428 of 1932, Decided on 5th April 1933, from order of Small Cause Court Judge, Sealdah, D/- 9th November 1932.

Civil P. C. (1908), O. 2, R. 2 — Claim for arrears of monthly rent—Separate suits cannot be brought for different periods so as to bring each suit within jurisdiction of Small Cause Court—If cause of action is split up and two suits are brought one of them must be dismissed—Provincial Small Cause Courts Act, S. 25.

Where rent is payable monthly, the landlord will not have a separate cause of action for arrears of rent in respect of each month; nor can he split up the cause of action and file two suits for arrears, so as to bring each within the jurisdiction of the Small Cause Court. Where he brings two suits of Small Cause nature, by splitting up the cause of action the effect of decreeing one of the suits is that the other should fail as the latter suit, amalgamated with the former, would be beyond the jurisdiction of the Court. And the High Court will interfere and dismiss the latter suit, even though the two suits have been tried together, and disposed of by one judgment and though there has been substantial justice. 6 Cal 791; 9 Cal 148 and 12 Cal 50, *Ref.*

[P 832 O 31]

Joges Chandra Roy, Krishnalal Banerji (II) and Sushil Chandra Dutt—
for Petitioner.

Ambicapada Chowdhury — for Opposite Party.

Judgment.—This rule arises out of a Small Cause Court decree and relates to the decree passed in suit No. 3471 of 1931. It appears that the plaintiff sued to recover from the defendant certain rent for certain premises belonging to the plaintiff. He proceeded to file two suits in the Small Cause Court, one being Suit No. 3470 covering rent for the premises less certain allowances or set off for the period from December 1930 to July 1931. He also filed a second suit No. 3471, for rent of the same premises for the months of August and September 1931. The former suit was valued at Rs. 838 and the latter suit at Rs. 688. It is admitted that the suits taken together were in excess of the pecuniary jurisdiction of the Small Cause Court Judge and the question is whether the plaintiff could split up his claim in this manner into two portions so as to bring each portion

within the pecuniary jurisdiction of a Small Cause Court.

Now, before me it has been contended on behalf of the defendant that such a procedure is not in accordance with law and is prohibited by O. 2, R. 2, Civil P. C. The illustration to that rule is very much on all fours with the present case and reliance is also placed upon the cases of *Taruck Chunder Mookerjee v. Panohu Mohini Debya* (1), *Sheo Sunkur Sahoy v. Hriday Narain* (2) and *Adhirani Narain Kumari v. Radhu Mohapatrao* (3). Now it is quite clear that the intention of the Code is that every suit is to include the whole of the claim arising out of the particular cause of action and the substantial question which one has to determine in a case like the present is whether it can be said that the fact that the rent in the present case was payable monthly is to be taken as showing that the plaintiff would have a separate cause of action in respect of claim for each month's rent and whether assuming six months' rent to be due in arrears he could file six separate suits each suit covering the rent for one month. I think it is quite clear on a consideration of this position that the cause of action in the present case remains the same in respect of each of the monthly rentals. There is no separate agreement as regards each month's rent. The relationship between landlord and tenant which is what constitutes the right or liability had its origin in the beginning of the tenancy. A suggestion was made that the evidence in Suit No. 3471 was not the same as in Suit No. 3470 in so far that in 3471 a question was raised as to whether in respect of the rent for certain months a cheque sent by the defendant purporting to cover the rent for a particular month (although in fact a larger amount was due) had been accepted or ought to be regarded as having been accepted as payment in full of the rent of that particular month, and inasmuch as that evidence was required to be given in Suit No. 3471, it was said that that was a matter differentiating it from the other suit namely, Suit No. 3470, in which such evidence was not required; therefore that test, which is one of the tests as to whether the claim arises out

of the same cause of action, was not to be found in this case. The answer to that as such is, I think, that that particular feature of the case is irrelevant to the origin of the cause of action.

The origin of the cause of action remains the same, whether or not the defendant raises a particular point as minimising his liability in respect of any one particular month or not. Then it is suggested that upon the facts of this particular case there should be no interference. O. 2, R. 2, it is said, is for the benefit of the defendants and that in the present case the two suits were tried together, evidence was received in both and the suits were filed together and one judgment covered them both. That in my judgment does not really have any bearing on the question of whether the cause of action in respect of the two suits is the same. If the cause of action is the same then the two suits ought to have been comprised in one. If the two suits had been comprised in one then the suit would have had to be brought in some other Court which had jurisdiction to deal with that suit. I agree that the effect of what has happened is not that both the suits must be dismissed. The effect would be that the moment one of the suits is decreed the other suit must fail, partly upon the assumption that if amalgamated with the former suit it would be beyond the pecuniary jurisdiction of the Small Cause Court and partly upon the footing that the first suit was within the jurisdiction of the said Court, and so far as the claim of the second suit is concerned the plaintiff must be taken to have abandoned it as he is entitled to do in order to bring the first suit within the jurisdiction of the Small Cause Court. The principle that the Court should not interfere in revision in a case where substantial justice has been done cannot apply to a case like the present. Here the simple substantial question is whether or not these two claims arise out of the same cause of action. If they do then the result must necessarily follow.

In this view of the matter the rule must be made absolute, the decree of the lower Court must be set aside and the suit dismissed. Hearing fee is assessed at one gold mohur.

K.S.

Rule made absolute.

1. (1881) 6 Cal 791=8 C L R 297.

2. (1893) 9 Cal 174=12 C L R 84.

3. (1886) 12 Cal 50.

A. I. R. 1933 Calcutta 833

LORT-WILLIAMS AND HENDERSON, JJ.
Surendra Nath Das—Appellant.

v.

Emperor—Opposite Party.

* Criminal Admitted Appeal No. 668 of 1933, Decided on 28th August 1933.

* Criminal P. C. (1898), S. 298—Statement of complainant that she has been raped—Jury should be warned, as a matter of practice, that complainant's evidence should not be accepted unless corroborated by independent evidence—Penal Code (1860), S. 375.

In cases of rape, the Judge should, as a matter of practice, warn the jury not to accept the evidence of the girl unless they find that it is corroborated by some independent witness in some material particular implicating the accused. But he ought to tell them that if, in spite of his warning, they come to the conclusion that they believe the girl, and think the accused guilty, then they have the right to convict him on her uncorroborated evidence. The Judge should also warn the jury if there is any evidence affecting the character of the complainant, because before a jury are justified in accepting the testimony of the complainant, they must be satisfied that she is a witness of truth, and if they find that she is a person of bad or loose character, obviously they will be reluctant to accept her evidence: *R. v. Thomas James Jones* (1925), 19 Cr. App. R 40; *R. v. Baskerville*, (1916) K. B. 658, Ref. [P 834 C 2 P 835 C 1]

K. N. Chaudhuri and Nalini Kumar Mukerji—for Appellant.

Khundkar and Nirmal Chandar Das Gupta—for the Crown.

Lord-Williams, J.—In this case the appellant was charged with rape under S. 376, I. P. C., and tried by the Sessions Judge of Burdwan and a jury who found him guilty by a unanimous verdict, and he was sentenced to five years' rigorous imprisonment. The case for the prosecution was that the girl Rajlakshmi Debi lived with her parents at Kalna. On 10th Jaistha it is alleged that she went out to the house of one Panchu Moira to a wedding of Panchu's daughter. On the way she met the appellant's wife, who asked her if she would pluck out the grey hairs from her head. She said that she would, and asked her to sit down by the roadside. But the appellant's wife asked her to go to her house to do it, so she went there. While there the appellant came in, and according to her story she was made to lie down on the bed, when the appellant's wife produced a pot containing oil, which the appellant applied to the girl's private parts and to his own, and then raped her. His wife, who was a woman

of 26 stood by and watched the rape, and further she held the girl's hands and gagged her while this was going on. Afterwards she asked the girl to come with her to a tank to get her cloth washed and said that when she came back she would give her some churis. The appellant's wife then took her to a tank but left her there. Rajlakshmi instead of coming back to the appellant's house went home. She was bleeding, and the blood was trickling down her legs. Her mother observed this and called the girl's father. When he came and asked her what she had been doing, she made a complaint saying that the appellant had raped her, and gave the particulars to which I have referred. On medical examination it was found that there was a tear in her vagina, and some congestion around her private parts. The evidence goes to show that she was under 14 years of age. Therefore no question of consent arises in this case, but she was developed far beyond her age. The orifice was much larger than usual, and the doctor said that this indicated that she had had intercourse prior to the present occasion. Further he said that the evidence showed that she could not have been raped, and that the connexion must have been with her consent.

There are a number of improbabilities in the girl's story. The Court called two witnesses, whom the prosecution said had been won over by the defence, but as the Judge observes there was no evidence of this. They said that no marriage had been held on that day in Panchu's house, and that such a marriage was impossible according to the Hindu calendar. With regard to the times stated by the girl for her coming in and going out she says that she left her home at 8; her mother says that she left at 12 o'clock mid-day and returned at 4 o'clock. If this be true no explanation has been given for her absence for over four hours. She had never spoken to the appellant's wife before, though she knew her by her sight. It seems unlikely therefore that the woman would ask her to pluck out her grey hairs, and still more unlikely that the girl would have gone to her house. The girl did not scream when the attack of which she complained was being made upon her. Apparently she did nothing.

while the appellant's wife was going for the oil, or while the oil was being applied to her private parts and to those of the appellant. The appellant and his wife occupied two rooms in this hut, and according to the girl the outside door, and the inner doors were open during the time when the rape was taking place. Further she said that two women were in the second room, of which the door was open. That is what she said before the Magistrate. Before the Sessions Court she said that they were not there at the time but that she knew that they lived there, and she described their relationship to the appellant. This seems to show that she knew much more about the people in this house than she pretended. The fact alleged, that the wife helped in this disgusting business seems very unlikely, not only because she was the appellant's wife, but because of her age. The only possible suggestion for such conduct would be the superstition that a man can get rid of his venereal disease if he has connexion with a virgin. In such cases, as I understand, a wife in this country may assist her husband, but far from there being any evidence that the appellant had venereal disease, he was examined by the doctor who said that he had none, nor was there any trace that he had had it previously. The hut in question was surrounded by other huts and shops. It was opposite Panchu's house and was within 100 yards of the girl's home. The accused's cloth was examined and no blood was found upon it. He was examined by the doctor and there was no injury found on his penis. There were no oil marks on the cloth of the girl or that of the accused nor was any oil found in the hut. The girl said that when she went to the tank she was not weeping, nor did she speak to any one, although there were shops on both sides of the road leading to the tank.

The medical evidence showed that she was not a virgin at the time when she said that the rape was committed. There were remains of a hymen, and the doctor said that her condition indicated that she must have lost her virginity at least three months before, and that she had had frequent intercourse since. There were no outside injuries, either on the orifice or on the vulva. Accord-

ing to, the doctor he would expect to find such marks in a case of rape. This indicates clearly that the girl consented to whatever was done, though this was not material to the present charge. Evidence was also given to show that the girl was intimate with a prostitute named Sasi, who was connected in some way with the appellant, and that she had been to her house in the evening. Two witnesses spoke to this.

In view of these facts it is clear that the utmost care must be taken by the Judge and the jury before they convict the accused. This sort of complaint is very common. The girl comes home bleeding and the blood is noticed by her mother or her parents. They ask for an explanation, and she has to give one on the spur of the moment. She is unwilling to admit that she has had intercourse with anybody so suggests that she has been raped. In the urgency of the moment there is no telling whom she will accuse of the attack which she alleges has been made upon her.

In such cases therefore it has been the practice for many years, for the Judge to warn the jury not to accept the evidence of the girl unless they find that it is corroborated in some material particular implicating the accused. But he ought to tell them that if, inspite of his warning, they come to the conclusion that they believe the girl, and think the accused guilty, then they have the right to convict him on her uncorroborated evidence. In this case there was no corroborative evidence. A witness saw the girl going with the appellant's wife into his house. But this did not implicate the appellant. There was no evidence that he was there. The blood found upon her cloth, and the complaint which she made, are not corroborative evidence such as is required by the rule. Firstly because it does not implicate the accused, and secondly because, upon this point, the girl cannot be allowed to corroborate herself. The corroborative evidence must be that of an independent witness. I have examined the learned Judge's charge carefully, and I cannot find a word of warning upon these points nor any direction that they ought not to convict without some corroborative evidence. In fact, he never used the word corroboration throughout the whole of his charge. Moreover the evidence about

Sashi was most important, because it affected the character of the complainant, but the Judge has not even mentioned it. In cases such as this, before a jury are justified in accepting the testimony of the complainant they must be satisfied that she is a witness of truth, and if they find that she is a person of bad or loose character obviously they will be reluctant to accept her evidence.

When I drew attention to these omissions from the Judge's charge, Mr. Khondkar said that the law does not require corroboration in rape, or that any such warning should be given to the jury. I confess that it is somewhat disconcerting to be so informed by the Deputy Legal Remembrancer about a rule which is so well recognized, and which has been a rule of practice familiar to me during the whole course of my professional life. There cannot be any doubt that recognized practice requires that such a warning should be given. The rule is stated categorically in Russell on Crimes, Edn. 8, at p. 2138, thus :

"In the case of rape, corroboration is required in fact, but not as a matter of law. In Archibold's Criminal Pleadings, 28th Edn., at p. 1017, the rule is stated thus : Corroboration of the story of the prosecutrix is not essential, but it is the practice to warn the jury against the danger of acting upon her uncorroborated testimony, particularly where the issue is consent or no consent."

In *R. v. Thomas James Jones* (1) which was a case of indecent assault, the learned Lord Chief Justice said :

"The proper direction in such a case is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence may, after paying attention to that warning, nevertheless convict."

The kind of corroboration required is described in Archibold, the same edition at p. 473 as follows, when dealing with the evidence of accomplices :

"The kind of corroboration required is not confirmation by independent evidence of everything the accomplice relates, as his evidence would be unnecessary if that were so. What is required is some independent testimony which affects the accused by tending to connect him with the crime, that is, evidence, direct or circumstantial, which implicates the accused, which confirms in some material particular not only the evidence given by the accomplices that the crime has been committed, but also the evidence that the accused committed it." *R. v. Bankerville* (2).

1. (1925) 9 Cr. App. Rep. 40 at p. 41.

2. (1916) 2 K B 658=86 L J K B 28=115 L T 453=80 J P 446=60 S J 696.

It is clear therefore from the facts which I have stated that there was no such proper direction in this case. The learned Judge failed to direct the jury on material points, therefore the conviction and sentence must be set aside and the appellant acquitted. In view of the improbabilities of the case and as there is no corroborative evidence, it does not appear to be necessary to send this case back for retrial.

Henderson, J.—Mr. Khondkar argued that inasmuch as in the present case the question of consent is immaterial the failure of the learned Judge to warn the jury was of little practical importance. But, in my judgment, that does not really affect the matter. The fact remains that the case made by the girl was that so far from her consenting it was a forcible rape. The medical evidence makes it quite clear that this was untrue. The other parts of her story which were capable of being tested aliunde were also found to be untrue. It is therefore obvious that it would be very dangerous to convict the accused on the uncorroborated evidence of a witness whose evidence, so far as it could be tested, has been proved to be false.

K.S.

Conviction set aside.

A. I. R. 1933 Calcutta 835

Special Bench

LORT WILLIAMS, BARTLEY AND

HENDERSON, J.J.

Kali Charan Halder—Accused—Appellant.

v.

Emperor—Opposite Party.

Death Reference No 18 and Criminal Appeal No. 569 of 1933, Decided on 25th August 1933, from order of Addl. Sess. Judge, Malda.

Criminal Trial—Discussion as to whether a retracted confession was voluntary or not—It is desirable that jury are out of Court and accused examined in their absence as to what took place between police and accused.

Where there is a discussion as to whether a retracted confession made by the accused, a prisoner in another case, as a result of an interview between himself and the C. I. D. officer in the jail is voluntary or not, it is desirable that jury are out of Court, as it is for the Judge to decide this question. And the Judge should do so after examining the accused in the absence of jury and ascertaining from him what it was that he stated and what the police Inspector said and promised. [P 837 C 1; P 839 C 2]

Monindra Nath Mukerji—for Appellant.

D. N. Bhattacharji—for the Crown.

Lort-Williams, J. — The appellant Kali Charan Halder was tried with one Afazuddin Sheikh by the Additional Sessions Judge at Malda and a jury of nine, charged with an offence under S. 396, I. P. C. The jury found the appellant "guilty" unanimously. By a majority they found Afazuddin "not guilty." Thereupon the Judge acquitted Afazuddin, accepting the verdict of the jury and sentenced the appellant to death, saying that he had admitted several previous convictions in dacoity cases, that he was a hardened criminal, obviously dangerous, that he should be removed from further possibility of harming society and that he had withdrawn from his confessional statement which might have been regarded as a sign of grace. The appellant had no pleader to defend him and, therefore he was defended by a pleader appointed by Government.

The facts out of which this case arose are shortly as follows: On 2nd April 1932, there was a dacoity in the house of a man named Kristo Mandal. He and his son were away at the time. But a number of women belonging to his household were sleeping there. None of the dacoits were recognizable, because they had smeared their faces with chalk. There is no doubt whatever about the dacoity having been committed. The dacoits beat the inmates of the house, dug up the floor and broke into all the rooms. While the dacoity was going on, the villagers were roused and the house was surrounded by the choukidar and a servant Nimai who called for assistance. When the dacoits saw this, they fired a gun from inside the house wounding some of the people outside. Then they came out of the house and escaped. The choukidar threw a spear at them and struck one man. Kulu who had been sleeping on the verandah of the house with Nimai threatened to attack them. They fired a gun and he fell down dead. Suren also fell down dead. The man whom the choukidar had injured with a spear died of his wounds; but the dacoits picked him up and escaped. The choukidar went into the house and found that Khiroda had been injured and that a dacoity had been committed. In-

formation was lodged at the thana and the Sub-Inspector took up the investigation. During the investigation he found a head which had been cut off from the dead body of the dacoit who had been speared by the chowkidar. Owing to the fact that none of the dacoits had been recognized, the investigation went on for several months without success. It is clear that the investigation would never have been successful, had it not been that the present appellant made a long confession in which he admitted a series of crimes and implicated a large number of persons, including himself. One of the women said that the dacoits took a pair of makri, a pair of patchuri, two pairs of ruli and other things. Subsequently, some of these articles were recovered as I shall explain hereafter, and were identified by the women of the house.

An old woman named Harimani was examined who said that the appellant stayed with her before the dacoity for three days and after the dacoity he and Afazuddin again stayed with her for three days and that the appellant hid some churis in the floor of her room. She said that they were in the floor of her southern hut, but, in fact, they were recovered from the northern hut. She says that she heard about the dacoity in Kristo Mandal's house at that time. Subsequently, the Sub-Inspector searched her house and, according to her evidence, the appellant, who was still there, escaped at the time. It is said that she knew the appellant some years before when he had been her neighbour at a place called Haripur. At a later date the appellant was taken to her house and there in the presence of the search witnesses he produced a makri from the thatch. It is clear therefore that this conviction must depend substantially on the question whether the appellant's confession can be relied upon. The evidence of the beggar woman, Harimani, admitting, as she does that some of the stolen property was given to her by the appellant, cannot be considered satisfactory and the evidence with regard to the discovery of the makri in the thatch is suspicious. It is true that the rest of the goods were found in the hut, and it seems curious that this piece of ornament should have been hidden in the

thatch of the house. There is some reason to think that as the makri was an article which the woman of the house seemed to remember very clearly, somebody thought it necessary that the makri should be produced in order to strengthen the evidence for the prosecution. The confession was retracted and was apparently challenged by the pleader who appeared for the appellant at the trial. Thereupon the learned Judge dismissed the jury for the day and heard the arguments in their absence. This was the proper procedure. Where it is convenient for the jury to be out of Court while there is such a discussion, it is always desirable.

It is for the Judge to decide whether a confession was voluntary or not. The examination and cross-examination of the Magistrate does not seem to have been very thorough. The Magistrate described how he warned the accused "in the usual way," and was satisfied that the confession was voluntary. In cross-examination, he said that the accused was produced from jail by a constable, that he did not give the appellant any particular time to reflect nor did he ask him whether he had any conversation with any other police officer, except the constable who produced him. He did not specifically caution the appellant that he need not fear the police. He told him that there was no need to confess and that he need not be afraid. The fact that this inquiry was so unsatisfactory is explained by the prosecution by saying that at the time the facts which have since been recorded by the appellant in his petition of appeal were not known to the prosecution nor had any suggestion of the kind been made to them. Nevertheless, it seems to me extraordinary, when once the voluntary character of the confession had been challenged by the defence that the Judge did not make a much more thorough inquiry to see whether, in fact, the confession was voluntary. This confession had been taken at extraordinary length throughout a considerable number of days. It described in the greatest possible detail a whole series of crimes which had been committed, and it was obvious that he was implicated in each one of them. I should have thought it would have struck the Judge at once, from his ordinary knowledge of human nature,

that it was most likely that such a confession had been induced by some promise or hope held out or threat made to the appellant.

It is just the sort of confession that one would expect to be made where the police promised the appellant that if he assisted them in clearing up a number of pending inquiries, and if he implicated the suspects in such a way as to assist the police to bring them to conviction, he himself would be treated as an approver and would, after giving his evidence, be released, and would escape from the consequences of the crimes which he had admitted. Yet neither the Magistrate, when he recorded the confession, nor the Judge at the trial, made any attempt to clear this matter up. I should have thought that it would have been desirable to call the police officers who had been in contact with the appellant during the time when the inquiry before the Magistrate was taking place and up to the time of the trial. The result was that the Judge admitted the confession in evidence holding, as he did, that it was made voluntarily, that is to say, he was satisfied that no such promise had been made to the accused. Nor that he had been threatened, for instance, by telling him that his accomplices had already confessed, and that if he confessed, he would be treated as leniently as those who had admitted their guilt. These points seem to me to be obvious as points which ought to have been thoroughly investigated before the Judge decided to admit this confession. The result was that when the accused was examined during the trial, he said that he had been seized and produced before the Daroga Babu by three men Samiruddin, Yanus Miah and Asir Sheikh. He also said:

"A sepy beat me and sent me up. I was taken to the S. D. O. and asked to make a confession. Afterwards the C. I. D. Inspector came to the jail and said that I would be released and rewarded if I would name Harimani and Afazuddin."

He tutored the appellant to mention the names of many persons, but he denied that he had any knowledge of the dacoity which was the subject-matter of the present case. He has submitted a very long petition of appeal to this Court in which he describes certain matters of business connected with his family, and says that, owing to the constant harass-

ment of the police, he was unable to stay in his native village. Finally, he found it absolutely necessary to come back, and on his arrival he found that his house had been pulled down and his father, his son and his mother were missing. Before he could go to the police to make a complaint about this, he was seized by his co-villagers Somaddi Molla, Ajij Sheikh and Enous Meah, his hands were tied behind him and he was marched off to the thana where he was handed over to Aswini Babu Daroga. Aswini Babu and a C. I. D. Officer Sudhir Babu pressed his arms and legs, struck him on the head with a ruler and said:

"Tell us, you fellow, at what places you committed thefts and dacoities."

The next day, he was produced before the Subdivisional Officer at Malda and complained that he had been assaulted by the Daroga Babu and the C. I. D. Officer. Thereupon the Subdivisional Officer sent him for examination to the jail doctor. We adjourned this case in order that the Crown might have an opportunity of investigating the charges made in this petition of appeal and some information has now been obtained. It appears that some of the statements of the appellant are accurate, and that it was found on examination that he had a number of injuries on his body which confirmed his statement. After a few days he was produced again before the Subdivisional Officer, and for failing to report himself as a C. T. Act member, he was sentenced to a year's imprisonment and sent to jail. A few days afterwards, the C. I. D. Inspector came to the jail and had the appellant called before him into the office room. The Inspector said:

"Kali, you should give the names of the persons I ask you to give, and the names of the places where the thefts and dacoities were committed. If you don't do as we tell you, we will give you more thrashing than we have done already. We will have all the tin sheets of your houses sold by auction." (This was the property to which the appellant referred in the beginning of his petition.) "If you won't listen to me, I will do you a great mischief. If you will listen to me, I will have your tin sheets returned and I will engage men and have all the houses of your bari restored to their former condition. I will have a sum granted to you as a reward from Government and your name will be removed from the list of C. T. Act offenders. I will also get the sentence of 15 months' imprisonment passed on you set aside: I will procure your release in all these cases and I will cite you as a Government witness. I will treat you

to Rasagollas, Biris and Sandesh on the days of hearings."

Thereupon, the petitioner asked him who he was and he said that he was a C. I. D. Officer from Calcutta. He asked the appellant to reflect over the matter and added that he would come over again in two or three days. He came again and the appellant said that he had reflected over the matter, but that nobody would trust the police, and asked him how was he to trust him. The officer then said that he was a Hindu and that if he liked, the appellant could administer an oath to him. Thereupon he took an oath before the petitioner and the latter trusted him and asked him whose names he was to mention. Then the appellant goes on to describe how various names were suggested to him and how he was tutored to mention the names of the places where the dacoities were committed. At the end, the C. I. D. Officer instructed the appellant to make an application to the District Magistrate offering to secure the arrest of the dacoits. The Inspector then went away and the appellant drew up an application to the District Magistrate. He was produced in Court two days afterwards. The Inspector then told him what he was to say and that if he mentioned the police, it would do him no good, nor would the police be able to make him an approver. Subsequently, he was taken to the police every day and produced before the Magistrate and and treated to sandeshes and biris and afterwards taken to jail.

After a few days, he asked the C. I. D. Inspector about his property. He was reassured by the police and after that he was told at night that there was a pair of makris secreted in a quantity of straw inside the west bhati ghar in the bari of Harimoni, and the Inspector would take him there and show him by signs whereupon he was to discover them and that he was to find in a similar way some articles hidden in an adjoining jungle. Afterwards he was kept in the thana for three days and sent up. After he had been in jail for a few days the Inspector had his son and brother brought to the district headquarters at the expense of the Inspector and on their arrival the police made an application to the District Magistrate for the return of the tin sheets. Later on, the C. I. D.

Inspector came and told him how he had his elder brother and son brought there and a petition drawn up and, as a result, the Magistrate had ordered a return of the sheets, and he promised to bring the elder brother to the jail in order to prove his bona fides. A couple of days afterwards, he came to the jail with the elder brother who confirmed what the Inspector had done with regard to his property. Thereafter the Inspector told him that certain cases were ready and the hearing had been fixed and that the appellant was not to worry and that the police would do him no harm but good. On being brought to Court, he was again treated to sandeshes and biris. These were the two cases from Pukhuria and Haripur. On the last day, the Inspector told him that he would have to give evidence before the Court. Afazuddin and Chota Faquir were on their trial in that case and they complained to the Court that the C. I. D. Inspector had been treating the appellant to sandeshes and biris and tutoring him to name them and that if the Court would order a search, biris would be found on him. Thereupon, the Magistrate asked him to produce the biris, as otherwise he would be searched.

The appellant admitted that he had the biris on him. The Magistrate asked the petitioner where he got these from and he told him that the C. I. D. Inspector had given them to him. In the end he was put on trial himself, instead of being called as a witness. Now, it is quite true that this petition is not evidence. Nevertheless, we must take it into consideration just as much as it is necessary to take into consideration the written statement of the accused which also is not evidence. The fact that the police were in a position to make the suggestions which are recorded in this petition is now admitted by the Crown, because Mr. Bhattacharya has, in the meantime, ascertained that the appellant was arrested on 3rd November as stated, by his co-villagers, that he was examined on 6th November when the injuries were found on him and that he was sentenced on 10th November under the C. T. Act, also that on 26th and 27th November the C. I. D. Inspector interviewed him in the jail for the purpose of ascertaining facts to be used in this trial. All that we know about what

took place between the Inspector and the appellant is what is recorded in this petition. It may be untrue; but if the learned Judge had made a proper inquiry before he admitted this confession in evidence, the police would have had an opportunity of stating what, in fact, took place in the jail.

At the end of the confession, the appellant stated that the reasons for his confession were that he had committed so many crimes and would probably be either hanged or transported for what he had done in this dacoity and that, feeling disgusted with his past life, he desired to make this confession. All that I can say is, that my experience of life which, I must admit, is not a very long one so far as this country is concerned, leads me to disbelieve the suggestion that a confession of this kind is ever made for the reasons elicited by the Magistrate. I can understand a simple admission of guilt, free from a detailed description of events and matters of that kind; this is quite usual when an accused person feels that the game is up. But a confession of this kind with this amount of detail and covering so many crimes leads me to think that it is much more likely that it was made in response to a promise by the police, that if he helped them in this way, he would escape the consequences of what he had done. It has been suggested by Mr. Bhattacharya that we ought to send this case back for a new trial, in order that all these matters may be re-investigated. If we have to keep on sending cases back for retrial, owing to the fact that at the trial they have not been properly handled, and the Crown have not elicited the facts which are necessary for the purpose of proving their case, we shall repeatedly have to send matters back for these reasons.

In a matter of this kind, a prisoner in this country is in the unfortunate position of not being able to give evidence himself and obviously there will be no other witness of what takes place between him and the police in the jail. The proper course in this case, in my opinion, was for the Judge to examine the accused on these points in the absence of the jury and to ascertain from him, without cross-examining him, what it was that he stated and what the Inspector said and promised. Thereupon,

the police could have been further examined on those points. I do not think it desirable in the circumstances of this case that it should be sent back for retrial. I do not say that I am satisfied that this was not a voluntary confession, because there is not sufficient evidence to enable me to hold that; but I do say that the circumstances are so suspicious that I am inclined to believe that the confession was obtained in the way which I have already indicated. It is obvious therefore that as the case rests almost entirely upon this confession, the conviction cannot be supported. The result is that the conviction and sentence must be set aside and the appellant acquitted.

Bartley, J.—I agree with the order setting aside the conviction and sentence in this case. I am not however prepared to hold on the legal evidence before us that the confession was inadmissible on the ground that it was due to an inducement, threat or promise proceeding from a person in authority and having reference to the charge. I base my decision on two considerations, first that the confession was a retracted confession; and secondly, that the extraneous evidence adduced by the prosecution in support of that confession is not, to my mind, of sufficient cogency to warrant any conviction being based on the confession itself. I think the position is that in the present state of the evidence, the accused is entitled to the benefit of the doubt.

Henderson, J.—I agree and have no hesitation in coming to the conclusion that this confession was obtained by means of an inducement. That is the explanation which the appellant has given in his petition of appeal, and in my judgment it is the only explanation which fits in with the facts which have now been elicited. The question whether this confession is voluntary or not was raised at the trial; but the prosecution did not put all the facts before the learned Judge. Before one can say whether such a confession is voluntary, one wants to know all the circumstances in which it was made and the circumstances under which the accused was arrested. The prosecution did not attempt to put these facts before the learned Judge, but merely examined the Magistrate who had recorded the confession.

At any rate, there was one fact which should have aroused the suspicion of the Magistrate. The appellant was not produced by the police. So far as we have been able to ascertain, he was not charged with this offence. He was a convict undergoing a sentence of imprisonment in connexion with another matter. In these circumstances, he made a petition to the District Magistrate expressing a desire to make a confession of various offences. If the Magistrate had then investigated into the matter, he would immediately have discovered that this petition was shortly preceded by an interview in the jail between the appellant and a C. I. D. Inspector. My suspicion is always aroused when the prosecution comes into Court with a case that as the result of an interview between a detective and a professional criminal, the latter is moved to repentance.

The explanation given at the time when the confession of the appellant was recorded was that he had become repentant. Had that been so, there is no reason why he should not have confessed before. The plain fact of the matter is that this desire to confess followed upon the interview with a police officer. I have no doubt whatever that, apart from that interview, this confession would never have been made. I also agree with my learned brother Fort-Williams that the evidence upon which the prosecution relied to corroborate this confession is highly suspicious. The appellant never said in his confession that he had kept the makri concealed in the thatch of the woman's house. There is nothing to explain what made the police think that it was there or why they should think that the appellant would be anxious to produce it himself. If they had really reasons for supposing that the makri was where it was found, they could have seized it themselves and there was no real reason for asking that a convict undergoing a sentence of imprisonment should be made over to their custody. I accordingly agree with the order which my learned brother proposes to make.

K.S.

Conviction set aside.

A. I. R. 1933 Calcutta 841 :

PEARSON, J.

*On difference between*C. C. GHOSE, AG. C. J. AND MITTER, J.
Pasupati Nath Mukerjee (deceased), In
*the goods of.**Secy. of State and another—Appellants.*

v.

*Parijat Debi and another—Respondents.*Appeal No. 15 of 1932, Decided on
24th April 1933.

(a) Succession Act (1925), Ss. 104 and 302—Probate granted to executor—Simultaneous agreement recorded between beneficiaries to have property disposed by executor not in complete accordance with terms of will—Even though executor agrees to distribute according to terms of agreement, he holds property as executor and not as trustee—And heir of residuary legatee who has not received share can invoke S. 104 and get relief by application and not necessarily by suit.

Per C. C. Ghose, Ag. C. J. and Pearson, J. (Mitter, J., Dissenting).—Simultaneously with the grant of Probate to the Administrator-General of Bengal who was appointed executor under will, all the parties beneficially interested in the testator's estate agreed that the same should be disposed of by the executor not in complete accordance with the terms contained in the will, but in a particular matter desired by them and referred to in detail in the said agreement. The Administrator-General of Bengal was therefore to distribute, and he undertook to distribute, the estate in accordance with the terms of the agreement annexed to the decree of the Court :

Held : that the executor held the property as executor and not as trustee and that on the death of a residuary legatee, who had not received his share under the agreement, his heir can invoke the aid of S. 104 and such relief can be granted on an application under S. 302 and that he need not be relegated to a suit. [P 843 C 1]

(b) Succession Act (1925), S. 214—Residuary legatee has no right to property till costs debts, etc., are paid—Heir of residuary legatee dying before such payments need not apply for succession certificate.

Per C. C. Ghose, Ag. C. J. and Pearson, J. (Mitter, J., Dissenting).—The residuary legatee has no right to specific item of property until the executors have discharged all payments. And where the residue has not been ascertained up to the time of the death of the residuary legatee, it is non-existent and there is no "debt" due to him in his life-time. Hence when his heir applies, he need not obtain a succession certificate as there is no debt. [P 843 C 2]

(c) Will—Special bequest—Doctrine of relation back is not applicable to bequest of residue.

Per C. C. Ghose, Ag. C. J.—In the case of a specific bequest, the beneficiary acquires title by relation back when the executor gives his assent; but the doctrine of relation back is not applicable to the bequest of a residue as the residue only comes into existence when the administration is completed. There is no such thing as an

assent to a residuary gift, the whole object of assent being to complete the title of the specific legatee to the particular legacy. When the executor has assented to the various specific gifts, he has a residuum which is available for the residuary legatees: *Lord Sudley v. Attorney-General*, (1897) A C 11 and *Barnardo's Homes v. Special Income-tax Commissioners*, (1931) 2 A C 1, Ref. [P 843 C 2]

(d) Succession Act (1925), S. 214—"Debt" is sum of money payable by reason of obligation—Words and phrases.

A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation: *Webb v. Stenton*, 11 Q B D 518 and 86 Cal 936, Ref. [P 851 C 1]

(e) Succession Act (1925), S. 214—It is enough if succession certificate is produced before decree.

Per Mitter, J.—It is a sufficient compliance with the provisions of S. 214 if the succession certificate is produced before decree: 88 Cal 827 and 1 I C 254, Ref. [P 851 C 2]

L. P. E. Pugh and Clough—for Appellants.

S. M. Bose and C. V. C. Chatterjee—for Respondents.

C. C. Ghose, Ag. C. J.—The facts involved in this appeal, shortly stated, are as follows: One Pasupathi Nath Mukerjee, a wealthy Hindu inhabitant of Calcutta, died on 9th May 1919 possessed of considerable movable and immovable properties and leaving a will executed by him on the said 9th May 1919. The Administrator-General of Bengal was appointed executor under the will. He applied for Probate of the said will to this Court on its Original Side and a caveat was entered by the widow of the testator Srimutty Parijat Debi. The application for Probate was set down to be heard as a contentious cause and it was numbered as suit No. 13 of 1920. A period of nearly eight years was taken to obtain evidence on commission of various witnesses on both sides. The suit came on for hearing before Costello, J., some time in 1928 and after the hearing had gone on for 11 days, the parties beneficially interested in the testator's estate came to a settlement whereby the caveat was discharged and probate of the said will was granted to the Administrator-General of Bengal and it was ordered that the settlement or agreement arrived at between the parties, which related to the division of the testator's estate in manner different from that indicated in the will, should be recorded. That agreement will be found printed at pp. 8 to 12 of the paper book in this appeal.

Shortly after the date of the decree granting probate to the Administrator-General of Bengal, Tirtapathi Mukerjee, son of the testator died, while an infant without leaving any issue, but leaving his mother the present respondent Srimutty Parijat Debi as his sole heiress under the Dayabhaga School of Hindu law by which he was governed. Under the will of the testator, as modified by the terms of the said agreement, Tirtapathi Mukerjee was entitled to a ten annas share of the residuary estate of the testator absolutely. He died without the said residuary share being made over to him. The petitioner Srimutty Parijat Debi thereupon demanded of the Administrator-General of Bengal the delivery to her of the said residuary share. The Administrator-General of Bengal having failed and neglected to do so, she applied to this Court on its original side some time in August 1930, for an order that directions might be given to the Administrator General of Bengal, as executor under the said will, to make over to her that portion of the residuary estate of the testator to which the said Tirtapathi Mukerjee was entitled to. The application came on before Costello, J., who by his order dated 17th March 1931, directed that the Administrator General of Bengal should hand over, to Srimutty Parijat Debi, Tirtapathi's share of the residuary estate, less a sum sufficient to cover any claim which might be made by the Crown upon the footing that she ought to have taken out a succession certificate as a condition precedent to her right to have the said residuary share handed over to her.

The present appeal is by (1) the Secretary of State for India in Council and (2) the Administrator-General of Bengal. So far as the Administrator General of Bengal is concerned, we are informed that he has since the date of Costello, J.'s order made over to Srimutty Parijat Debi the share of Tirtapathi in the residuary estate less a certain sum of money which may be required for payment of duty on a succession certificate, should it be held that such a certificate is necessary to enable Srimutty Parijat Debi to obtain the said residuary share. So far as the Secretary of State for India in Council is concerned, Mr. Pugh's contention is that it ought not to be decided on an application under S. 302, Succession

Act, that Srimutty Parijat Debi automatically steps into the shoes of her deceased son by reason of her relationship to him and the operation of the principle of Hindu law which exempts Hindus from the necessity of taking out Letters of Administration in enabling them to succeed to the rights of a deceased relative. Mr. Pugh's further argument is that inasmuch as the said residuary share consists largely, if not entirely, of Government promissory notes and as the obligation in respect of the said promissory notes was between Government and the testator's son Tirtapathi, if the applicant, Srimutty Parijat Debi, is to succeed to Tirtapathi's legal position, she must prove that she is entitled to the benefit of the (debt) as between the Government and whoever may be for the time being the holder of the promissory notes in question. On this argument of Mr. Pugh which has been advanced before us and which was also advanced before Costello, J., the latter observed as follows :

"In other words Mr. Pugh says that before this lady can get possession of these Government notes, she will have in effect to establish her right to have assigned to her the debt owing by the Government to her deceased son Tirtapathi. This, if I may say so, is a very ingenious argument. It is possible that there is something in it. I am about to say however that without considering the matter further, I am not prepared to give an opinion on the matter one way or the other. I think that that is a matter which ought to be left open. If the Crown still wishes to argue that in the circumstances of this particular case there is an obligation on the present applicant to take out a succession certificate and to pay the appropriate duty, they ought not to be shut out of so doing."

For reasons which appear later, I am of opinion that there is no substance in Mr. Pugh's contention. In this appeal, the main question that has been argued on behalf of the appellants is that unless Srimutty Parijat Debi takes out a succession certificate, she is not entitled to the delivery to her of the said residuary share, and secondly that she cannot have an order in her favour by means of an application under S. 302, Succession Act. It will therefore be necessary to consider and determine whether what Srimutty Parijat Debi wants is the payment of "debt" within the meaning of S. 214, Succession Act, and if not whether there are any real obstacles to her recovering the said residuary share from the hands of the

Administrator-General of Bengal. It is said that if it be held that there was no "debt" and that the residue had not been ascertained, then Costello, J., was incompetent to make the order he did.

* Now, before we go into these questions, it is necessary to see what exactly was the position of the Administrator-General of Bengal at the time when Srimutty Parijat Debi made her application. By the decree of this Court, dated 8th June 1928, probate of the said will was granted to the Administrator-General of Bengal and the agreement arrived at between the parties as regards the division of the testator's estate was ordered to be recorded. In other words, simultaneously with the grant of probate to the Administrator-General of Bengal all the parties beneficially interested in the testator's estate agreed that the same should be disposed of by the executor, not in complete accordance with the terms contained in the will, but in a particular manner desired by them and referred to in detail in the said agreement. The Administrator-General of Bengal was therefore to distribute, and he undertook to distribute, the estate in accordance with the terms of the agreement annexed to the decree of this Court. I am of opinion that there is no substance in Mr. Pugh's contention that from and after the date of the decree granting Probate to the Administrator-General of Bengal, he, in the events which happened, was not holding the estate as executor but, by virtue of the agreement between the parties, as trustee. The Administrator-General of Bengal, if he was to hold the property as trustee, could only do so if the procedure indicated in the Administrator-Generals Act was followed. That obviously was not done and therefore, in my opinion, the Administrator-General could not hold the estate as trustee. Further it is quite clear, apart from everything else, that the stage when he could claim to hold the estate as trustee had not arrived when Tirtapathi died. His sole authority to hold the estate was as executor and he continued to do so in that capacity down to the date when Srimutty Parijat Debi's application was made to this Court.

Tirtapathi was entitled to a 10 annas share in the residuary estate. At the time when he died, the residue had not

been ascertained. It was admitted on all hands at the hearing before us that costs, debts and pecuniary legacies had not been paid; the residuary legatee had therefore no "property" in any portion of the testator's estate at the time of his death. In other words, the residuary legatee, such as Tirtapathi was, had no right to any specific item of property at all; and until the executors had discharged all payments, there was nothing which could be regarded as residue; see in this connexion *Lord Sudeley v. Attorney-General* (1). In the case of a specific bequest, the beneficiary acquires title by relation back when the executor gives his assent; but the doctrine of relation back is not applicable to the bequest of a residue as the residue only comes into existence when the administration is completed. There is no such thing as an assent to a residuary gift, the whole object of an assent being to complete the title of the specific legatee to the particular legacy. When the executor has assented to the various specific gifts, he has a residuum which is available for the residuary legatees: See in this connexion *Barnardo's Homes v. Special Income-tax Commissioners* (2). It therefore follows that the residue not having been ascertained up to the time of the death of Tirtapathi, it was non-existent and there was no 'debt' due to Tirtapathi in his lifetime. If there was no "debt" due, no question of obtaining a Certificate under S. 214, Succession Act, can possibly arise.

In the events therefore which happened and the entirety of the estate of the testator being in the hands of the Administrator-General of Bengal as executor, S. 104, Succession Act, is attracted to the present case. The section runs as follows:

"If a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives."

It makes no difference that the bequest to Tirtapathi under the will had been augmented by the agreement between the parties. At any rate, the rule laid down in S. 104 is applicable to this case by analogy. Tirtapathi died with-

1. (1897) A C 11.

2. (1931) 2 A C 1=90 L J K B 545=125 L T 250=37 T L R 540=65 S J 433.

out having received the residuary estate and therefore the same passed to his representative. In this case the representative is his heiress under the Hindu law and it is not necessary under S. 212, Succession Act, for the representative or heiress, she being a Hindu, to take out Letters of Administration or any other kind of representation, because the representative or heiress sufficiently represented and represents the estate of the deceased. Costello, J.'s order means nothing more than this that the Administrator-General of Bengal should hand over the residuary estate referred to above when the administration is completed. It is not understood why the learned Judge was not competent to make this order.

I now come to the question whether *Srimutty Parijat Debi* can get the relief she wants by means of an application. All the parties interested were before Costello, J., and there is no reason whatsoever why relief should not be granted to *Srimutty Parijat Debi* on an application such as she made, seeing that no intricate questions of fact had to be determined on evidence of witnesses. Procedure after all is mere machinery; and in my opinion *Srimutty Parijat Debi* could get all that she wanted by means of an application whether one treats the application as coming either under S. 302, Succession Act, or under S. 28, Administrator-Generals Act. There are no compelling reasons to hold that she must be driven to a suit. It is all form; but if there is no substance behind the form, Court will not hesitate to grant that relief to the applicant to which she appears to be entitled. The result therefore is, that in my opinion this appeal has no substance and should be dismissed. The Administrator-General of Bengal will pay his own costs; but so far as the Secretary of State for India in Council is concerned, the same will come out of the estate. *Srimutty Parijat Debi* will pay her own costs. As however my learned brother is of a different opinion, the matter must be referred to a third Judge under Cl. 36, Letters Patent.

Mitter, J.—I regret I am unable to concur in the judgment of the learned Acting Chief Justice which has just been read. I regret it all the more as the question raised by this appeal is one of consi-

derable importance as it affects the stamp revenue of Government on the one hand and concerns the liability of the subject to pay considerable amount of stamp duty to the Crown on the other. I have therefore given my most anxious consideration to the case and I am constrained to arrive at the conclusion that this appeal should be allowed for reasons to be detailed hereafter. This is an appeal from an order of my learned brother Costello, J., by which he directed the Administrator-General to hand over to the respondent *Sreemati Parijat Devi* her son's (*Tirthapati's*) share of the residuary estate left by *Pashupati Mukherjee*, husband of the respondent, less a sufficient sum to cover any claim which may be made by the Crown on the footing that the respondent ought to have taken out a succession certificate as a condition precedent to her right to have the funds handed over to her. The appeal is preferred both by the Secretary of State for India in Council and the Administrator-General of Bengal who have appeared through the same counsel. It is necessary to state the facts with sufficient fulness in order to decide the questions of law that fall for determination in this appeal. The facts are these: One *Pashupati Mukherjee*, who was a Hindu resident of the town of Calcutta, died on or about 9th May 1919 possessed of considerable movable and immovable properties situate within and outside the local limits of the ordinary original jurisdiction of this Court having before his death and on 9th May 1919 made and published his last will and testament in the English language whereby he appointed the Administrator-General of Bengal, or failing him the Official Trustee of Bengal, as the executor. By the said will, after making certain specific bequests and making provisions for certain annuities and for the marriage of his daughter, the testator disposed of the residue of his estate in the following terms:

"Half of my estate shall be divided equally among the sons of my late lamented elder brother, and the remaining half shall be divided among my children in the proportion of two shares for a male child and one share for a female child."

Pashupati was survived by his widow *Parijat Devi*, his son *Tirthapati*, his daughter *Protima* and his brother's sons.

After the death of the testator the Administrator-General of Bengal as the executor named in the will applied to the High Court in its testamentary and intestate jurisdiction for the grant of probate of his will. Caveat was entered in the said proceedings by Parijat. Eventually the parties came to a settlement whereby probate was granted to the Administrator-General of Bengal and certain terms were arrived at for the disposal of the properties. Those terms were incorporated in the decree in the sense that the said agreement was also recorded and the Court certified also that the agreement was for the benefit of the infant defendants in the probate suit and the Caveat was discharged. Amongst other things the share of Tirthapati in the residuary estate was increased to 10 annas from 5 annas 4 pios given by the will and the share of Protima was decreased from 2 annas 8 pios given by the will to 2 annas. The details of the agreement are given on pp. 8, 9, 10 and 11 of the paper-book. The decree which recorded the agreement is dated 8th June 1928. Shortly after the decree Tirthapati, the only son of the testator, died on 6th May 1930. Messrs. Dutt and Sen wrote a letter to the Administrator-General of Bengal on behalf of their client Parijat Devi of making over to their client all the properties belonging to Tirthapati in the custody of the Administrator-General. On 30th May the Administrator-General wrote to Messrs. Dutt and Sen that the estate of Pashupati Mukherjee had not been fully administered as the residuary estate had not been divided amongst different residuary legatees and further that before the securities to be earmarked to the estate of Tirthapati Mukherjee could be made over to the persons beneficially interested, administration to that estate must be obtained. On 4th June 1930 Messrs. Dutt and Sen wrote back to the Administrator-General and in that letter occurs the following passage:

"As a stake holder we do not think it is within your province to go into the question of our client's interest in the estate which she has inherited as the heiress of her son."

I will have to return to this passage. On 14th June, Messrs. Dutt and Sen wrote a letter to the Administrator-General, Bengal, in which they asked

the Administrator-General to let them know what acts beyond the division of estate declared by the decree remained to be done. On 21st June the Administrator-General acknowledged the receipt of the letters dated 4th, 11th and 14th June and wrote to Messrs. Dutt and Sen a letter stating that the specific legacies had been paid except those payable to the minor legatees but all the costs had not been paid nor had the residue been allocated to the residuary legatees. In this letter it was further pointed out that the question of representation to Tirthapati Mukherjee's estate had been raised at a certain meeting and accepted as being necessary. There were certain other correspondences between the Administrator-General and Messrs. Dutt and Sen between 3rd and 11th July to which it is not necessary to refer. On the 11th Messrs. Dutt and Sen wrote to the Administrator-General enquiring whether the latter was prepared to pay to Parijat Devi 10 annas share of the residuary estate. In reply, on 17th July 1930, the Administrator-General pointed out that the question of payment of 10 annas share of the income of residuary estate to Parijat Devi also depended on the question of Tirthapati Mukherjee's estate being represented. On 18th July Messrs. Dutt and Sen wrote back saying that they noted the fact that the Administrator-General was not willing to make over the corpus of the residuary estate to their client and was even unwilling to pay the income from the same.

On 12th August 1930 a Master's summons was taken out to the effect that an application would be made on behalf of Parijat Devi for direction to the Administrator-General to make over to her a portion of the residuary estate of the testator now in the hands of the Administrator-General under the decree mentioned in the application. The application which is set forth at p. 2 of the paper book recited the settlement whereby probate of the will was granted to the Administrator-General and certain terms were arrived at as regards the disposal of the properties. It also recited the death of the applicant's son Tirthapati and stated that the applicant was his sole heiress under the Bengal school of Hindu law. It recited the fact that notwithstanding the petitioner's re-

peatedly calling upon the Administrator-General to make over to the applicant her share in the residuary estate the Administrator-General refused to do so. In para. 7 of the said petition she submitted that no representation was necessary to be taken by her to the estate of her deceased son Tirthapati and that as a mother and heiress under the Hindu law she was entitled to 10 annas share in the residuary estate of the testator which was directed to be made over to her son under the decree which recorded the terms of settlement. In reply to this petition the Administrator-General stated amongst other things that until the applicant took out representation of the estate of Tirthapati Mukherjee she could not claim the estate to be made over to her and she could not give the Administrator-General a proper and legal discharge. It was also objected that as in any event the properties which were likely to be made over to her consisted mostly of Government securities of a value which, on the allocation of the share of Tirthapati Mukherjee in the residuary estate, might come up to Rs. 25,00,000, the petitioner should take out representation at least for such securities. As the question raised by the Administrator-General affected a considerable amount of stamp duty payable to Government notice was directed to be issued to the Crown in order that the Crown might be represented at the hearing and the question argued as to whether the applicant was liable to pay duty. The Crown appeared in these proceedings and contended that the applicant ought to have taken out a succession certificate as a condition precedent to her right to have the funds handed over to her. Costello, J., however refused to decide whether the applicant was liable to pay the stamp duty, but in order that the Crown's right on this behalf may not be prejudiced, made the following remarks:

"The Crown is not to be prejudiced in any way by the making of this order, and I direct the Administrator-General to retain the appropriate sum which I have already mentioned for a period of three months. If no proceedings are taken by the Crown within that time the amount outstanding will also be handed over."

With these remarks the learned Judge directed the Administrator-General to hand over to Parijat Devi Tirthapati's share of the residuary estate less a suffi-

cient sum to cover any claim which may be made by the Crown upon the footing that the applicant ought to have taken out a succession certificate as a condition precedent to her right to have the funds handed over to her. Costello, J., refused to decide whether the application of Parijat Devi was an application under S. 302, Succession Act of 1925, as was contended for on her behalf. The application was made to the Court in its testamentary jurisdiction and not the Court in its ordinary original civil jurisdiction. The learned Judge proceeded to deal with the application on the footing that as all the necessary facts and circumstances were before the Court and indeed all the persons who in any way could be said to be interested in the matter were fully represented, it was of no importance whether or not the application was in technically correct form, and so treating the application the learned Judge made the order as already indicated.

Against this order the present appeal has been brought both by the Administrator-General and the Secretary of State for India in Council. Mr. Pugh appearing both for the Crown and the Administrator-General has, in an able argument, contended that the learned Judge was in error in passing an order for the payment of the share of Tirthapati Mukherjee in the estate of Pashupati Mukherjee by the Administrator-General to Parijat Devi, without deciding that the title of Parijat Devi to Tirthapati's estate could be proved otherwise than by producing a succession certificate relating to the estate of Tirthapati. He has further contended that as the share of Tirthapati depended upon a compromise effected after the death of Pashupati and no longer depended on the will of Pashupati such share could only be dealt with in the ordinary original civil jurisdiction by a suit or on originating summons and not in the testamentary jurisdiction. His contention is that as the bulk of the estate consists of Government promissory notes of considerable value in the hands of the Administrator-General, the Administrator-General was a debtor to Tirthapati under the terms of the agreement which was recorded in the decree issuing probate, and on the death of Tirthapati he became a debtor to

Parijat Devi and no decree should have been passed or order made against a debtor of Tirthapati for payment of his debt except on the production of a succession certificate as is required by S. 214, Succession Act. Mr. Pugh, argues that after the agreement the Administrator-General was holding the estate not in terms of the will but, in terms of the family settlement arrived at between the beneficiaries under the will. It is said that everybody had agreed to put aside the disposition of the will and the Administrator-General was holding as a person who has assented to the terms of the agreement, and he could not be holding as executor any longer after having assented to the legacies in terms of the agreement. In support of this proposition the learned counsel has relied on two decisions, *George Attenborough & Son v. Solomon* (3), and *Wise v. Whithburn* (4). These cases are authorities for the proposition that when an executor assents to a specific legacy the effect of the assent is to strip the executors of their title as executors and to clothe them with a title as trustees. Reference in particular is made to the following passage in the judgment of Lord Chancellor Halsbury in *Attenborough's* case (3):

"The executors had long ago lost their vested right of property as executors and become, so far as the title to it was concerned, trustees under the will. Executors they remained, but they were executors who had become divested, by their assent to the disposition of the will, of the property which was theirs *virtute officii* and their right in rem, their title of property, had been transformed into a right in personam, a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision."

This decision does not apply to the case of a residuary bequest and is not of much assistance. It is argued that there is a reorganisation of the whole bequest and the application of Parijat could not be an application under S. 302, Succession Act, for she is not relying on the will but on the agreement which alone entitled Tirthapati to 10 annas share in the residuary estate much in excess of the share allotted to him under the will. It is said that she was

really entering into the realms of contract and was asking for performance of the terms of the contract which entitled her son to a 10 annas share of the net residue after the payment of costs and certain legacies. This argument resolutely and ably advanced by Mr. Pugh, is deserving of careful consideration and to my mind there seems to be considerable force in this contention which I shall examine presently. Mr. S. M. Bose who appears for Parijat Devi contends that *Attenborough's* case (3) is distinguishable, for in that case the executors were also trustees appointed by the will and the estate had been fully administered and consequently executors ceased to be executors and argues that in the present case the administration had not been complete on the date of application and that therefore the Court in its testamentary jurisdiction has jurisdiction under S. 302, Succession Act, to give general or special direction in regard to the administration of the estate. He argues that the effect of the agreement is mutual assignment as between the beneficiaries for it is said that the will was not altered in any way but that Parijat was getting a portion of the residuary estate under the will and she was getting something more from those who are entitled to the excess under the terms of the will. It is difficult to my mind to accept this contention in view of the fact that her son could not claim 10 annas share of the residuary estate except under the agreement and the agreement could only be enforced by a suit. For as Woodroffe, J., points out in the case of *Kamal Kumari Devi v. Narendra Nath Mukherji* (5), where the circumstances were similar to the present case:

"There could be no 'amended probate' as stated in the ekrarnamah, but when a testamentary instrument is propounded and a caveat against the grant is entered, it is common practice that opposition to the grant should be withdrawn upon terms. Upon this being done, the promovent proceeds to prove the will unless probate has already been granted in common form. In such a case and according to the practice on the original side of the Court the caveat is discharged and the grant made. Such an order is alone within the scope of the suit. But if a settlement has been arrived at under which opposition has been withdrawn, it is recited in the decree that the parties have agreed to terms of settlement and it is ordered that such terms be recorded. The terms are then recorded in a,

3. (1918) A C 76=82 L J Ch 178=107 L T 834=57 S J 76=21 T L R 79.

4. (1924) 1 Ch 480=98 L J Ch 235=130 L T 655=68 S J 802.

5. (1909) 1 I O 578.

schedule annexed to the decree. Such terms, when as they ordinarily are beyond the scope of the suit are not the subject matter of the decree, and if not carried out, must be enforced by separate suit."

It is important to remember in this connexion that the applicant treated the Administrator-General as a mere stake-holder in her solicitor's letter dated 4th June 1930 to which reference has already been made. Mr. Bose however relies on the observation of Woodroffe, J., in *Kamal Kumari's* case (5) to the effect that the agreement in question recorded in the decree granting probate may be given effect to either by a redistribution by and amongst themselves after the executor shall have made over the property in terms of the will or without waiting for such a distribution in conformity with the will by a direction given by all beneficially interested to the executor to give direct effect to the agreement which the parties have arrived at as to the disposition of the properties given to them by the will. Suppose the executor refused to give effect to the direction of the beneficiaries: a suit will have to be brought. The agreement could only be enforced by an action and could not be enforced in the course of administration, for it is not part of the decree in the probate action.

Mr. Bose next argues that under S. 104, Succession Act, an executor has to pay the legacy to the legatee and that if the legatee dies before receipt the person to receive the legacy is the heir of the deceased legatee. Mr. Pugh in reply says that S. 104 can have no application as there is no question of any legacy of the residuary estate under the will but there is a question of succession to the residuary estate as under the agreement, and he wants us to reject the contention of Mr. Bose based on S. 104. I have already given my reasons for holding that the present application is based on the agreement. In this view Mr. Pugh's contention must be accepted. It may be difficult to give effect to the contention of Mr. Pugh, that the Administrator-General was holding the estate of Tirthapati not as an executor in terms of the will but in pursuance of the agreement. The difficulty is occasioned by the fact that the Administrator-General's functions, duties and privileges are regulated by the statute and in view of the provisions of S. 27, Administrator-General

Act it is difficult to ascribe to the Administrator-General any other capacity than that of an executor.

It is however a fallacy to suppose that merely because the Administrator-General functions as an executor the provisions of S. 104, Succession Act, must apply to the case, for in order to attract the provisions of that section it is essential to show that the legal representative of the deceased legatee was asking for the handing over of the residuary estate as in terms of the will. And this essential element is lacking in the present case and Parijat Debi's application is not on the footing of the bequest but on the footing of the family arrangement which in my opinion could only be enforced by suit. S. 104, Succession Act, cannot in my judgment, be attracted to the facts of the present case for is the lady Parijat Debi resting her application on the ground that as the residuary legatee, her son, had died before the receipt of the legacy which consisted of 5 annas 4 pies of $\frac{2}{3}$ rd of 8 annas share of the residue as mentioned in the will it has passed to her as his sons legal representative, or is she resting her application on the family arrangement which entitled her son to share in ten annas share of a different residuary estate? There can be no doubt that she is resting her case to succeed to the son's share in the residuary estate as defined by the agreement or family arrangement which has been certified by the Court as being beneficial to the infant beneficiaries. She has travelled from the realm of bequest into the realm of contract and it is from the latter region that she makes the application to the Court. As a result of the family arrangement, the residuary estate of Tirthapati has not only changed in form but in substance. It has swelled from five annas four pies of one residuary estate to ten annas of a different residuary estate, and it is this different and larger residuary estate that she is asking the Administrator-General to make over to her and the latter rightly says:

"I am willing to give the sum to you provided you produce a succession certificate for the bulk of Government securities to show you are entitled to succeed to your son."

The next argument of Mr. Bose may be summed up as follows in his own words:

Where however the legacy is a residuary one, or, in other words, in the case of a residuary bequest the executor is not required to give his assent to any such legacy until he has distributed the estate in accordance with the directions in the will. As a matter of fact if the estate has been distributed prior to the handing over of the residuary bequest no question arises of the executor's giving his assent, because when the estate has been distributed the executor's functions come to an end and the residuary estate is taken by the residuary legatee as a matter of course. Therefore it is said that until the residue has been ascertained the residuary legatee cannot be described as the proprietor of the residuary bequest: see in this connexion *Ganoda Sundari v. Nalini Ranjan* (6). It follows from what has been stated above that a residuary legatee at any point of time between the date of the death of the testator and the date when the residuary bequest is handed to him can look upon the residuary bequest in the hands of the executor as a debt due to him. That follows from what has been stated above and put in the fewest possible words, for the reason that the residue is not ascertained until the moment when the residuary bequest is handed over to the residuary legatee. If what has been stated above is correct, then whether the application of the present respondent was headed 'in the testamentary or intestate jurisdiction' or 'ordinary original civil jurisdiction', the substance of the matter will have to be looked at and the application would lie under S. 302, Succession Act, and also under S. 28, Administrator-General's Act."

In support of Mr. Bose's contention that the residue is not ascertained until the moment when the residuary bequest is handed over to the residuary legatee reliance has been placed on a decision of the House of Lords in the case of *Dr. Barnardo's Homes v. Commissioners for Special Purposes of the Income-tax Acts* (2). It is necessary to state the facts of that case in order to see if it has any application to the state of facts in the present case. The facts are these: A testator who died on 14th November 1914 by his will bequeathed the residue of his property, which consisted of stocks and shares to a charitable institution absolutely. Between the date of the testator's death and 4th December 1916, when the residue was finally ascertained and distributed, the executors received income of the estate from which income-tax had been deducted at the source. The income so received by the executors was part of the fund handed over in due course by them to the charitable institution. The institution claimed the return of the income-tax deducted on the ground that the deduction was contrary to S. 105, Income-tax Act, 1842.

In this state of facts it was held that

until the date when the residue was ascertained the institution had no property in any specific investment forming part of the estate, or in the income therefrom, that the payment by deduction of income-tax made by the executors in respect of the income was not made on behalf of the institution, and that the institution was therefore not entitled to repayment of the income-tax so paid. On the authority of this case it is argued that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete, and special stress is laid on a passage in the speech of Lord Atkinson which runs as follows:

"The case of *Lord Sudeley v. Attorney-General* (1) decided in this House conclusively established that until the claims against the testator's estate for debts legacies, testamentary expenses etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained."

The decision before the House of Lords cannot govern the present case, for it is not the case of either party that the residue of Tirthapathi's estate had not been ascertained at the date of the application. As a matter of fact the Administrator-General in his reply to the Master's summons states in para. 5, Cl. (11) that the properties which were likely to be made over to her consisted mostly of Government securities of a value which, on the allocation of the share of Tirthapathi Mukherjee in the residuary estate, may come up to Rupees 25,00,000. The applicant Parijat Debi also made the application asking for an order for a payment of the share of Tirthapathi in the residuary estate on the footing that the residue had been ascertained prior to the date of the application, and Mr. Pugh rightly points out that the two arguments, namely that on the one hand Parijat is entitled to an order for payment of the residuary estate and on the other hand that the residuary estate had not yet been ascertained, are mutually destructive. The Administrator-General in one of the letters says that the estate had not been completely administered as the residuary estate had not been divided amongst the different

residuary legatees. That is a very different thing from saying that the residuary estate of Tirthapati had not been ascertained. The question whether the residue had been ascertained and the bequest assented to by the executors or trustees is a question of fact and must depend on the circumstances of each particular case : see *Commissioners of Inland Revenue v. Smith* (7).

"The question in all cases is as the administration of the estate reached a point of ripeness at which you can infer an assent, at which you can infer that the residuary estate has been ascertained and that it is outstanding and not handed over merely for some other reasons."

Looking broadly at the facts disclosed by the correspondence it appears that the residuary share of Tirthapati's estate had been ascertained to be about Rupee 25,00,000. Indeed it does not appear that the applicant took the objection before the learned Judge that the residuary estate had not been ascertained and for a very good reason, namely if she took up that position it would cut away from the ground of her application for payment of Tirthapati's share in the residuary estate to her. Even assuming that the residuary estate had not been ascertained it is doubtful whether for the purpose of probate or succession duty payable by the executor of the person entitled to residuary estate who died after executing a will and before the undue is ascertained, the residuary estate should be regarded as non-existent. This doubt of mine is based on an examination of the case of *Lord Sudely v. Attorney-General* (1). In the case of Lord Sudely the facts were these : The Honourable Algernon Gray Tollemache by his will and codicil after bequeathing various legacies and annuities gave one-fourth part of the residuary estate to his wife Mrs. Tollemache. The testator died in 1892, domiciled in England, and the will and codicil were proved in England by his executors who were domiciled in England. The testator's estate included mortgages on real estate in New Zealand. His wife died in 1893 and her will was proved in England by her executors. In estimating the probate duty payable upon her one-fourth share of her husband's residuary personal estate the executors excluded the value of the New Zealand mortgages which in all exceeded £440,000. The

Attorney General having filed an information against the executors of the widow of the testator claimed that one-fourth of the value of the New Zealand mortgages ought to have been included for probate duty. The executors in their answers to the interrogatories stated that at the time of the wife's death her husband's personal estate had not been fully administered and was in course of administration; that one legacy only given by his will then remained unpaid; that the amount of the clear residue had not been ascertained; but that it had been ascertained that there would be a large residue (excluding the New Zealand mortgages) over and above the debts and legacies, and that that fact had to the best of their belief been communicated to the wife during her life by her husband's executors; that no appropriation had been made of the New Zealand mortgages, nor of any securities or portions of securities to particular shares of the net ultimate residue.

In these circumstances the House of Lords, affirming the decision of the Court of appeal, declared that one-fourth part of the value of the New Zealand mortgages, forming part of the husband's residuary personal estate, was liable to probate duty under the Customs and Inland Revenue Act, 1881, as part of the estate and effects of the wife, in respect of which probate of her will was granted to the defendants, and ordered them to pay the amount of that duty. The basis of this decision of their Lordships was that there was no right to the particular New Zealand assets in Mrs. Tollemache or her executors, but that she had right to—and what her executors had right to—was one-fourth of the clear residue of Mr. Tollemache's estate, that is to say what remains of his estate after satisfying debts and legacies, and that it was impossible until the estate was fully administered to say of what assets the residuary estate would consist of. Mrs. Tollemache's executors were required to pay probate duty on one-fourth part on the value of New Zealand's mortgages also. This case therefore shows that for the purposes of probate duty the interests of the executors of Mrs. Tollemache in her husband's residuary estate were taken into account in assessing probate duty. On the authority of this case it would be right to hold that Parijat Devi

might have had to pay the duty if she was required to take out letters of administration even before the ascertainment of the residuary estate of Tirthapati. But as she is a Hindu it is not obligatory on her to take out letters of administration to Tirthapati's estate.

The question still remains whether the bulk of the properties which consist mostly of Government securities of value of Rs. 25,00,000 and which may be allocated to the share of Tirthapati in the residuary estate, may be regarded as a debt for which succession certificate is necessary, under S. 214, Succession Act. It is argued by Mr. Pugh that the Government securities should be regarded as a debt due from Government to the Administrator-General and the sum representing the value of the said Government securities might be regarded as a debt due from the Administrator-General to Tirthapati, for the Administrator-General holds the assets in his hands and was bound to pay Tirthapati if he was alive in pursuance of the agreement entered into between several beneficiaries under the will of Pasupati as soon as the 10 annas residuary share was ascertained.

It is now well settled so far as this Court is concerned that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. That is the definition given by Lindley, J., in *Webb v. Stenton* (8). That is also the definition of the word "debt" as used in S. 4, Succession Certificate Act, which now corresponds with S. 214, Succession Act: see the decision of the Full Bench in *Banacha Ram Mazumdar v. Adyanath Bhattacharyya* (9). By the terms of the will and the agreement there was a promise to pay the residue when ascertained. There can be no doubt that on the date of the agreement Tirthapati became beneficially interested in 10-annas share of the residuary estate. The amount of the residue was ascertained after his death. The Administrator-General was indebted to Tirthapati for 10-annas share of whatever amount might eventually be determined to be the net residue. On Tirthapati's death his mother Parijat Devi as his sole heir became entitled to re-

cover that debt from the hands of the Administrator-General, and in view of the provisions of S. 214 she could only recover the amount of the residue which consists of Government securities to the value of Rs. 25,00,000 on production of a succession certificate. The right of a residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate including the expenses of administration have been satisfied. It is not a contingent right but a right transmissible by sale and the purchaser from a residuary legatee or heir buys subject to any disposition which may be made of the deceased's estate in due course of administration: see *Chatterput Singh v. Maharaj Bahadur* (10).

It was a debt, in my opinion, due to Tirthapati in his lifetime although it became payable after his death, after the residue was ascertained, 10-annas share of which was payable to Tirthapati in terms of the family arrangement. For reasons given before I will treat this application of Parijat as a suit in the ordinary original civil jurisdiction of this Court and hold that she is not entitled to recover the Government Securities of the value of Rs. 25,00,000 without production of a Succession Certificate in respect of Government securities.

I would therefore set aside the order of Costello, J., and declare that she is entitled to recover the Rs. 25,00,000 worth of securities in the hands of the Administrator-General, it being a condition precedent to such recovery that she produces a succession certificate in this Court within a time to be fixed by the Court. It is now well settled that it is a sufficient compliance with the provisions of S. 214, Succession Act, if the succession certificate is produced before decree: see *Kumar Chandra Kishore v. Prasanna Kumari* (11), *Sital v. Manick* (12). It is stated in this case that the Administrator-General has already made over about 23,00,000, twenty-three lakhs, to Srimati Parijat Debi and holds about two lakhs worth of Government securities in his hands. From out of this sum Parijat Debi should be required to pay the necessary duty for obtaining

8. (1884) 11 Q B D 518=52 L J Q B 564=49 L T 482.

9. (1909) 86 Cal 198=3 I C 469 (F B).

10. (1905) 32 Cal 198=32 I A 1 (P C).

11. (1911) 89 Cal 837=9 I C 129=88 I A 7 (P C).

12. (1902) 1 I C 284.

succession certificate and the succession certificate may be produced in this Court. In my view the costs of both the Secretary of State and Administrator-General should be borne by Parijat Debi, who must pay her own costs.

By the Court.—The points upon which we have differed are : (1) whether in the circumstances which have happened in this case the applicant Sm. Parijat Debi can invoke S. 104, Succession Act, in her favour ; (2) whether it is incumbent upon Sm. Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukherji ; and (3) whether any relief can be granted to her on an application such as she made to the High Court on its original side or whether she must be relegated to a suit.

Pearson, J.—This matter has been referred to me under Cl. 36, Letters Patent, upon a difference of opinion between the Acting Chief Justice and Mitter, J., sitting in appeal against an order of Costello, J., upon an application made to this Court in its testamentary and Intestate Jurisdiction. The facts are not in dispute. Pasupati Mukerjee died on 9th May 1919 leaving a will of the same date. By that will he made bequests of substantial amounts in legacies and annuities : he also provided for expenses of his daughter's marriage and for certain rights of residence for the ladies of his family. He appointed the Administrator-General of Bengal his executor. And he directed that as regards the residue one-half should go among the sons of his deceased elder brother, and the other half between his own son and daughter, Tirthapati and Pratima Debi, in the proportion of two-thirds and one-third. The Administrator-General applied for probate. Caveat was entered by the widow, Sm. Parijat Debi, and protracted contentious proceedings went on until, after 11 days' hearing, in 1928 an arrangement was arrived at.

This arrangement was embodied in a memorandum of agreement dated 3rd March 1928. The caveat was withdrawn. The decree in the probate proceedings was made on 8th June 1928 by which probate of the last will and testament of the testator was granted to the Administrator-General of Bengal, and

the agreement was ordered to be recorded, and it was annexed to the decree. By the terms of the agreement the payment of the pecuniary legacies was confirmed ; the main alteration was in the shares of residue. Instead of the shares given by the will as stated above, these were now, under the agreement, to be as follows : Tirthapati—ten annas (in place of five annas eight pies under will), Pratima Debi—two annas (instead of two annas four pies) ; and the three sons of the testator's predeceased elder brother one anna four pies each (in place of two annas eight pies each). On 20th August 1928 Tirthapati died. Admittedly Parijat was left as his heiress, being entitled to the estate of a Hindu mother. In 1930 the summons in the present proceeding was taken out on behalf of Parijat in the testamentary and intestate jurisdiction of this Court asking for an order that directions should be given to the Administrator-General of Bengal as executor directing him to make over to Parijat Debi

"that portion of the residuary estate of the testator in his hands to which (under the decree mentioned in the petition) the applicant's son Tirthapati Mukerjee was entitled, or that such further or other orders may be given to the Administrator-General of Bengal in relation to the administration and final distribution of the estate as to this Court may seem fit."

The application has all along proceeded on the footing that what is involved in the language used is the 10 annas share of Tirthapati. Costello, J., ordered that the Administrator-General should make over to Parijat Debi Tirthapati's share of the residuary estate, after retaining in his hands a sum sufficient to cover the fees in the event of it being held that she ought to have taken out a succession certificate as a condition precedent. The Secretary of State for India in Council and the Administrator-General of Bengal have appealed. In these circumstances the points upon which the Acting Chief Justice and Mitter, J., differed are thus formulated (1) Whether in the circumstances which have happened in this case the applicant Srimati Parijat Debi can invoke S. 104, Succession Act, in her favour. (2) Whether it is incumbent upon Srimati Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son

Tirthapati Mukerjee. (3) Whether any relief can be granted to her on an application such as she made to the High Court on its original side or whether she must be relegated to a suit. I shall deal with these points in the order mentioned.

(1) S. 104, Succession Act, 1925, comes under Ch. 6 of the Act which deals with the construction of wills. It provides that if a legacy is given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives. That is as much as to say, in the present case, that Tirthapati would take a vested interest in his residuary share under the will, and since he died without receiving it, it passes to his mother Parijat Debi. Mitter, J., however, is of opinion that S. 104 can have no application in the present case, and I think his reason may be put in this way: that S. 104 could only apply if Parijat Debi was asking for the handing over of the residuary estate in terms of the will, whereas in fact her application is based on the family arrangement: Parijat's application has reference to the ten annas share of residue under the agreement, not to the five annas four pies share of residue under the will. Or, as he puts it in another part of the judgment, Parijat Debi has travelled from the realm of bequest into the realm of contract, and it is from the latter region that she makes her application to the Court. With the greatest respect, I am not able to agree with this point of view. It is true that Parijat Debi may be claiming in part under the agreement between the parties, so far as the quantum of the share is concerned. But what is it that gives her the right to claim at all? That right appears to me to have its roots in the will, in the testator's appointment of the Administrator-General as executor, and in the decree granting probate to the executor. The administration of the estate under the will is not superseded by the agreement; otherwise there would have been no reason for the grant of probate. The executor holds title to the property under the will and the probate, and so far as he is concerned he has to carry

out his administration according to what the law lays down. The decree contains a declaration that the testator rightly and duly executed the will of 9th May 1919 and: "did will, give and bequeath, devise and dispose and do all things as therein contained."

It is the estate under that will which the executor is authorised to administer. So far as the agreement is concerned, it is to be observed that the Administrator-General is no party to it himself. No doubt where all the parties have agreed he has consented to give effect to the agreement in his administration of Pasupati's estate. Disputes between the parties might have resulted in the executor being driven back on the strict terms of the will itself, and in the parties being driven to a civil suit for determination of their rights under the agreement, but for determination of a question of the destination of a share of residue under the will, I do not see why S. 104 should not be resorted to, though the amount of the share has been augmented under the agreement. I think the executor may and should refer to S. 104 for the due administration of the estate in his charge. Upon this point of difference therefore I would hold that in the circumstances which have happened in this case the applicant Srimati Parijat Debi can invoke S. 104, Succession Act, in her favour.

(2) The second point of difference is as to whether it is incumbent upon Srimati Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukerjee. It is admitted that the necessity for letters of administration does not exist in the present case, having regard to S. 212 (2), Succession Act, and to the fact that the parties are Hindus. The question then is whether in the present application what Parijat Debi is seeking to recover is a "debt" within the meaning of S. 214, Succession Act: if it is, then it is said a succession certificate must first be taken out by Parijat Debi and produced to the Court.

Tirthapati's share was a share of residue, and it does not seem to me to be of assistance to consider the position of an executor in regard to a specific bequest, to which he has assented. A residuary

share is on a different footing: In *Trethewy v. Helyar* (18) Sir George Jessel says :

"It appears to have been long settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, all costs of the administration of the estate of the testator. Therefore until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle."

It is with reference to that passage that Younger, L. J., says in the *Dr. Barnardo's Homes* case (14) (at p. 484) the principle is that :

"until the residue is ascertained, and until its existence as net residue has been acknowledged either by payment to the residuary legatee, or if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any specific part of that which subsequently becomes residue as a specific fund, but that his right is, until that amount of time arrived, subject of course to any interim distribution, to have the estate administered in due course."

In the same case before the House of Lords *Attenborough's* case (2) the same principle was upheld following *Lord Sudeley's* case (1). It is laid down that the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained : and Lord Atkinson says (at p. 11) that *Lord Sudeley's* case (1) conclusively established that until the claims against the testator's estate have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained. The case of *Attenborough v. Solomon* (3) referred to in argument before me does not appear to me to bear on the present case : that was a case where the circumstances were such that the true inference to be drawn from them was held to be that in pledging certain chattels belonging to the residuary estate the executors were not acting as such, because the residuary estate had at that time become vested in the trustees as trustees. In the present case the residuary estate never became so vested in the Administrator-General as trustee, either under the agreement or otherwise. I have already said that in my judgment the Administrator-General of Bengal was ad-

ministering the estate under the will and his title to the property was under the will, that also seems to be a fact recognized by the agreement ; he is not a party to the agreement and is not even brought into it in any capacity of trustee. Now in regard to Tirthapati's share of the residuary estate in the present case, I find the Acting Chief Justice says :

"It was admitted on all hands at the hearing before us that the costs, debts and pecuniary legacies have not been paid."

Mitter, J., on the other hand says in one passage :

"it is not the case of either party that residue of Tirthapati's estate has not been ascertained at the date of the application."

Mitter, J., further refers to various statements that the share of Tirthapati may come up to 25 lakhs. He refers to a statement of the Administrator-General in a letter that the estate has not been completely administered as the residuary estate and had not been divided among the different residuary legatees ; and he adds that

"that is a very different thing from saying that the residuary estate of Tirthapati had not been ascertained."

Later on he again refers to the 25 lakhs which may be allocated to the share of Tirthapati, and then he goes on to say that the amount of the residue was ascertained after his (Tirthapati's) death and that it was a debt in the hands of the Administrator-General. Now I find that in his letter of 30th May 1930 the Administrator-General says that the estate of Pasupati Mukerjee has not been completely administered. On the 21st June he writes that all the costs have not yet been paid nor has the residue been allocated. And in para. 5 of his affidavit he refers to the fact that the share of Tirthapati in the residuary estate may on allocation come up to 25 lakhs. In this position of affairs and upon the authorities referred to above it seems clear enough that the residuary estate has never yet been ascertained and that in that event there can be no question of any debt in respect of it. Nor do I see any reason for saying that "debt" in S. 214, Succession Act, is to be construed in any wider or other sense than the meaning given in *Webb v. Stenton* (8) as a sum of money which is now payable or will become payable in the future by reason of a present obligation. In these circumstances it is unnecessary

18. (1879) 4 Ch D 538=46 L J Ch 125.

14. (1920) 1 K B 468.

to discuss the further argument that under Securities Act, 1920 and S. 370, Succession Act, Tirthapati's share is a debt in so far as it consists of Government Securities, from the point of view that these are debts by Government to the holder. Upon this point therefore I find myself in agreement with the Acting Chief Justice, and that it is not incumbent upon Sm. Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukerjee.

(3) The last point of difference is upon the question whether any relief can be granted to Parijat Debi on an application such as she has made to the High Court on its original side or whether she must be relegated to a suit. The Acting Chief Justice held that the procedure by application was unobjectionable by reason of the fact that all the parties were before the Court, and that there was no dispute on the facts. Mitter, J., holds that the procedure under S. 302, Succession Act, by application in the testamentary jurisdiction, is not strictly available because the matter is no longer under the will but under the agreement. I have already given my reasons for not accepting this latter view. The Administrator-General still must rest primarily on the will and the grant of probate for his authority for administration of the estate. The administration is not yet complete, and I apprehend that for these reasons and so long as the administration is alive the procedure by application under S. 302, (or under S. 28, Administrator-General's Act) would be available to the Administrator-General if he required directions "in regard to the estate or in regard to the administration thereof." And if, as I think that procedure is open to him, I can see no reason why it is not available to any one of the parties to the administration, including Parijat Debi. I would therefore hold that relief can be granted her on such an application as she has made, and that she need not be relegated to a suit.

The result on the whole appeal is that I am in agreement with the Acting Chief Justice upon all three points. The order must be made as proposed by him : the appeal will be dismissed. The Administrator-General will pay his own costs.

The costs of the Secretary of State for India in Council will come out of the estate. Srimutty Parijat Debi will pay her own costs.

K.S.

*Appeal dismissed.***A. I. R. 1933 Calcutta 855**

MITTER AND M. C. GHOSH, JJ.

Lalit Mohan Roy and others—Judgment-debtors—Appellants.

v.

Sarat Chandra Saha—Decree-holder—Respondent.

Appeal No. 259 of 1932, Decided on 28th February 1933, from appellate order of Dist. Judge, Mymensingh, D/- 2nd March 1932.

Limitation Act (1908), Art. 132—Judgment-debtor entitled to raise plea of limitation but not doing so—He is precluded from raising this plea at subsequent stage of execution proceedings.

Where a decree-holder applies for execution and the judgment-debtor, being entitled to and having had an opportunity to raise a plea of limitation, does not do so and an order for execution by attachment is made on the application, the judgment-debtor is precluded from raising that plea at a subsequent stage in the said execution proceedings : 8 Cal 51 (P O), *Fall*; AIR 1921 P C 28, *Ref*; 40 Mad 1016 and 19 Cal 129; *Dist.* [P 856 C 9]

Paresh Lal Shome—for Appellants.

Prafulla Chandra Chakravarty—for Respondent.

Mitter, J.—The question raised by this appeal relates to the finality or otherwise of certain objections made in the course of execution. It is necessary to state the facts of the case in order to appreciate the contention raised by the appellants. It appears that a suit for dissolution of partnership was pending in the Court of the Subordinate Judge (Second Court) of Mymensingh and a receiver was appointed in that suit. The receiver obtained a decree against the present appellants judgment-debtors in January 1921, for debts due to the firm in respect of which the dissolution proceedings have been started. The receiver made several attempts to have the decree satisfied by execution. His last application for execution was filed on 7th July 1926 and was dismissed on 8th September the same year. On 2nd April 1929 this decree which is sought to be executed was allotted to the present respondent. The respondent filed an application for execution on 21st May 1930 alleging payment of certain interest in August 1926 and certain other sums.

quent payments in Pous 1336 and later. That application for execution was registered subject to the case of limitation.

The notice under O. 21, R. 22, Civil P. C., was ultimately served on 10th August 1930 and there is an order in the order sheet of that date showing that the notice was served and that the service was proved. The present appellant did not appear on that date and the Court directed an attachment under O. 21, R. 54 of the Code. On 3rd December 1930 a further notice was issued under O. 21, R. 66 of the Code for settlement of price to be mentioned in the sale proclamation, and this notice was served on 12th December 1930. On 12th December 1930 the present appellant appeared and he obtained an adjournment to enable him to put in his objection. On the 20th idem the present appellant filed an objection. He denied in the objection payments alleged by the decree-holder and he pleaded limitation. The Subordinate Judge who dealt with the matter in the first instance upheld this objection of the judgment-debtor and dismissed the execution case on the ground that it was barred by limitation.

Against this order an appeal was taken to the Court of the District Judge of Mymensingh and the learned District Judge was of opinion that the execution was in effect time barred when the present application for execution was filed. But he was of opinion that having regard to the order of the Court dated 22nd August 1930 directing the issue of attachment under O. 21, R. 54 of the Code, it was not open to the present appellant to raise the contention at a subsequent stage of the execution proceedings that the application was not barred by the statute of limitation. In this view he set aside the order of the Munsif and directed that further proceedings in execution should be allowed.

Against this order the judgment-debtors have preferred this appeal and it has been contended and very strenuously on behalf of the appellants that there has been no decision on the question of limitation by the order of 22nd August 1930 and that the principle analogous to the principle of *res judicata* which has been applied by the learned District Judge should not have been applied to the present case. In our opinion this contention has really no substance

in it. It has been decided by their Lordships of the Judicial Committee so far back as in the very well-known case of *Mungal Pershad Dichit v. Girija Kunt Lahiri* (1) that where a decree-holder applies for execution and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation, as in the present case, does not do so and an order for execution by attachment is made on the application the judgment-debtor is precluded from raising that plea at a subsequent stage in the said execution proceedings. It has been sought to distinguish the facts of the present case from those of *Mungal Pershad Dichit's* case (1) on the ground that the question of limitation was not determined in the present case as it was not raised, the present appellant not appearing after the service of notice. It is difficult to distinguish the facts of *Mungal Pershad Dichit's* case (1) from the facts of the present case for there, as here, there was a service of notice on the judgment-debtor as to why attachment should not issue and the order for attachment was made by the Subordinate Judge on 8th October 1874. As I have pointed out notice was served on him to show cause why the decree should not be executed against him. With reference to this order their Lordships of the Judicial Committee observed this:

"The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made."

Here also as in *Mungal Pershad Dichit's* case (1) the present appellant did not appear in pursuance of the notice to show cause why execution processes for attachment should not issue, and in his absence the order was made for issue of attachment and execution processes on 3rd December 1930, when notice under O. 21, R. 66 of the Code was served. The present appellants came in and took time to file an objection and the objection was actually filed on 20th December 1930. It is not in our opinion open to them now to raise it when they did not raise it when the notice to show cause was issued on them. Their Lordships of the Judicial Committee have also

1. (1910) 8 Cal 51=6 I A 123=4 Bar 245 (P C).

considered in a subsequent case, namely, in the case of *Raja of Ramnad v. Velusami Tevar* (2), questions similar to the one with which we are dealing in the present case; and it is instructive to quote from their Lordships' decision a portion of the remarks made by their Lordships in the said case as it is pertinent to the present controversy. Their Lordships said this:

"In these final proceedings he permitted the defendants to raise again the plea that the above order of December 1915, did not preclude the defendants from raising the plea that the defendants were barred by limitation. Their Lordships are of opinion that it was not open to the learned Judge to admit the plea. The order of 18th December 1915, is a positive order that the present respondent should be allowed to execute the decree. To that order the plea of limitation if pleaded, would according to the respondent's case have been a complete answer, and therefore it must be taken that a decision was given against the respondents on the plea. No appeal was brought against that order, and therefore it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon. No appeal was brought from the order then made, and therefore it was not competent for the Subordinate Judge to admit the plea on subsequent proceedings, or to consider it in his order of 31st March 1917, and the same remark applies to the judgment of the High Court on 7th March 1918, from which this appeal is brought."

Applying these remarks to the facts of the present case it is absolutely clear that it was open to the present appellants to prefer an appeal against the order made on 22nd August 1930, directing attachment to issue. That order could only be sustained by holding that the Court decided by the plainest implication that the decree was still subsisting and that it was not barred by the statute of limitation. That order could not be sustained unless that was the view which was taken on the previous occasion; and against such order there is no doubt that an appeal would lie as between the parties in the suit under S. 47 of the Code and no appeal having been taken at any stage prior to the execution the order passed must be taken as final between the parties in the matter.

It remains to notice a few cases on which reliance has been placed on be-

half of the appellants. The first of these cases is the case of *Bhola Nath v. Prafulla Nath* (3). An examination of that case will show that although notice was issued to the judgment-debtors before the decree was actually transferred to another Court in consequence of change of jurisdiction it does not appear that before the order for attachment was issued by the second Court that notice was served again on the judgment-debtors. The second Court had, by the transfer of jurisdiction, been given the power to execute the decree. But the notice was given by the first Court. Besides there is another point of difference and that is this: that the application for execution was ultimately dismissed by reason of default and the judgment-debtor after the attachment order had been made by the second Court came in and objected to the execution on the ground that it was barred by limitation. After several adjournments principally at the instance of the decree-holder when the case came on for hearing neither parties had appeared and the Court refused the application for execution and disallowed the objection of the judgment-debtors. The facts therefore are distinctly dissimilar to the facts of the present case. Another case which has been relied on is the case of *Subramania Ayyar v. Raj Rajeswara Dorai* (4). An examination of that case will show that the notice which was issued before the order of attachment was not a notice to show cause why execution should not issue but was notice to show cause why his heirs should not be brought on the record as the legal representatives of the deceased judgment-debtor for the purpose of execution and the legal representatives had no notice that any particular property of theirs was going to be attached. On the other hand there are observations of Seshagiri Ayyar, J., which would support the view which we are taking. The learned Judge says thus:

"At the same time as pointed out by the Judicial Committee, parties should not be allowed to agitate the same question after it has been once decided; and this dictum of their Lordships has been extended to cases where the parties had an opportunity to object to the decision, but did not avail themselves of that opportunity. One principle seems to be clear, and that is, that the party who is sought to be affected by the bar of

res judicata should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision."

These conditions were fulfilled in the present case and according to the view of the learned Judge just referred to the objection of the appellants is not tenable. The result is that the appeal fails and must be dismissed with costs. The hearing fee is assessed at one gold mohur.

M. C. Ghose, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Calcutta 858

MUKERJI AND S. N. GUHA, JJ.

Kristo Behary Dutt—Plaintiff — Appellant.

v.

Sarojini Dassi—Defendant—Respondent.

Olvil Suit No. 57 of 1932, Decided on 16th March 1933.

Hindu Law—Dayabhaga school—Stridhan Ayautuka—Daughter's son does not include step-daughter's son — Latter is not preferential heir to brother's son.

Among the list of heirs to ayautuka stridhan property of a woman governed by the Dayabhaga school of Hindu law, daughter's son does not include a step-daughter's son, and the latter is not a preferential heir to a brother's son: 82 Cal 261; 40 Cal 82 and 11 Cal 69; Ref; A I R 1928 Cal 289, Dist. [P 858 C 1; P 861 C 1]

J. O. Hazra and A. K. Hazra — for Appellant.

N. O. Chatterjee and H. N. Sanyal — for Respondent.

Judgment.—The question in controversy in this case relates to the inheritance of the ayautuka stridhan of one Radharani Dasi, a widow governed by the Dayabhaga school of Hindu law. The plaintiff is the son of Radharani's step-daughter. The defendant sets up *jus tertii*, and contends that on Radharani's death the property descended to one Gosto Behari, a son of Radharani's brother.

Buckland, J., has dismissed the suit, holding that Gosto Behari was the preferential heir. At p. 158 of Mulla's Hindu Law, Edn. 7, are to be found two tables enumerating the two sets of heirs, the first set consisting of 5 groups of heirs, in their order in respect of ayautuka stridhan according to the Bengal school; and it is with reference to these tables that the matter will be discussed here. As regards the first three groups of the first table, no question arises in

this case. Mr. Hazra's first contention on behalf of the appellant is that in Group 4 of the first table "daughter's sons" should be read as including "step-daughter's sons." If this contention succeeds it is obvious that the plaintiff should be held to be the preferential heir, because the defendant comes in only under Group 9 of the second table. In support of the contention that no distinction should be drawn between "daughter's sons" and "step-daughter's sons" reliance has been placed upon certain decisions which we shall now notice. In *Dasarathi Kundu v. Bepin Bihari Kundu* (1) the contest was between a step-sister's son and the elder brother of the husband. Several reasons were given by the learned Judge for holding that a step-sister's son is practically in the position of one's own sister's son and in a better position than the elder brother of the husband even from the point of view of spiritual benefit. While overruling a contention that the mention of "whole brother" in para. 29 of Dayabhaga, Ch. 4, S. 3, which was considered by the learned Judges as applying to succession to a woman's sulka only, suggested that whole-blood was also meant in para. 31 et seq, the learned Judges observed:

"This rather supports the contention of the plaintiff than that of the defendants in this case; for the verse indicates that where a person connected by half-blood is meant to be excluded the author says so."

The case of *Sashi Bhusan Lahiri v. Rajendra Nath Joardar* (2) merely purported to follow the decision in the case of *Dasarathi Kundu v. Bepin Behari Kundu* (1) in so far as that case gave the step-sister's son a place in Group 7 of the second table, and also proceeded upon the decision in the case of *Bholanath Roy v. Rakhal Das Mukerji* (3) in which it had been held that under the Bengal school of Hindu law sons of sisters of the half-blood are entitled to succeed equally with sons of sisters of the whole blood to the property of a deceased brother. The case of *Jatindra Nath Roy v. Nagendra Nath Roy* (4) was a Mitakshara case, the contest being between the father's half-sister's son

1. (1905) 82 Cal 261=9 O W N 112.

2. (1919) 40 Cal 82=15 I O 235.

3. (1853) 11 Cal 69.

4. A I R 1928 Cal 289=105 I O 246=55 Cal 1133.

and the mother's sister's son as, to the right to succeed to a male owner; and while dealing with *atmabandhus*, the learned Judges observed that where the text-writers meant that there should be a difference between the relations of full-blood and half-blood that was especially enumerated, but where no such distinction is made in the text the words should be read as including both full-blood and half-blood. These decisions, in our judgment cannot be regarded as having laid down any general proposition that wherever in any list of heirs a particular heir is named, it should be taken, in the absence of any express words to the contrary, to include both whole-blood and half-blood. And on the authority of these decisions we are not prepared to hold that Group 4 of the first table should be read as including step-daughter's sons. The next attempt made on behalf of the appellant was to support the group of heirs whom Srikrishna in his *Dayakarma Sangraha* interposes between Group 4 and Group 5 of the first table. *Jimutabahana*, in naming the heirs up to Group 5, allowed the doctrine of spiritual benefit to be subordinated to other considerations to a certain extent. From the texts of *Manu Brihaspati* and *Devala*, he deduces the rule (*Dayabhaga*, Ch. 4, S ii, 9) that the son and maiden daughter have a like right to succession, and on failure of either of them, the goods belong to the other, and on failure of both of them the succession devolves with equal rights on the married daughter who has a son, and on her who may have a male issue, for by means of their sons they may present oblations at solemn obsequies. He then turns to the text of *Manu* (ix, 139) which says:

"Even the son of a daughter delivers him in the next world like the son of a son;"

and then as between a son's son and a daughter's son he gives preference to the former, observing that since the married daughter is debarred from inheritance by the son it is reasonable that the son of the debarred daughter shall also be excluded by the person who bars her claim (*Dayabhaga*, Ch. 4 S. 2, 11). So far, that is to say as regards Groups 1 to 4, it may perhaps be said that spiritual benefit was a primary consideration with him. But in naming Group 5, that is to say, after the

daughter's son, he admits barren and widowed daughters. But these are unable to confer any spiritual benefit, and his reason for letting them in here is that they are also her offsprings (*Dayabhaga* Ch. 4 ii, 12), which is nothing else than the ground of natural love and affection. Srikrishna, on the other hand, being more zealous in following out the doctrine of spiritual benefit, has placed between Group 4 and Group 5 the following heirs in their order: (1) son's son, (2) step-son, (3) step-son's son and (4) step-son's son. (Srikrishna's commentary on *Dayabhaga*, Ch. 4 S. 3. *Dayakarma Sangraha* Ch: 2, S. iv, 9). Sir Gooroo Das Banerji in his *Hindu Law of Marriage and Stridhan*, Edn. 5, p. 477, has observed that though *Jimutabahan's* rule is more authoritative and also more equitable, Srikrishna's list has been generally accepted. It is clear, however, that this list as it stands gives the appellant no place, unless "step-son's son" is taken to include "step-daughter's son."

To establish that the step-daughter's son should come in under the category of step-son's son in the list of Srikrishna's heirs, or should, in any event, come in after the husband, i. e., Group 4 of the second table, Mr. Hazra relies upon paras. 31 to 34 of *Dayabhaga*, Ch. iv. S. 3. He has also argued that the decision of this Court in the case of *Purna Chandra Bysack v. Gopal Lal Sett* (5), in which it was held that the words "of the rival wife" in para. 31 and paras. 32 and 33 are interpolations and spurious was not right and that on a proper interpretation of these as well as of the paragraphs that follow it should be held that the step-daughter's son should have a place at one or other of the aforesaid places. After providing for the 5 groups of the first table, *Jimutabahana* proceeds to deal with the next group of heirs consisting of the woman's parents, her brother and her husband. So far as these are concerned it is not necessary to deal with them in detail. It is now well-settled that para 28 of *Dayabhaga*, Ch. 4, S. 3, which contains a rule of succession, and para. 29 thereof, which contains a résumé of some of the preceding paragraphs, formulate a rule which is applicable to all kinds of *Stridhan*: see *Judoonath Sircar y.* (1908) 8 C L J 869.

Basanta Kumar (6). This rule is that in the first place it goes to the brothers of the whole blood; and if there be none, to the mother; if she be dead, to the father; and on failure of all these, it devolves on the husband. The order given in the *Dayabhaga* has been accepted by the Courts as applicable to all kinds of *Stridhan*: see *Sir Gooroo Das Banerjee's Marriage and Stridhan*, Edn. 5, p. 473. Mr. Hazra has seen the difficulty that *Jimutabahana* up to para. 29 of the section has never thought of the step-daughter's son. He therefore relies upon paras. 31 to 34 and wants to get out of them a meaning which will enable his client to come in either in the group of Srikrishna's heirs or at any rate, after the husband, for either would suit him equally well. These paragraphs have therefore to be carefully considered.

In para. 31, *Jimutabahana* begins by saying "on failure of heirs down to the husband this rule is again provided" and then says: "Brihaspati thus delivers," and then cites a text of Brihaspati which runs thus: (Here the judgment stated the text and proceeded). This text has been translated in the fragments of Brihaspati, Sacred Books of the East Series, thus:

"88. The mother's sister, the wife of a maternal uncle, a paternal uncle's wife, a father's sister, a mother-in-law and an elder brother's wife are declared to be equal to a mother.

"89. If they have no legitimate son of the body, nor (other son) nor daughter's son, not *their* son *their* sister's son etc., shall inherit their property."

In paras. 32 and 33, the word *aurasa* is explained as meaning both son and daughter and a reason is given for this meaning; and the word "son" in verse 89, quoted above, is also explained as not being confined in its meaning to an issue of the body but as including the son of a contemporary wife. For such a meaning of the word "son," reliance is placed upon a text of *Manu* with reference to which it is said:

"If among all the wives of the said husband, one brings forth a male child,"

Manu has declared them all, by means of that son, to be mothers of the male issue; and a further reason is also given that if a limited meaning be given to the word *son*, the word would be superfluous and the sister's son or other remote heir would have the right of succession though the son of a contem-

porary wife be living. In this way the conclusion is reached that if there be no legitimate son or daughter, nor a grandson in the male line, nor a son of a rival wife, the right of succession devolves on the daughter's son. The question as regards the authenticity of paras. 32 and 33 arose in the case of *Purna Chandra Bysack v. Gopal Lall Sett* (5) in which the contest was between the daughter's son and the rival wife's son. Paras 32 and 33 directly bear upon this question. For reasons that are elaborately set out in the decision of Mookerjee, J., it was held in that case that the verdict of such commentators as Srikrishna, Achyuta, Moheswara and others censuring the paragraphs as spurious or questionable was well founded and that there were substantial grounds for holding that they were interpolations. The case went up before the Judicial Committee, but their Lordships observed that they would make no pronouncement on this question as it was not necessary. For us also it is not necessary to go into the question of authenticity of these paragraphs in the present case, because we cannot see how, even if they are genuine and regarded as correctly laying down the law, the son of a step-daughter can avail of them in any way for his benefit. The paragraphs make no mention of the son of a step daughter. We may observe in passing that in a later decision in the case of *Debi Prasanna Roy Choudhury v. Harendra Nath Ghose* (7) Mookerjee, J., has referred to paras. 32 to 36, but has not said anything as regards the genuineness or otherwise of paras 32 and 33. We therefore pass on to para. 34 which is the most important paragraph to be considered in this connexion. This paragraph deals with the word *tatsutah* (their son) in Brihaspati's text quoted above. This paragraph has been thus translated in *Colebrook's Dayabhaga*:

"By the pronoun in the phrase 'sons of those persons' (31) the woman's own issue and the child of a rival wife are signified. Therefore *their* sons have a right to inherit; nor the son of a daughter's son also, for he is excluded from the oblation of food or obsequies."

It is clear however that the word in the text which has been translated as *child* is the word "*putra*," the paragraph running thus (After stating the paragraph the judgment proceeded). The translation

only follows the commentators Srikrishna and others in what they have said of the word *tatsutah* in Brihaspati's text and not as to what Jimutabahana means by it. These commentators in order to give the utmost latitude to the doctrine of spiritual benefit and in order to see that its application is logically sound and consistent, have read the word *tatsutah* in Brihaspati's text as meaning not only son of the rival wife but his sister as well. They do not mean to translate Jimutabahana's rendering of the word as given in para. 34. And Srikrishna himself, in his summary of the rules at the end of the section of the Dayabhaga on which he was commenting, was content with introducing his groups of heirs between Groups (4) and (5) of the first table and giving no place to a step-daughter's son in that group or anywhere else. As for Jimutabahana himself, immediately after the husband he gives places to Brihaspati's secondary sons, and he has expressly given the order of succession in para. 37 and also taken the precaution of saying in para. 38 that the mention of the secondary sons in para. 31 was intended merely for an indication of the heirs, without specifying the order in which they succeed. In para. 39 come others, including the husband's sapindas.

It may be pointed out here that the order of inheritance of the six secondary sons amongst whom the respondent comes under Group 9 of the second table, is agreed in by Raghunandan and Srikrishna and they refer to the same doctrine of spiritual benefit as the basis of their conclusion. (See Sir Gooroodas Banerjee's Marriage and Stridhan Edn. 5, p. 498). In these circumstances, we are unable to hold that either in the text of Dayabhaga or in the authorities there is anything on which it may be held that in the law as prevailing in Bengal the appellant can come in preference to the respondent. The appeal is dismissed. We make no order for costs in it.

K.S. *Appeal dismissed.*

A. I. R. 1933 Calcutta 861

RANKIN, O. J. AND COSTELLO, J.
Rajeswari Debi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 590 of 1932, Decided on 3rd January 1933.

Criminal P. C. (1898), S. 161—Inquest report mentioning none of the people examined could give any clue as to who committed murder—Statement at time of trial by witnesses some of whom were examined at inquest, that accused confessed her guilt soon after occurrence—Accused is entitled to get copy of inquest report and cross-examine witnesses speaking to the alleged confession.

Where an inquest report mentioned that none of the people examined could give any clue to the murder, and that all of them said that the murder had been committed by some unknown person, but accused was charged with murder on the alleged confessions made by her soon after the event to the witnesses, some of whom were also examined at the time of inquest:

Held: that accused was entitled to get copy of inquest and cross-examine the witnesses, who spoke to the alleged confession by her.

Held further: that the inquest report did not come under S. 161, Criminal P. C. [P 858 C 2]

Santosh Kumar Basu and Manindra Nath Banerjee—for Appellant.

Khondkar, Deputy Legal Remembrancer—for the Crown.

Rankin, C. J.—In this case the appellant before us is a woman named Rajeswari Debi. She was put on her trial before the learned Sessions Judge of Burdwan and a jury upon a charge of murder under S. 302 and another separate charge of abetment of murder under S. 302 read with S. 109, I. P. O. The charges were in respect of the death of a woman called Lilabati who was found with her head almost severed from her body on her bed in her own house on the morning of 22nd January 1931. The prosecution case was that Lilabati's husband was away on business and that the accused who lived at a house of her own some 6 or 8 bighas distant was to come in and sleep at night with Lilabati and keep her company. It further appears that Lilabati had a small child of about 15 or 18 months who slept with her. On the morning of 22nd January Lilabati's maidservant of the name of Jhalu Metani (P.W. 6) found that her mistress was lying in bed with her throat cut in the way I have mentioned. She saw the little child come crawling or toddling out covered with blood. Several of the neighbours came before very long; the accused Rajeswari came that very moment and the President of the Union Board wrote a letter which he sent through a chowkidar to the Sub-Inspector at the police station. Neither the

Chowkidar nor the letter said anything about a particular person being suspected or having been incriminated as the murderer of the deceased. The Sub-Inspector came that day, the 22nd, and in the evening he held an enquiry. His inquest report included the statement that Lilabati had been alone in her house the previous night, that every one believed that some unknown person had committed the murder and that no one could say anything as to the cause of this murder. A number of witnesses signed that inquest report after it had been read over and explained.

From the following day the 23rd, until about the 25th the Sub-Inspector remained in the village. He examined some witnesses for example, P. W. 2 under S. 161, Criminal P. C., on the 23rd. There was no mention at that time of any confession by the accused. He examined some other witnesses, in particular P. Ws. 4 and 5, but not until 13th February, by which time witnesses were speaking to a confession having been made by the accused on the morning of the 22nd at the time the lady was discovered and in the presence of the neighbours. As a result of the investigation a certain number of circumstances were discovered. Some of these are doubtful; others are reasonably certain. The chief thing was that a large sacrificial knife in the house of the accused was found on the morning of the 23rd. It is said to have been treated with oil but nevertheless there were spots of blood on this which have been found to be human blood. In addition to that there is a witness who says that at about 3 o'clock in the morning of 22nd January he was out getting labourers and while passing Rajeswari's house he heard her saying that she was feeling restless and asking for water. The prosecution story according to their own witnesses is that when the neighbours came on the morning of the 22nd, and Rajeswari also came, Rajeswari was the person who took down the quilt from the deceased woman; that they asked her to do this, and that she took it down to a certain extent, and did not take it down further because she said the injury extended only that far. In view of this fact and in view of the fact that there was a small baby toddling about covered with blood

it is not possible to lay any great stress on the circumstance that there were spots of blood on the woman's sari or on her hands. There is something rather in favour of the accused in the circumstances that between the morning of the 22nd and the 23rd, when her sari was seized at her house, she had apparently made some attempt to wash off the patches of blood on her sari and she did not apparently make any serious attempt to delete it altogether. But there has been from the beginning to the end of this case no scrap of evidence as to motive so as to render the action of the accused intelligible on the assumption that she committed this murder. At one time a different theory of the cause of this death was apparently put forward. There was a previous trial and one man was acquitted and this woman was convicted, but she was directed on appeal to be retried.

Taking this as a sufficient indication of the character of the case, the accused woman in this appeal makes a number of complaints against the charge of the learned Judge. I think that a large part of the charge, if I may say so, is very well done, but there is one portion of the charge which it seems to me that we cannot possibly support. I have already narrated that in the evening of the 22nd the Sub-Inspector having held his inquest and having seen quite a number of witnesses recorded that nobody whom he had seen could give him any notion as to the cause of the murder and that everybody professed that it was some unknown person. Now the main plank of the prosecution evidence in this trial is that on the morning of that day Rajeswari had uttered various expressions, some of which are entirely ambiguous and not necessarily expression of guilt at all, but that among other things she actually said "Look at the blood on my hands. I have cut her." It was therefore very important indeed for the defence to get before the jury the fact that although according to the prosecution this woman had used language of that kind in the morning in the presence of a number of neighbours including some of the persons most interested the Sub-Inspector in the evening was not informed of any such confession, all the people whom he had examined professing to have no know-

ledge at all as to the person who did the murder and attributing it to some unknown person. Now the defence do not appear to have seen the importance of this as early as they might have done. On 21st May before the Sub-Inspector went into the box this matter was clearly in the mind of the defence and they put in a petition according to which they wanted the learned Judge to give them a copy of this inquest report and wanted that certain witnesses speaking to the confession by the accused on the morning of 22nd January should be cross-examined upon it.

The learned Judge following, as he thought, a decision of this Court in the case of *Emperor v. Karimuddi Sheikh* (1) refused to allow that inquest report to be used by the defence to throw doubt upon the evidence of confession given by the prosecution. In my judgment there is no foundation whatsoever for such a ruling and it would be very remarkable indeed if so obvious a test of the evidence of the prosecution witnesses was not to be available to the defence. It is not evident to me that the inquest report comes under S. 161, Criminal P. C., but in any view in this case it did not matter. What the Sub-Inspector says is that neither A nor B nor C nor D nor any one of the people whom he examined including those who signed the inquest report had any knowledge as to who committed the murder. Therefore it is not a question of a joint statement as distinct from a separate statement. All these people should have been cross-examined as to how it came about, if what they say is true, that the Sub-Inspector did not hear anything that morning though one of the witnesses was a witness before the Sub-Inspector and signed the inquest report. To take away from the defence the right to make the most of that point before the jury was to reduce this trial almost to a farce. I may say for myself that as a jurymen on the basis of this fact alone I have very little doubt indeed that the evidence of confession in this case is entirely false. Now it is not necessary to examine the validity of some of the other criticisms which Mr. Basu has made about the charge of the learned Judge. It seems to me that the fact

that this inquest report according to the ruling of the learned Judge himself was not to be considered by the jury by way of casting doubt upon the evidence of confession makes it quite impossible to sustain the verdict given by the jury. The learned Judge says that he has disallowed the defence from using the inquest report in this manner because it is a joint statement. That in my judgment is entirely a fallacious view to take.

Now the charge of murder is a very serious charge and even although this woman has been tried twice it is a very serious matter which we have to consider, viz., whether she ought to be tried for a third time. The basic fact in the circumstances of this case is that whereas there was a case of a certain character and a certain degree of strength on the charge of murder she has been acquitted by the jury of that charge and I think very properly acquitted of that charge. At the end of the charge the learned Judge introduced the question of abetment of murder. He says that "the learned Public Prosecutor argues that even if you come to a finding of not guilty as regards the murder, you should still consider whether she is not guilty of abetment, for the evidence of P. W. 4, Gopi Krishna Roy, before the committing Magistrate, was that this woman Rajeswari said at the time of her confession 'I have opened the lock.'"

He goes on to point out that this witness states that he does not remember if he said so before the committing Magistrate. Then the learned Judge goes on to put a further argument of the Public Prosecutor that if the woman Rajeswari was in the house of Lilabati she must have opened the door no matter who the assailant was and Rajeswari therefore was an abettor. It is a little difficult to see why if the confession that she backed Lilabati is not reliable the remark "I have opened the lock" should be relied upon to convict her of abetment. At any rate there is no such evidence worthy of consideration in this trial; and as to the suggestion that if the woman was there she must have let the assailant in, I can only say that it does not appear that there is very much in that and that in any event to let the assailant in is not necessarily to let him in with the knowledge that he would murder Lilabati. I regard the charge of abetment in this case as entirely unsupported. I cannot imagine why a

separate charge of abetment was ever framed; and what has happened in this case is that the jury have acquitted the woman on the charge of murder but have found her guilty of the charge of abetment of murder. It seems to me quite wrong that this woman should ever be tried on this charge because the prosecution has no statable case. It is not known to this day what case of abetment could be run against this woman. There are three kinds of abetment according to law. I do not think that blood on the woman's Sari has anything to do with the charge of abetment. The charge of abetment is certainly not a charge on which it is reasonable to have this woman remanded for retrial. As regards the charge of murder she has been acquitted of that charge and in my judgment there is no reliable evidence against her except the fact that a knife hanging in her house was found to be marked with some stains of human blood. I put aside the evidence of confession as almost palpably untrue. The evidence of the man who says that he heard her say something at 3 o'clock in the morning is extremely suspicious to my mind, and even the evidence that this woman was at that night sleeping with Lilabati, if you take it as a whole, is extremely doubtful. I cannot myself think it possible that if this woman is properly tried she would again be convicted of the charge of murder of which the jury in the present case have already acquitted her notwithstanding the summing up which did not allow the jury to take into consideration a point which is a very strong point in favour of the defence. In these circumstances it seems to me that the proper course is to allow the appeal and to direct that the woman Rajeswari Devi be acquitted and released. It is not necessary in the interest of justice or proper that she should be retried.

Costello, J.—I agree.

K.S.

Appeal allowed.

A. I. R. 1933 Calcutta 864

GUHA, J.

Altap Ali and others—Appellants.

v.

Srish Chandra Dutta and others—Respondents.

Appeals Nos. 1 to 3 of 1931, Decided on 19th March 1933.

Bengal Tenancy Act (8 of 1885), S. 153—Claim for arrears of rent for particular period and claim for enhancement of rent from subsequent period in same suit kept distinct and separate—Decree for arrears of rent is not appealable.

In certain suits, the claims for arrears of rent and for enhancement were made, but the claims were kept quite distinct and separate and enhancement was claimed only subsequent to the period covered by the arrears of rent claimed; and the Court also adopted the same course in passing decree in the suits:

Held: that the decree for arrears of rent was not appealable: *A I R 1926 Cal 1152, Rel on; 4 I C 745, Dist.* [P 864 C 1]

Ramdayal De—for Appellants.

Atul Chandra Gupta and Birendra Chandra Das—for Respondents.

Judgment.—The plaintiffs in the three suits in which these three appeals have arisen, prayed for realisation of arrears of rent for the period for 1335 to the Bhadra Kist of 1338 B. S., in respect of three tenancies. In addition to the claims for recovery of arrears of rent for the period mentioned, there was a prayer for enhancement of rent on the ground of rise in prices, as provided by S. 30, Ben. Ten. Act. The tenants defendants raised various questions in resisting the plaintiff's claim for rent as made in the suits. It was pleaded that the suits were not maintainable, and that the defendants did not hold the jamas in respect of which rents were claimed, under the plaintiffs. As indicated by the Court of appeal below, the question of the maintainability of the suits for recovery of arrears of rent, as also the question of the relationship of landlord and tenant between the parties, were the main questions at issue between the plaintiffs and the defendants. The trial Court observed in its judgment that it was futile to raise complicated issues in these suits for rent, and did not apparently decide the questions of title indicated in the same. The Court, however was asked to decide the question of liability of the defendants to pay rent on the basis of realization of the same; and the decision of the Court of first instance went against the plaintiffs: the suits were dismissed.

On appeal the learned Subordinate Judge in the Court of appeal below, observed that the materials before the Court were not convincing enough to lead to an inference that the plaintiffs had not the title in them to receive rent from the defendants, and that leaving

aside the question of title which was not necessary to investigate in these rent suits, it could not be held that the plaintiffs should be deprived of their right to get rents from the defendants in these cases for the period in suit, as they (the plaintiffs) were in receipt of rents for the previous years; that if any other party had a better title, it was open to that party to bring an action against the plaintiffs for establishment of that title. The plaintiffs' suits were accordingly decreed by the Court of appeal below, so far as the claims for recovery of arrears of rent were concerned, and the cases were remanded to the primary Court for decision on the issues as to whether the plaintiffs were entitled to enhancement of rent under S. 30, Ben. Ten. Act, and if so, to what extent. The claims for realization of arrears of rent as made by the plaintiffs in the suits, and the claims for enhancement of rent, which according to the statements in the plaints in the suits, which were to take effect—after the period for which there were the claims for recovery of arrears of rent—were kept distinct and separate. This was the obvious course to be adopted in view of the claims made in the plaints as the plaintiffs had not claimed recovery of arrears of rent at an enhanced rate, after determination of the amount of enhancement under S. 30, Ben. Ten. Act. So far as the decision and decrees of the Court of appeal below, entitling the plaintiffs to realise arrears of rent as claimed in the suits, the defendants have appealed to this Court.

A preliminary objection was taken on behalf of the plaintiffs-respondents that the appeals to this Court were not maintainable, regard being had to the provisions contained in S. 153, Ben. Ten. Act. In view of the claims separately made in the plaints for recovery of arrears of rent for the period mentioned, and for enhancement of rent, the claims not being for rent at an enhanced rate, I have no hesitation in coming to the conclusion that the appeals cannot be held to be maintainable under the law. The suits, so far as they related to arrears of rent for the period from 1335 to the Bhadra Kist of 1338 B. S., were obviously suits in which claims for recovery of rent within the meaning of S. 153, Ben. Ten. Act, were made, and there-

was no question of assessment of rent involved in those claims before the Court. As has been indicated above, the claims for recovery of arrears of rent at a specified rate, and the claims for enhancement under S. 30, Ben. Ten. Act, were kept altogether distinct and separate by the plaintiffs, and the Court below in passing decrees in favour of the plaintiffs had adopted that course.

In the above view of the cases before me, regard being had to the reason for the decision of this Court in the case of *Beni Madhab v. Bijoy Chand* (1), with which I am in entire agreement, the appeal to this Court preferred by the defendants-appellants which clearly relate to the claims made by the plaintiffs-respondents, for realisation of arrears of rent for a particular period, at the rate specified, must be held to be not maintainable. It may be mentioned that the decision of this Court in the case of *Dhanukdhari v. Baburam* (2), on which reliance was placed on behalf of the appellants, is of no assistance to them, inasmuch as the suit in which the above decision was given was of a description to which S. 153, Ben. Ten. Act, would have no application. This has been clearly pointed out by the learned Judge of this Court deciding *Beni Madhab's* case (1), to which reference has been made above. In the result, the appeals are held to be not maintainable, and are dismissed with costs. One hearing fee is allowed in the three appeals.

K S. *Appeals dismissed.*

1. A I R 1926 Cal 1182 = 96 I C 570.
2. (1909) 4 I C 745.

A. I. R. 1933 Calcutta 865

MITTER AND HENDERSON, JJ.

Nagendra Nath Roy and others — Appellants.

v.

Haran Chandra Adhikary — Respondent.

Appeals Nos. 37 and 57 of 1933, Decided on 12th April 1933, against order of Dist. Judge, Fabna, D/- 30th November 1932.

(a) Practice — Witness — Trial Court has discretion in matter of recalling witness for further examination.

The trial Court has a discretion in the matter of recalling a witness for further examination, and if it thinks that the questions to be put to such witness are more or less of frivolous character or irrelevant, it can refuse to recall such witness. [P 868 C 1]

(b) Civil P. C. (1908), S. 49 — Mere claim for restitution of certain sum of money against decree-holder is not equity available to the judgment-debtor.

Judgment-debtor had applied to claim restitution of a certain sum of money against his decree-holder. The decree was assigned by the latter to another who had notice of the application. In execution of the decree by the assignee, the judgment-debtor contended that the right of assignee was subject to his claim for restitution :

Held : the mere claim for restitution was not an equity which was available to the judgment-debtor and that he had no right of set off on date of application for execution : 16 Cal 619, *Ref.*

[P 868 C 2]

(c) Decree—Execution—Execution by assignee of decree-holder—Order for sale made in lifetime of latter — Legal representative of decree-holder cannot contend that execution cannot proceed for entire sum.

Where an assignee of a decree obtains an order for sale in execution of the decree during the lifetime of the assignor, the latter's legal representatives cannot, on principle analogous to res judicata, contend that execution cannot proceed for the entire sum in respect of which it was sought to bring about sale of the property : 8 Cal 51, *Ref.*

[P 869 C 1]

(d) Debtor and Creditor—Creditor becoming heir to debtor or vice versa — Two interests are merged.

When, on account of death a creditor becomes heir to a debtor, or a debtor becomes heir to a creditor, and thus the two opposite characters of debtor and creditor become united in the same person there is merger of two interests : 5 All 27, *Rel on.*

[P 869 C 1]

(e) Civil P. C. (1908), S. 2, Cl. (11) — A person to become legal representative must retain possession of the property belonging to the estate with intention to represent the estate.

It is one of the essential tests with regard to the case of persons who intermeddle with the estate of another before they can be called as legal representatives of the deceased persons, that they must retain possession of properties belonging to the estate with the intention of representing the estate ; A I R 1926 Cal 825, *Rel on.*

[P 869 C 2]

(f) Practice — Objection as to prayer for discovery not taken in grounds of appeal in lower appellate Court—It cannot be taken in second appeal—Civil P. C. (1908), S. 100 and O. 11, R. 11.

An objection, that there has been prejudice by reason of the prayer for discovery not having been given, effect to, if not raised in the grounds of appeal in the lower appellate Court, cannot be allowed to be raised in second appeal.

[P 870 C 1]

Rupendra Coomar Mitter and Surajit Chandra Lahiri—for Appellants.

Atul Chandra Gupta, Satish Chandra Sinha and Bansorilal Sarkar — for Respondents.

Mitter, J.—The facts of the two appeals, Nos. 37 and 57 of 1933, are to

some extent inter-connected with each other and it is necessary to state the facts of the two cases in the order in which they have been presented by the learned advocate for the appellant. It appears that there were two brothers of the name of Prasanna and Bhabani. Prasanna had also another name Gurucharan. He died leaving behind him a widow Sham Rangini and his brother Bhabani. During the lifetime of Sham Rangini she executed a deed of relinquishment of her husband's estate in favour of Bhabani, the latter promising to giving a certain amount as maintenance to the lady during her lifetime. In 1917 Bhabani executed a promissory note for certain amount in favour of Sham Rangini who instituted a suit against Bhabani on the said note. During the pendency of that suit Bhabani died. Sham Rangini however obtained a decree against the sons of Bhabani who are four in number, namely Syamapada Roy, Nagendra Nath Roy, Birendra Nath Roy and Jogendra Nath Roy.

Against this decree which was obtained by Sham Rangini against the present appellants, namely the sons of Bhabani, the latter preferred an appeal to the District Judge. In the meantime Sham Rangini took out certain proceedings to which it is not necessary to refer. On 20th October 1925, during the pendency of the appeal, the amount which was decreed in her favour and which had swelled at that time to a sum of Rupees 2,070 odd was withdrawn by Sham Rangini, one of her relations having stood surety for her. On 5th March 1930 the learned District Judge in the appeal brought against Sham Rangini came to the conclusion that her suit on the promissory note was barred by the statute of limitation and the suit was accordingly dismissed by the appellate Court. Sham Rangini preferred an appeal to the High Court. On 15th December 1930 the defendants, that is, the sons of Bhabani, made an application for refund of the money which had been taken out by Sham Rangini after the decision of the Court in the promissory note case. To this proceeding the surety was added as a party. On 4th January 1931, while the appeal to the High Court was pending, Sham Rangini died. On the death of Sham Rangini the appellants wanted

to bring on record three persons, Kumudnath Roy, Ambikapada Roy, and one Haran Chandra Adhikary, on the ground that they had intermeddled with the estate and as such they were legal representatives of Sham Rangini or of her husband's estate within the meaning of S. 2, Civil P. C. The Subordinate Judge held that they are not the legal representatives, as the appellants are the legal representatives, being both the reversioners of Sham Rangini's husband's estate as also the heirs of her stridhan property. The Subordinate Judge accordingly dismissed this application for restitution. The District Judge has affirmed that decision holding at the same time that no appeal lay to him. Notwithstanding, the learned District Judge has gone into the merits of the case. It is against that order of the District Judge that an appeal from appellate Order No. 57 of 1933, has been preferred to this Court.

Now to come to the facts of appeal from appellate Order No. 37 of 1933. On the reversal of the judgment by the District Judge in the promissory note suit it is said the defendants-appellants became entitled to an amount of about Rs. 4,500. Sham Rangini brought a suit for arrears of maintenance and obtained a decree against Bhabani on 11th June 1930. On 20th August 1930 she made an application for execution for a sum of about Rs. 1,379. On 23rd December 1930 Sham Rangini is said to have assigned the benefit of this ex parte decree of Rs. 1,379 in favour of one Haran Chandra Adhikary who is respondent in appeal No. 37. The validity of this deed of assignment was challenged by the defendants. They alleged that as the deed was registered on the date on which Sham Rangini died, that is on 4th January 1931, it cannot be said to be a deed which was registered by her at a time when she was in full possession of her senses and it was further contended that the deed of assignment was a forgery as Sham Rangini was admittedly a literate lady and as she is alleged to have signed the document in eight places in four of which her name was spelt in four different ways.

The handwriting expert one Mr. Hardless was examined who has deposed that the deed does not contain

her signature. It is to be observed that the thumb impressions which were there are not disputed to be her thumb impressions; but it is said that the thumb impressions were obtained at a time when the lady was unable to execute the deed of assignment. It was further said that the Sub-Registrar before whom the deed was registered was examined. The present appellants asked for further recalling of this witness in order to put him certain relevant questions their case being that the Sub-Registrar had never been near Sham Rangini's residence at the time when the deed was said to have been registered. Both the Courts below have agreed in the view that the deed of assignment is a genuine one and that it was executed for consideration by Sham Rangini and have accordingly disallowed the objections raised on behalf of the present defendants-respondents. Against this concurrent judgment appeal No. 37 has been brought to this Court.

We deal with appeal No. 37 first as that has been argued first by the learned advocate for the appellants. Two questions arise in this appeal. It is argued in the first instance that the judgments of the Courts below are vitiated by irregular procedure which was followed by the Court of first instance seeing that the trial Court shut out evidence on material points and has allowed the late production of a document which has been marked as Ex. F in the case and that the appellants have been seriously prejudiced by the reception of this document at the late stage. It is stated in the second place that Haran Chandra Adhikary, the respondent in the present appeal, has taken the assignment with notice of the claim made in the application for restitution by the present defendants-appellants against Sham Rangini and that the Courts below should have held that the defendants were entitled to get a set off of the sum for which restitution has been applied. With regard to the first of these grounds we are of opinion that there is absolutely no substance in it. It appears that the Sub-Registrar who was examined on 24th August was not put the question which it is now complained the appellants should have been allowed to put to him. Several days after, some time in September, an application was put in,

before the Court stating that some material questions should be put to the Sub-Registrar in support of the case made by the appellants that the Sub-Registrar was nowhere near Sham Rangini's residence on the date the deed of assignment was executed.

We ourselves have examined those questions and we are of opinion that the Courts below were right in coming to the conclusion that some of those questions were not of any relevancy and did not bear on the questions in issue in the present case. In matters of this kind a certain amount of discretion is always vested in the trial Court, and in the exercise of that discretion the Court of first instance was of opinion that the questions were more or less of a frivolous character, and having examined some of the questions we have read we are of opinion that this ground must fail. With regard to the late production of Ex. F it appears that this document was not in possession of the present respondent, but was in the possession of a pleader who produced it on 4th June 1931. It does not appear that any application was made to the trial Court asking for time to rebut the evidence produced at the late stage namely to rebut the letter which was really produced for the purpose of showing an admission made by Sham Rangini as to the execution of the deed of assignment in question.

With regard to the second point taken namely that the assignment was subject to equities and that the Courts below were wrong in not allowing a set off of the sum of Rs. 4,000 odd which forms the subject matter of the application for restitution against the sum of Rs. 1,379 in respect of which the application for execution has been made by her, reliance has been placed very strongly by Mr. Mitter who appears for the appellants in these two appeals on S. 49, Civil P.C. It is said Haran Chandra Adhikary who was really looking after the litigation on behalf of Sham Rangini had notice of this application for restitution and as such he must be said to have taken the assignment with notice of this equity. The question which arises for decision is as to whether the

tution of certain sum of money, Sham Rangini can be held to be an equity which was available in favour

of the present appellants. It is contended for the respondent that S. 49 which occurs in the body of the Code is expressed in very general terms and it is the rules in the schedule to the Code which really state the way in which this equity is to be worked out and it was never intended by the framers of the Code that although there was in existence on the date of the assignment no cross decree in the restitution matter, still the rights of the assignees will be subject to the mere claim for restitution. If one looks to S. 49 of the Code the illustrations to the section which of course are not exhaustive show that in both the illustrations what was allowed to be set off were the two decrees that had been obtained on the date when the execution application was made.

The principle which is embodied in S. 49, Civil P. C., is the same as that enacted in S. 132, T. P. Act of 1882, and it appears to us that the right of set off is undoubtedly an equitable right, and if the judgment-debtor has the right to set up a cross decree under O. 21, R. 18 of the Code, he has this right also against the transferee of the decree-holder. Reference may be made in this connexion to a decision of this Court in the case of *Kristo Ramani Dassee v. Kedar Nath* (1), which was decided at the bar. In Illus. 2, which really is taken from the facts of the case of *Kristo Ramani Dassee v. Kedar Nath* (1) to which we have just referred, it appears that at the time when C applied for execution against B of the whole decree B had already obtained a decree against C and it was held that C was not entitled to execute the decree for more than the sum which C could recover after the set off. From the other illustration also it appears that if A holds a decree against B for a sum of Rs. 5,000 and B holds a decree against C for Rs. 3,000 and A transfers his decree to C, C cannot execute the decree against B for more than a sum of Rs. 2,000. The right of set off was not in existence on the date when this application for execution of the present respondent in respect of the decree assigned over to him was made. In these circumstances it appears to us that this ground also must fail. It has been pointed out further on behalf of the respondent that even during the life-time of

Sham Rangini the order for sale, in execution of the decree which has been assigned over to the present respondent was made and it is argued on the principle analogous to *res judicata*, which has been enunciated by their Lordships of the Judicial Committee of the Privy Council in the case of *Mungal Pershad Dicit v. Gria Kant Lahiri* (2) that it is no longer open to her legal representatives to contend that execution cannot proceed for the entire sum in respect of which it is sought to bring about a sale of the property. On all these grounds we are of opinion that this contention of the appellants must also fail. The result is that this appeal must be dismissed.

To take now Appeal No. 57. It is argued in this appeal that the Courts below were not right in coming to the conclusion that this application for restitution must fail seeing that there has been a merger of the rights of the creditor and the debtor the two rights having vested in one and the same set of persons. It appears that after the death of Sham Rangini as has already been stated her husband's estate vested in the present appellants and the present appellants are also the heirs of Sham Rangini. Therefore one could see every reason in ordinary circumstances to hold that after Sham Rangini's death the rights of the estate of Sham Rangini, either her personal estate or her husband's estate would vest in the appellants. Therefore the position is that so far as the application for restitution is concerned the applicants and the opposite parties would be one and the same set of persons. There would in such circumstances be what has been termed as merger of two interests. This position was considered in a very early case by the very learned Judge, Mahmood, J., of the Allahabad High Court. In circumstances similar to the present the learned Judge observed in the case of *Banarsi Das v. Maharani Kuar* (3), (at p. 34) thus :

"We are prepared to hold that when on account of death a creditor becomes heir to a debtor or a debtor becomes heir to a creditor, and thus the two opposite characters of debtor and creditor become united in the same person the application to pay money may be regarded as extinguished."

This principle has been followed in a

later decision one of which was the decision of the Madras High Court to which the learned District Judge has referred. The principle accords with common sense and we agree with the principle laid down in the Allahabad case. In our opinion that application for restitution by the appellant can no longer be executed. It is next said that even if it could not be executed as against the present appellant it is certainly executable as against some persons, namely the respondents who have already been stated to be three in number who have intermeddled with the estate of Sham Rangini's husband as also with her own personal estate and as such they are legal representatives against whom execution can be levied within the meaning of S. 2, Cl. 11, Civil P. O. The facts which have been found are that they have in their possession a small part of the movables, namely the utensils and so forth, and perhaps a small cash belonging to the estate either of Sham Rangini or her husband. But there is no finding, neither there is any assertion, in the application to substitute them as legal representatives to the effect that they are in possession of the movables and cash with the intention of representing the estate either of Sham Rangini or her husband. In these circumstances it becomes very difficult to hold that they are really legal representatives within the meaning of S. 2, Cl. 11, Civil P. O. It is one of the essential tests with regard to the case of persons who intermeddle with the estate of another before they can be called as legal representatives of the deceased persons that they must retain possession of properties belonging to the estate with the intention of representing the estate. That is the view which has been taken in a very recent case in this Court in the case of *Satya Ranjan Roy v. Sarat Chandra* (4) which has been also referred to by the learned District Judge.

It is next said as a part of the argument on this branch of the case that by reason of irregularity of procedure in the Court of first instance it has not been possible for the appellant to establish that the three persons who are the respondents are really the legal representatives within the meaning of O. 2, R. 2. It is said that an application was

2. (1910) 8 Cal 51=8 I A 128=4 Bar 248 (FC).
3. (1883) 5 All 27=(1882) A W N 140.

4. A I R 1925 Cal 825=95 I C 695.

made asking for discovery of the books of the estate and that application was acceded to by the Court and notwithstanding that the books which were in possession of the three respondents have not been produced and the Court should have taken other steps to ensure the production of those books and if those books had been produced it would have been possible to show that the respondents were in possession of a large portion of the cash and movables belonging to the estate and from that intention might have been gathered that they did so with the object of representing the estate. It appears further that when this application for discovery was made each of the three persons came forward and said that they were not in possession of those books and consequently notwithstanding the order made by the Court the case proceeded without these documents. It appears further that this objection, namely, that there has been prejudice by reason of this prayer for discovery not having been given effect to was not taken in the grounds of appeal before the learned District Judge in appeal. In these circumstances we do not think we shall be right in allowing this objection to be raised here. It is not necessary in this view to consider the other ground on which the appeal of the appellant before the lower appellate Court was dismissed, namely that the appeal was incompetent for the learned advocate for the respondents does not wish to press this ground. It appears therefore that for reasons we have given this appeal must also be dismissed. The result therefore is that both these appeals must be dismissed with costs. We assess the hearing-fee at two gold mohurs in each case.

Henderson, J.—I agree.

K.S. *Appeals dismissed.*

***A. I. R. 1933 Calcutta 870**

LORT-WILLIAMS AND MCNAIR, JJ.
Dahu Raut and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Admitted Appeals Nos. 326, 340, 407 and 432 of 1933, Decided on 29th August 1933.

(a) Criminal P. C. (1898), S. 369 — Judgment of two Judges as Criminal Bench cannot be overridden by any other Judge or Bench of Judges.

A judgment of two Judges sitting as a Criminal Bench is a judgment of the High Court and

no other Judge or Bench of Judges has power to override, alter or review it except to correct a clerical error. Even the same Bench becomes functus officio when once judgment is signed: 14 Cal 42, *Rel. on.* [P 871 C 1; P 873 C 2]

(b) High Court — Chief Justice has no greater judicial powers.

The Judicial powers of the Chief Justice are not greater than nor different from, but exactly the same as, those of any other Judge of the Court: 2 C W N 481, *Ref.* [P 871 C 1]

(c) Criminal P. C. (1898), S. 439 — High Court admitting appeal on question of sentence only — It can pass orders, where it does not want any assistance from party or Crown, without issuing notice or sending for records.

Where the High Court is satisfied that the conviction was justified, but thinks that there may be grounds for reduction of sentence, it will generally invite the Crown and the appellant, or either of them, to furnish information, in order to assist the Court to arrive at a decision. In such a case, the practice is to admit the appeal on the question of sentence only, though it is doubtful whether this procedure is strictly within the provisions of the Code. But where the Court does not require any further information on the point, it would be merely a waste of time, money and labour, to issue notices, and send for records, and summon parties whom the Court does not wish to hear, and in such case the Court has jurisdiction to pass orders without issuing notice or sending for records. [P 872 C 2]

(d) Criminal P. C. (1898), S. 439—Crown has no right to influence Court in revision on question of punishment

The question of punishment is peculiarly a matter for the Court, and in revision the Crown has no right to seek to influence the Court on this question, unless invited by the Court to do so. [P 872 C 2]

(e) Criminal Trial — High Court Bench acting without jurisdiction—Only remedy is to move Local Government.

Where a Bench of a High Court sitting as a criminal appellate Court has acted without jurisdiction the only remedy is to move the Local Government to exercise the royal prerogative where the accused has been prejudiced

[P 873 C 2]

(f) Criminal P. C. (1898), S. 561-A — S. 561-A does not add to powers of High Court — Inherent power does not include power to review order made in criminal appellate jurisdiction.

Section 561-A in no way adds to the powers of the High Court. It merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. The inherent powers of the Court do not include the power to review an order which has been made in the criminal appellate jurisdiction: A I R 1938 Lah 462, *Appr.* [P 874 C 2]

Satindra Nath Mukherjee, Syed Nasim Ali, Suresh Chandra Talukdar and Bhudhar Haldar—for Appellants.

Lort Williams, J.—Some weeks ago a complaint was made in Court to the Acting Chief Justice by the Deputy

Legal Remembrancer that certain orders passed by my learned brother and myself were illegal and made without jurisdiction. No petition or affidavit was filed, and the process was wholly irregular, as the Deputy Legal Remembrancer, and the Legal Remembrancer who instructed him, ought to have known. The Acting Chief Justice quite properly decided that he had no jurisdiction whatsoever to interfere with the orders of the Division Bench. But as I had heard about the complaint, and expressed my willingness to consider the matter further, he directed that my learned brother and myself should form a Division Bench, when the Crown could mention the matter, if it was so advised. I fail to understand what was the object of making a complaint to the Acting Chief Justice, or what interest he was alleged to have in the matter. Such a procedure was an act of disrespect to the Court, directly to the Division Bench, and indirectly to the Acting Chief Justice. No complaint had been made to us by the Deputy Legal Remembrancer or anyone else, and the Deputy Legal Remembrancer presumably, and the Legal Remembrancer who instructed him, had some knowledge of the legal position, which was stated with clarity and precision by Sir Comer Petheram, C. J., and a Full Bench in *In the matter of the petition of P. W. Gibbons* (1), decided so far back as the year 1886, which decision no one since has seriously attempted to question.

A judgment of two Judges of this Court sitting as a Criminal Bench is a judgment of the High Court of judicature at Fort William in Bengal, and no other Judge or Bench of Judges of this Court has power to override such judgment. The judicial powers of the Chief Justice are not greater than or different from, but exactly the same as, those of any other Judge of the Court. On this point reference may be made to the case of *Empress v. Khagendra Nath Banerji* (2). Moreover, in my opinion the Court when it has signed its judgment has no power to alter or review it, except to correct a clerical error. (S. 369, Criminal P. O.) The four orders to which exception has been taken were as follows:

Appeal No. 326 of 1933.—The term of the order was "the appeal is admitted. The sentence passed on the appellant is reduced to six months' rigorous imprisonment." That was a case in which the appellant, who was a farash working in the Imperial Secretariat Buildings, and a young man with no previous conviction, was convicted of stealing some bags containing bundles of forms, which he asserted were waste paper, but which the prosecution said were unused and current forms. In the circumstances we thought that six months' rigorous imprisonment was ample.

Appeal No. 340 of 1933.—In this case the order was "the appeal is admitted." The appellant was a young man with good antecedents and no previous conviction, who had been convicted under S. 420, I. P. O. He had ordered certain goods and issued two worthless cheques. The goods were seized at the railway station and the complainant suffered no loss. In view of the age of the accused, and the fact that the complainant was willing to compound the offence we reduced the sentence of imprisonment for one year, to a sentence of imprisonment for six months, though we said that the Chief Presidency Magistrate was quite justified in passing the sentence which he did. In our opinion, in view of all the circumstances and the appellant being only 22, a sentence of six months was sufficient.

Appeal No. 407 of 1933.—There were three appellants in this case, and they had been convicted under the Indian Registration Act and the Indian Penal Code for forgery and conspiracy in respect of a kabala. No. 1 had been sentenced to five years for conspiracy and three years under the Indian Registration Act, the sentences to run consecutively. No. 2 had been sentenced to six years, and No. 3 to five years. We went carefully through the charge, and we saw no reason for discriminating between the three accused, and we thought that five years rigorous imprisonment was sufficient for each of them. We therefore directed the two sentences against No. 1 to run concurrently and not consecutively, and reduced the sentence of No. 2 to five years. We did not interfere with the sentence of No. 3. The result was that each of the appellants became liable to five years' rig-

1. (1887) 14 Cal 42.

2. (1898) 2 O W N 481.

rous imprisonment. Nothing was said in this order about dismissing or admitting the appeal.

Appeal No. 432 of 1933.—The appellant had been convicted under S. 436, I. P. C., and sentenced to four and a half years' rigorous imprisonment and a fine of Rs. 100, or in default to rigorous imprisonment for six months more. The sentences of imprisonment to run concurrently. The order stated that the appeal was allowed on the question of sentence only. We thought fit to point out that the Judge must have made some mistake in the sentences, because he first inflicted rigorous imprisonment for four and a half years and a fine of Rs. 100 or in default six months' rigorous imprisonment, which was to be in addition to the four and a half years making five years in all. But he went on to say that the sentences of imprisonment should run concurrently. The latter part of his order therefore contradicted the former part. Further there was no provision that the fine should be paid as compensation to the complainant. We drew attention to the fact that the Court had repeatedly said that there was no object in inflicting a fine as well as a long term of imprisonment, except where the fine was to be used for the purpose of compensation, and in other special cases to which we had referred in past decisions of the Court. We went on to say that in the circumstances of the present case the only reason for inflicting a fine would be that it should be paid as compensation to the person whose house was burnt. Therefore we confirmed the conviction, but altered the sentence to a term of rigorous imprisonment for four years and a fine of Rs. 100 which, if realized, was to be paid as compensation to the person whose house was burnt: in default of payment of the fine, the accused was to undergo a further period of imprisonment for six months; that is to say, in default of payment of the fine he was to undergo, in all 4½ years, rigorous imprisonment, which was exactly the term of imprisonment which the Magistrate intended to inflict upon him.

It is complained that as the appeals were admitted, the usual notices ought to have been given, and the appeal heard as provided in Ss. 422 and 423, Criminal

P. C. In each of these orders as drawn up there are clerical errors, and the form of the order is not in accordance with the judgment which I gave. This was overlooked when the orders were signed—what I said was, that there was no necessity to send for the record—and then I proceeded to give reasons why the sentences ought to be modified. According to my recollection nothing was said about admitting or dismissing the appeal, but the effect of the order was, that the appeal was dismissed summarily under S. 421, Criminal P. C., and the sentence was varied under the Court's revisional powers, the proceedings having otherwise come to its knowledge within the meaning of S. 439, Criminal P. C.

This kind of order is not the usual one of admission or rejection of the appeal and doubt seems to have arisen in the mind of the Bench Clerk, and in the office, about the correct form of the order. In future the senior Judge of the Criminal Bench should be consulted, when any doubt or difficulty arises about the form of the judgment of the Court. A number of similar orders were made by the criminal Bench over which I presided two years ago, and no complaint was made by the Crown or by anyone. This form of order is convenient and useful, and is intended to save unnecessary waste of time, labour and expense, which is a matter not to be lightly disregarded in these difficult days. Where the Court is satisfied that the conviction was justified, but thinks that there may be grounds for reduction of sentence, it will generally invite the Crown and the appellant, or either of them, to furnish information in order to assist the Court to arrive at a decision. In such a case, the practice is to admit the appeal on the question of sentence only, though it is doubtful whether this procedure is strictly within the provisions of the Code. But where the Court does not require any further information on the point, it would be merely a waste of time, money and labour, to issue notices, and send for records, and summon parties whom the Court does not wish to hear.

It must be remembered that the question of punishment is peculiarly a matter for the Court. In revision the Crown has no right to seek to influence the

Court on this question unless invited by the Court to do so. The Deputy Legal Remembrancer must have overlooked this, when he complained to the Acting Chief Justice that he had a great deal to say upon the subject in connexion with the four sentences to which I have referred. The Court always hears him with patience, but in revision neither party has any right of audience, though no order must be made to the prejudice of the accused, unless he has had an opportunity of being heard: Ss. 439 and 440, Criminal P. C. I am satisfied that the Court has jurisdiction to proceed as it did. If such procedure were not strictly within the provisions of the Code provision for it ought to be made without delay. But in my opinion we have the power already. The powers of the Court in revision are almost unlimited. In particular it has all the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428, Criminal P. C. In an appeal under S. 423 the Court has no power to enhance the sentence, but it may do so in the exercise of its revisional powers. If the Court has power to enhance the sentence in revision, surely it has power to modify or reduce it. The Court when hearing an appeal may alter the finding, and then under its revisional powers enhance the sentence: see the case of *Re Bali Reddi* (4). In the case of *Aridoy Mondal v. Emperor* (5) the accused had pleaded guilty to murder, and had been sentenced to transportation for life, and had appealed. The Court dismissed the appeal, because he had pleaded guilty, and the minimum sentence had been passed, but in exercise of its revisional powers, the Court altered the conviction to one under S. 304, I. P. C., and sentenced the appellant to seven years' rigorous imprisonment.

The Acting Advocate-General has not attempted to support the procedure before the Acting Chief Justice, but he has argued that the orders were illegal being made without jurisdiction. He contends that the Court has two alternatives only, and must either dismiss an appeal summarily under S. 421, Criminal P. C., or cause notices to be given and hear the appeal under S. 422. Fur-

ther he contends that in such circumstances the Court cannot exercise its revisional powers under S. 439, because it cannot dismiss an appeal summarily unless it thinks that there is no sufficient ground for interfering (S. 421). Assuming that the Court has acted without jurisdiction, then he contends that it has power to treat the illegal orders as being void ab initio, and to rehear the matter on its merits, and he has referred us to the case of *In re Soma Naidu* (6), and to the case of *Ramesh Pada Mandal v. Kadambini Dassi* (7), and other cases. This must mean that any Judge or Bench of this Court may treat not only his or its own orders, but the orders of any other Judge or Bench of the Court, as having been made without jurisdiction, and being void ab initio and rehear the matter on its merits.

There is no magic in the fact that the same two Judges are sitting together, as at the time when the alleged illegal orders were made. We have no greater and no less power than any other Bench of this Court. After we had signed the orders we were functus officio, and when we ceased to sit together, the Bench of which we were members, ceased to exist, and could not ever be revived. If one Bench had power to decide that the orders of another Bench were made without jurisdiction and were void ab initio, a third Bench would have power to decide that the orders of the second Bench also, were made without jurisdiction, and so on ad infinitum. Moreover if the Chief Justice disapproved of the decision of any Bench, he could appoint another Bench to overrule it, as being made without jurisdiction, or could appoint himself, to sit with another Judge, and this actually was done once by Sir Barnes Peacock in a case mentioned in *In the matter of Abdul Sobhan* (8). I think it is clear that the cases to which we have been referred were wrongly decided, and in my opinion the only remedy in such circumstances is to move the Local Government to exercise the Royal prerogative where the accused has been prejudiced—otherwise there is no remedy.

6. A I R 1924 Mad 640=84 I C 850 = 26 Cr L J 870=47 Mad 428.

7. A I R 1927 Cal 702=104 I C 447 = 28 Cr L J 881.

8. (1882) 8 Cal 68.

4. A I R 1914 Mad 268 = 22 I O 756=16 Cr L J 180=87 Mad 119.

5. (1918) 22 CW N 111 (N).

The orders, as drawn up, in these four cases not being in accordance with the judgment which I gave, I am clearly of opinion that we have power to correct the errors which appear in them. They are mere errors of draftsmanship, and therefore clerical errors within the meaning of Ss. 369 and 561-A, Criminal P.C. As however my learned brother does not agree, and as I have no powers acting singly to correct what is in form a joint order, they must stand uncorrected. The errors are only technical, and no injustice has been done to anyone, therefore the ends of justice do not necessitate any correction.

McNair, J. — The Advocate-General has mentioned to this Bench four matters in which he suggested that my learned brother and I, when previously sitting as a criminal Bench, passed orders which are not in conformity with the provisions of the Criminal Procedure Code. No substantive application is before us. The learned Advocate-General in mentioning these matters stated that, in each case in which the orders referred to were passed, there was an application by the accused for admission of an appeal and an order was made admitting the appeal and reducing the sentence without issuing notice upon the Crown. The facts of each case and the orders made have been referred to in detail by my learned brother and it is unnecessary for me to analyze the exact procedure which was adopted, or the reasons which prompted us to make the orders. It may well be, as stated by my learned brother, that we intended to dismiss the appeals and to deal with the question of sentence under our powers of revision. The orders, as worded, purport to show that the appeals were admitted and the sentences reduced. The question that has been raised is whether this Court having once made such an order has power either as a criminal Bench or as any other Bench to alter or review that order except to correct a clerical error. I very much regret that I am unable to agree with my learned brother that this was a mere clerical error.

I am unable to say definitely at this distance of time what was the particular form of procedure adopted, but my impression is that at least on one occasion we stated that we admitted the appeal on the question of sentence only,

and that in the particular circumstances of the case we did not think it either desirable or expedient to put the accused and the Crown to the expense of a further hearing when we disagreed with the lower Court only in regard to the severity of the sentence. If I am correct in my recollection no clerical error arose in that case. The two sections of the Criminal Procedure Code under which we are invited to review our decision are Ss. 369 and 561-A. S. 369 is as follows:

"Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

Section 561-A provides thus:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

With great respect I am entirely in agreement with the view that was expressed by the Lahore High Court in *Raju v. Emperor* (9) that S. 561-A in no way adds to the powers of the High Court. It merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. The inherent powers of the Court do not include the power to review an order which has been made in the criminal appellate jurisdiction. We are therefore compelled to look to S. 369 to see whether the power of review is contained in that section. I have no doubt that the intention of this section is to debar the High Court from reviewing its own judgment in criminal matters. The only exception which is permitted is in the case of a clerical error. It is essential even in civil matters that there should be finality in the orders of the Court, and in criminal matters it is obvious that such finality is of even greater importance, and in my opinion the object of this section is to procure such finality. The provisions of S. 369 were carefully considered by the Full Bench of this Court in *In the matter of, Gibbons* (1) where it was held that no power of review resides in the Court or in any Bench of

the Court. Every Division Bench when constituted in a criminal case is a Court in itself and once its judgment has been signed.

"this court is functus officio and neither the Court itself nor any Bench of it has any power to review that decision or interfere with it in any way."

Were it otherwise, no finality could be ensured, for at any time a Division Bench might be constituted which under the guise of review might reverse or interfere with the orders passed by a previous Bench. Moreover it seems to me impossible to say that a Bench which has once been constituted and then dissolved can be reconstituted at a much later date and be called the same Bench because it is composed of the same Judges. Even if the same Bench has powers of review, which I doubt, I am convinced that no such powers of review survive when that Bench has been dissolved. I am unable to accede to the argument of the learned Advocate-General that the orders passed were without jurisdiction and in any event I am satisfied that there is no power in this Court to review them.

K.S. *Order accordingly.*

A. I. R. 1933 Calcutta 875

RANKIN, C. J. AND COSTELLO, J.

Govinda Prosad Shah and another—
Plaintiffs—Appellants.

v.

Sreemutty Charusila Dassi — Defendant—Respondent.

Appeal No. 102 of 1932, Decided on 13th March 1933, from original decree of Pankridge, J.

* (a) Transfer of Property Act (1882), S. 108 (h)—S. 108 (h) is a complete statement of tenant's right regarding removal of structures — If tenant fails to remove within reasonable time, he cannot do so afterwards or sue for compensation.

Clause (h), S. 108 is intended to be a complete statement of the tenant's right as regards removal of structures, including a case of removal after termination of tenancy. If the right given by Cl. (h) is exhausted, the tenant cannot have a further right to remove the fixtures, making out his right by the personal law or by the general rule of equity and good conscience which had prevailed before passing of Transfer of Property Act (1882). If the tenant does not remove them within a reasonable time after termination of the tenancy, he has no right to remove them or to sue for compensation: *Case law discussed.*

[P 877 C 2]

(b) Transfer of Property Act (1882), S. 108 (h)—Object of Cl. (h) was to provide a

substitute for rights under personal law or on general principles of equity.

The intention of Cl. (h) was to declare the law and to substitute for a law dependent on the personal law of the parties or general considerations of equity, a definite principle. It established a principle inconsistent with the principle of *quicquid plantatur* by declaring the tenant's right to remove; but it limited and defined the tenant's right to remove a right to be exercised during the term. [P 878 C 2]

(c) Transfer of Property Act (1882 as amended in 1929), S. 108 (h)—No new principle is introduced but only period for removal is extended.

No new principle was introduced by the amendment. It extended the period within which the lessee could remove beyond the "continuance of the lease" to any further time during which the lessee is in possession of the property leased, but did nothing more. [P 878 C 2]

A. K. Roy and P. M. Chatterjee—for Appellant.

A. N. Chaudhuri and S. C. Mitter—for Respondent.

Rankin, C. J.—This is an appeal by the plaintiff from the decree of Pankridge, J., dismissing his suit. The premises, No. 187 Darmahatta Street, form part of the estate of the late Akhoy Kumar Ghose of which the defendant is the administratrix. From 1910 these premises were let to the firm of Kalicharan Udit Narayan as monthly tenants. These monthly tenants having erected certain pucca buildings thereon, assigned or conveyed to the plaintiff their interest in the premises and in the structures by a deed dated 8th December 1921. In December 1927, the defendant having brought an ejectment suit, obtained possession of the premises in execution, but the decree in ejectment was, by consent, vacated on 3rd February 1928 by an order passed in appeal therefrom.

In connexion with these proceedings the present plaintiff, on 21st December 1927, had by his solicitors written denying the right of the landlady to the structures. Although the decree had been vacated, the plaintiff never got back possession; it appears that another tenant, one Harnandan, had been let into possession in the meanwhile and remained in possession till 1932. The landlady however on 12th March 1928, gave a valid notice to quit and the tenancy determined with effect from 13th April 1928. The plaintiff brought the present suit on 10th December 1930 to recover possession of the buildings and structures erected by his predecessors.

in-title on the land, or, in the alternative, the value thereof, with other reliefs. Two issues were contested before the learned Judge and before us. The first is an issue of fact. The plaintiff says that when he received the notice to quit in April 1928, it was served on him personally, that he then claimed the right to remove the structures, that he was referred to the landlady's manager, Jotindra Mohan Mitter, and made his claim to be permitted to remove the structures, but his claim was refused. The learned Judge has disbelieved this story which depends entirely on the oral testimony of the plaintiff. The interview is denied by Jotindra Mohan Mitter and the learned Judge considers that the correspondence of December 1927 shows that if any claim had been refused a solicitor's letter would have been sure to follow. Mr. A. K. Roy for the plaintiff-appellant has taken us through the evidence in an endeavour to persuade us that the learned Judge's finding of fact was wrong. I am however of opinion that no exception can be taken to it and that it is quite impossible for the Court of appeal to find that the plaintiff on this issue has proved his case. There is a direct conflict of oral testimony between the plaintiff and the manager and there is such corroboration of the plaintiff's story as would entitle the Court of appeal to differ from the opinion of the learned Judge who saw the witnesses.

The second issue is one of law. Assuming that the plaintiff's tenancy determined in April 1928, can the plaintiff, in this suit of 10th December 1930, assert a claim to recovery of possession of the structures, or to the value thereof? Before the Transfer of Property Act of 1882, the rule of law to be applied as between landlord and tenant to structures built by the tenant upon the lands demised was more open to dispute as regards property in Calcutta than as regards property in the mofussil. In *Thakoor Chander Paramanik's* case (1) it was held, upon a consideration of Hindu and Mahomedan law, that the English maxim *quicquid plantatur* was not in accordance with the usages and customs of the country, and it was accordingly laid down as a general rule that a tenant, or indeed any one except a mere

trespasser, is entitled if he has erected buildings on the land, to remove the materials restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.

It was afterwards considered, in *Jugut Mohan v. Dwarka Nath* (2) that this rule was laid down as a rule of equity and good conscience to be generally observed in the mofussil, rather than a rule of Hindu law or Mahomedan law applicable only when Hindu law or Mahomedan law was the personal law of the parties or of the defendant. In that case it was suggested that in Calcutta in any case in which the personal law of the parties was not shown to apply the law of equity and good conscience which was administered by the Supreme Court, that is, generally speaking, the English law, would govern the matter. In 1880 Wilson, J., in *Russick Lall v. Lokanath* (3) had decided the case on the footing that a tenancy created by contract was required by S. 17 of 21, George III., Cap. 70 (now S. 17, Government of India Act) to be dealt with by the personal law of the parties. He applied the principle of *Thakoor Chander Paramanik's* case (1) to a tenancy in Calcutta as being Hindu law.

Now the Transfer of Property Act of 1882 was a Code which had for its object the enactment of a common law. If the right to buildings in Calcutta is to depend upon the personal law of the parties, or of the defendant, it is evident that great confusion would arise. In S. 108, T. P. Act, the legislature set out what were in the absence of contract, or local usage, to be the rights and liabilities of lessor and lessee in a number of cardinal matters; and under "Rights and Liabilities of the Lessee," Cl. (h) enacted as follows:

"The lessee may remove at any time during the continuance of the lease, all things which he has attached to the earth, provided he leaves the property in the state in which he received it."

2. (1882) 8 Cal 587.

3. (1880) 5 Cal 588=5 C L R 492.

1. (1866) Beng L R Sup Vol 595=6 W R 228.

This is the law under which the present case falls, though in 1929 Cl. (h) was amended to run as follows:

"The lessee may, even after the determination of the lease, remove at any time whilst he is in possession of the property leased, but not afterwards, all things which he has attached to the earth provided he leaves the property in the state in which he received it."

Now, the question before us is whether, in addition to the right given to the tenant by Cl. (h), S. 108, as enacted in 1882, to remove the fixtures during the term, a tenant to whom the statute applies has the right declared in *Thakoor Chander Paramanik's* case (1) to be applicable to those cases in which the builder during the continuance of any estate he may possess, the right, namely, to remove the strictures unless the landlord elects to take the buildings on paying compensation. If the answer to this question is "yes" further considerations will arise as to the applicability of *Thakoor Chander Paramanik's* case (1) to the town of Calcutta. In *Kanai Lal v. Rassikhal* (4), a Division Bench of this Court had before it a case of a tenancy created by the mortgagor after the mortgage. The mortgagee under the mortgage decrees sold the property so that the tenancy was suddenly determined without any opportunity to the tenants to remove the buildings. The Court appears to have considered that the rule in *Thakoor Chander Paramanik's* case (1) might be regarded as a local usage within the meaning of S. 108; and in any case considered it equitable that in the circumstances the tenant should be allowed to remove the buildings. It is however in my judgment, reasonably clear that the rule in *Thakoor Chander Paramanik's* case (1) was not laid down as a local usage, and it is not possible, upon any view, to regard that rule as a local usage of the city of Calcutta. Such a case might be made by evidence or by prior decisions establishing the usage so as to make it judicially notorious under the Transfer of Property Act, the question of construction however still remains. Are the provisions of Cl. (h) intended to be a complete statement or definition of the tenant's right to remove the fixtures, or is the clause limited to the question: What can the tenant do as regards fixtures during the term leaving his rights after the tenancy has ceased

to be determined by a consideration of the pre-existing case law? In my judgment, Cl. (h) was intended to be a complete statement of the tenant's right as regards removal of fixtures.

The legislature did not think fit to improve the quicquid plantatur rule; it thought fit to enact a rule which might I think be intelligibly stated very shortly in terms of English law, namely, that all fixtures were to be tenant's fixtures. It did not intend that if the right given by Cl. (h) had been exhausted, the tenant was to have a further right to remove the fixtures, making out his right by the personal law or by the general rule of equity and good conscience which had hitherto prevailed. This matter was discussed in *Sheik Hussain v. Govardhandas* (5), though in that case it would appear that the appellant's claim was for compensation and not a claim to be allowed to remove the buildings. In *Ismail Kani v. Nazar Ali* (6), a case decided upon the law prior to the passing of the Transfer of Property Act, it was held that under *Thakoor Chander Paramanik's* case (1) the right of the tenant was the right to remove fixtures and not the right to claim compensation for them on vacation, and it was observed that when the Transfer of Property Act was enacted this rule was adopted by the legislature in S. 108 (b) and that the rules laid down by the Transfer of Property Act, substantially reproduce the law as it stood before the Act. "It is however note worthy that Cl. (h), S. 108 only" provides for the tenant removing 'during the continuance of the lease' all things which he may have attached to the land, and nothing is said as 'to the rights of the parties in respect of such' things after the determination of the lease, if 'they have not already been removed by the tenant'. The question may arise whether the tenant forfeits all his rights in such things if he has not so 'removed them, and in the absence of any contract' on the point, the question will have to be solved with reference to 'local usage' whatever may be the precise sense in which that expression is used in "S. 108". This case seems to be the origin of the suggestion that the rule in *Thakoor Chander Paramanik's* case (1) may be regarded as a local us-

5. (1895) 90 Bom 1.

6. (1904) 27 Bom 211.

age and even the Hindu law and the Mohamedan law referred to in that case might be regarded as a particular local usage.

In 1913 the case of *Angamal v. M. M. S. Aslam Sahib* (7) was decided by the Madras High Court on Letters Patent appeal. In that case a lady who had built a house upon the land was subject to a month's notice to quit. The landlord filed a suit in ejectment, the tenant claimed a right to the superstructure built by her or its value. The landlord appears at one stage to have given the tenant notice to remove the structure within a fortnight but this does not seem to have affected the decision. She did not do so but instituted a suit to declare that she was the owner of the house and that she was entitled to compensation for it or should be allowed to remove the structure. It was held by a majority that the tenant was entitled to a reasonable time after the end of the tenancy to remove the structure. But White, C. J., considered that under S. 108, Cl. (h), T. P. Act, the tenant was not entitled to remove the building after the determination of the tenancy. He was of opinion that even assuming that by the previous law the lessor's right to take the building after the expiration of the tenancy was subject to lessee's right to compensation, the law was altered by S. 108 (h), T. P. Act, and he approved the statement in a well-known text book: "Under the terms of the clause, however the tenant is no longer entitled to the alternative" relief. He must remove or forgo the materials "which he is entitled to, unless he can establish local usage or make out a case of estoppel against the landlord." In this view the learned Chief Justice concurred with Wallis, J., the trial Judge, that the right to remove a building is restricted to the duration of the lease. Sankaran Nair, J.'s reasoning was to the effect (a) that Cl. (h) is only an enabling provision; (b) that the opening words of S. 108 are to be read solely as taking away the tenant's right for removal during the lease in cases where the contract or local usage disallows such right, and (c) that the section does not touch the rights of the parties after the term has come to an end. The last proposition would in my opinion bring back into

Presidency towns the rule of the personal law as in *Rassiklall's* case (3) and the difficulties discussed in *Jagunt Mohini's* case (2) and *Dunia Lal v. Gopi Nath* (8). While the section is somewhat ambiguously worded, I consider that the intention of Cl. (h) was to declare the law and to substitute for a law dependent upon the personal law of the parties or general considerations of equity a definite principle.

The legislature did not, in my judgment, intend to clear up the matter during the continuance of the term, and after the term to leave it, as under the decision of Wilson, J., in *Rassiklall's* case (3), it remained a question of Hindu or Mohamedan law, according to the personal law of the parties. Nor did it intend to leave open as regards any point of time the question whether in a Presidency town the rule of equity to be applied was different from the rule to be applied in the mofussil. It established a principle inconsistent with the principle of *quicquid plantatur* by declaring the tenant's right to remove, but it limited and defined the tenant's right to remove a right to be exercised during the term. In so doing it failed to notice that cases of hardship might arise where a tenancy was suddenly determined, e. g., by a mortgagee's sale, by the action of Government in land acquisition proceedings. Even in more ordinary cases a practice grew up to postpone execution under ejectment decrees in order to enable the tenant to remove structures erected by him. The limit produced difficulties and these difficulties were the reason of the amendment of 1929. It is clear that Cl. (h) as amended negatives any right to remove after the time limited by the clause. The present case falls to be decided by the unamended clause but in my judgment no new principle was introduced by the amendment. It extended the period within which the lessee could remove beyond the "continuance of the lease" to any further time during which the lessee is in possession of the property leased, but did nothing more. After all the tenant's right to remove is not two rights: (1) to remove during the term and (2) to remove after the term. In the original Cl. (h) I think the phrase, during the continuance of the lease has a negative

value, that the right to remove was intended to be declared as qualified thereby.

As in the present case the time between 13th April 1928 and 10th December 1930 is not in any way accounted for the plaintiff cannot claim to be within reasonable time after the expiry of the lease. Even on the view upon which *Angammal v. M. M. S. Aslami Sahib* (7) was finally decided, in accordance with the opinion of Miller, J., the plaintiff's case must fail and this appeal be dismissed with costs.

Costello, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 879

MALLIK AND JACK, JJ.

Debendra Kumar Dutta—Plaintiff—Appellant.

v.

Pramada Kanta Lahiry and others—Defendants—Respondents.

Appeal No. 2828 of 1930. Decided on 2nd May 1933, from appellate decree of First Class Sub-Judge, Mymensingh, D/- 16th June 1930.

(a) Civil P. C. (1908), S. 11—"Competent to try the subsequent suit."

The judicial interpretation of the expression "competent to try the subsequent suit" in S. 11 is "competent to try the subsequent suit if brought at the time the first suit was brought." 10 Cal 697, *Ref* [P 879 C 2]

(b) Record of Rights—Presumption arising from an entry is rebutted if foundation for such entry is rotten.

If the foundation of an entry in a record of right is bound to be rotten the presumption arising from the record of rights would be more than rebutted. [P 880 C 1]

Birendra Kumar De—for Appellant.

Basak and Jatindra Nath Sanyal—for Respondents.

Mallik, J.—This appeal arises out of a suit for declaration of plaintiffs' title to and recovery of possession of some plots of land on the allegation that the land in Schedule I which comprises four plots was held by the plaintiff as part of a permanent tenure under defendant 1 and that the land in Sch. 2 which comprises 2 dags was held as a Brohmottar in defendant 1's zemindari. The defence was that the plaintiff had no title to the lands in suit and the lands appertained to the zemindari of defendant 1 and that the suit was also barred by res judicata, there having been two suits in the year 1913 being

Suits Nos. 2503 and 2504 where it had been held that the plaintiff had no permanent tenure or Lakheraj as alleged now. The first Court gave a decree to the plaintiff. This decision on appeal was reversed by the lower appellate Court, the learned Subordinate Judge holding that the suit was barred by res judicata and also that the plaintiff had no title and had never been in possession of the lands at any time within twelve years of the suit. The plaintiff has appealed to this Court.

The first contention on behalf of the appellant before us was that the learned Subordinate Judge was wrong on the res judicata point. It was said that the plots of land in the litigation of 1913 were not the same as those in the present suit and that the Court that had tried the suits in 1913 had no jurisdiction to try the present suit and therefore was not a competent Court. It is true that the plots of land in the two litigations are not the same, but in the previous suit one substantial point that arose and that was decided was whether the plaintiff had any permanent tenure or Lakheraj to which he alleged the plots in question in that litigation appertained and it is on the same allegation, namely, that the plots in question in the present suit appertained to the same permanent tenure or Lakheraj that the present suit for title and possession was instituted. In these circumstances it is immaterial for res judicata purpose that the plots of land in the present suit were not identical with the plots in the previous suit. Then as regards the other point in connection with the res judicata question it was said that the Court which decided the suit in 1913 had no jurisdiction to try the present suit, inasmuch as the value of the property in the present suit was over Rs. 1000 which was beyond the pecuniary jurisdiction of the Munsiff who heard the 1913 suits. Having regard to the words "competent to try the subsequent suit" as they are to be found in S. 11, Civil P. C., one would be inclined to think that this contention is not without some substance. But in more than one decision, among which I may mention *Gopi Nath v. Bhugwat Pershad* (1) there has been a judicial interpretation of the expression "competent to try the sub-

sequent suit" as it is to be found in S. 11 and that interpretation is "competent to try the subsequent suit if brought at the time the first suit was brought." It is no doubt true that the lands in the present litigation have been valued at a figure more than Rs. 1,000. But the land in the previous litigation had been valued only at Rs. 550 and the learned Subordinate Judge found that the area of the lands in the previous suit was more than 3 aras whereas the area of the lands in the present suit is less than 3 aras and the quality of the lands in the two suits is not different.

The decision in the 1913 litigation therefore in my opinion did operate as res judicata in the present suit.

On the question of title also the lower appellate Court held against the plaintiff and in my judgment held so rightly. To establish his title to the lands the plaintiff filed some documents, Exs. 5, 6, 7 to 7g and 19. The lower appellate Court could place no reliance on these documents. It is true that the learned Subordinate Judge in rejecting those documents gave no independent reason of his own for doing so and only mentioned the fact that they had been disbelieved by the two Courts in the 1913 litigation. But he evidently accepted the same view as regards these papers and himself held that no reliance could be placed on them. The plaintiff no doubt had the entry in the finally published Record of Rights in his favour. But the entry in the Record of Rights together with the proceedings before the revenue officer as evidenced by Ex. 8 would show that the only foundation of the entry was some Dakhilas. If that foundation is found to be rotten, the presumption arising from the Record of Rights would be more than rebutted. In the present case that foundation has been found to be rotten. The Courts in the litigation of 1913 has found that foundation, namely the Dakhilas, to be not genuine and that view has been accepted by the learned Subordinate Judge in the present case.

On the question of possession also the plaintiff's case was bound to fail. The lower appellate Court has found as a fact that the plaintiff was never in possession of the lands at any time within 12 years of the institution of the suit. This finding was assailed before

as on the ground that the learned Subordinate Judge in coming to this finding had overlooked the entry in the Record of Rights. A perusal of the judgment of the lower appellate Court would not however bear out this contention. The learned Subordinate Judge in considering the evidence of possession clearly mentioned that the disputed lands had been entered in the name of the plaintiff. The plaintiffs' case was in my judgment, fit to be dismissed, on more than one ground. The appeal is therefore dismissed with costs.

Jack, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 880

LORT-WILLIAMS AND MCNAIR, JJ.

Akshay Kumar Maiti and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1142 of 1932, Decided on 4th August 1933.

(a) Criminal P. C. (1898), Ss. 199 and 537—Complaint under S. 498, Penal Code, by person other than husband—Courts' leave must be obtained—Absence of such leave is not cured by S. 537—Penal Code (1860), S. 498.

A complaint under S. 498, Penal Code, cannot be made by a person other than the husband. Unless leave of Court is obtained absence of such leave cannot be regarded as mere irregularity curable by S. 537: *A I R 1926 Sind 150, Dist.* [P 891 C 2]

(b) Penal Code (1860), S. 498—Knowledge that woman is married is essential.

Mere presumption that the accused must have known that the woman was married, without proof of knowledge, is not enough: *A I R 1920 Cal 979, Ref.* [P 882 C 1]

(c) Penal Code (1860), Ss. 497 and 498—Validity of marriage challenged—Factum of marriage as well as strict observance of custom or law applicable must be proved.

Where the validity of the marriage is in question, mere proof of the factum of the marriage is not sufficient. It must be proved that the marriage had been celebrated entirely in accordance with the requirements of custom and law applicable to the parties: *7 C W N 148, Ref.* [P 832 C 1]

Dinesh Chandra Ray—for Appellant.

D. N. Bhattacharya—for the Crown

Lort-Williams, J.—On 10th June, in the early hours of the morning, two girls Jaba aged 16 or 17, and Charu aged 18 or 19, the sister and cousin respectively of the complainant Mihi Lal, and under his care on behalf of their husbands, are alleged to have been abducted by the accused. Sova is a sister of

Bepin, and mistress of one Nogen. Akshay is a fellow-worker of Nogen. Bepin was priest in the house-holds of both girls' parents and officiated at their marriages. Sovu induced the girls to leave home on the pretext of taking them on a pilgrimage to the Ganges. Later they were joined by Bepin, Akshay and another. Eventually they reached Calcutta, and from there Akshay took them by train to Khardah, and lodged them with a prostitute named Suro Bala. Then Akshay went away for three or four days, and returned with Bepin, and each girl was ravished by one of the two accused and deprived of their ornaments. They complained to Suro Bala about the loss and she informed one Kali Pado Basu, who got the ornaments back from Akshay, wrote to their parents, and eventually took them home.

On 30th June, with the consent of their husbands, Mihi Lal lodged a complaint in Court. The three accused were tried by the Additional Sessions Judge of Howrah and a jury who convicted them of offences under S. 498, Penal Code, with respect to each of the girls, and they were sentenced each to one year's imprisonment for each offence to run concurrently. All of them were acquitted under Ss. 120-B, 366, 373 and 497 under which sections also they had been charged.

The defence was that neither of the girls was married, that the accused had nothing to do with the alleged incident, that they had been implicated falsely after long delay as a result of a conspiracy against Nagen, that the girls were not sound in morals, had eloped with some one, and came home because they got disgusted with the life when they began to be molested by goondas. The complainant explained the delay from 10th to 30th June, in lodging the complaint, by saying that he was advised not to do so until the girls had been recovered, and that he had to consult their husbands first. The evidence cannot be called satisfactory, and the Judge does not appear to have been impressed with the veracity of the witnesses.

The girls said that they opened their room door at night, because they thought that Bepin wanted them for some bonafide purpose. They said that they cried out when they were being ravished, but

Suro Bala did not hear any cries and they never attempted to raise her. They never complained to her about their ravishment, but only a the loss of their ornaments. Though these were taken forcibly, no marks were left on either of the girls. It was only after they got back some of the ornaments that they first expressed a desire to go home. Neither of their husbands seems to have taken any active steps for their recovery. The only evidence of inducement by deceitful means was the girls' evidence as against the accused Sovu.

The evidence about the age of the girls was not satisfactory. The Judge seems to have been satisfied that Charu at any rate was over 18.

Three points have been raised on appeal: That the charges under S. 498 were added by the Sessions Judge, contrary to the decision in *Abdul Aziz Shah v. Empiror* (1), that no leave was obtained from the Court under S. 199, Criminal P. C., allowing Mihi Lal to make the complaints in the absence of the girls' husbands. Without such leave, he could not make the complaints and without such complaints the Court had no jurisdiction; that there was no evidence that either of the girls was legally married. These objections appear to be sound, and cannot be regarded merely as irregularities which can be cured by S. 537, Criminal P. C. There is nothing in the record to show that leave was either asked for or granted, or that the requirements of S. 199 were ever present to the Magistrate's mind. This distinguishes the present case from *Sahib Rai v. Emperor* (2) where it was clear that the Magistrate had considered the point, but had omitted to record any formal sanction.

Moreover both husbands were available, and ought to have made the complaints themselves, if they desired to do so. I am not satisfied with the explanation that they thought that Mihi Lal ought to make the complaints, because the girls were in his custody at the time of the alleged abduction, though not at the time when the complaints were made. As already stated both husbands seem to

1. A I R 1931 Cal 521=1931 O R 676=184 I O 814=32 O L J 1135.

2. A I R 1928 Sind 159=98 I O 78=27 O L J 414.

have been surprisingly lukewarm, and uninterested in the proceedings. S. 199 was provided in order to discourage prosecutions under S. 498, unless the husband (or, in his absence some one on his behalf) feels himself to be injured sufficiently to induce him to institute proceedings.

The only evidence of marriage consisted of the statements of the girls and their husbands and Mihi Lal, that they were married. As to the knowledge of the accused, Bepin was said to have officiated as priest, Sovu was said to be his sister and visited the girls' parents' houses. Akshay had no direct concern with the girls' parents' families. He was said to have been a worker in Sovu's brother's mill.

This evidence was not, in my opinion, sufficient to justify a conviction, and the Judge ought to have pointed this out much more clearly to the jury. Mere presumption that the accused must have known that the woman was married without proof of knowledge is not enough: *Batiram Keot v. Bhandaram Keot* (3). The evidence about marriage was proof only of the factum. There was no proof that the marriages had been celebrated strictly in accordance with the requirements of custom and law applicable to the parties. This is not sufficient in cases under Ss. 497 and 498, where the validity of the marriage is questioned: *Danesh Sheikh v. Tafir Mandal* (4). For all these reasons this appeal must be allowed, and the convictions and sentences set aside and the accused acquitted and discharged.

McNair, J.—I agree.

K.S. *Appeal allowed.*

3. A 1 R 1920 Cal 979=61 I C 662=22 Or L J 412.

4. (1903) 7 C W N 148.

A. I. R. 1933 Calcutta 882

MUKERJI, J.

Jullu Rahman Shaikh -- Plaintiff—Appellant.

v.

Tenee Shaikh and others—Defendants—Respondents.

Second Appeal No. 396 of 1931, Decided on 16th March 1933, from decree of Dist. Judge, Murshidabad, D/- 30th June 1930.

Easements—Suit for—Necessary parties—All persons interested in servient tenement are not necessarily necessary parties—Person

entitled to present possession however necessary party.

Where an easement is claimed, all persons interested in the servient tenement, no matter what the character of their respective interests may be, are not always to be regarded as necessary parties. The general rule is that all owners of the servient tenement, as regards which there is a cause of action and over which the easement is claimed, should be made parties, e. g., persons who have an interest entitling them to present possession of the servient tenement: *AIR 1921 Cal 622, Dist; 5 I C 23, Expt; Case law referred.* [P 883 C 2; P 884 C 1]

Kshetramohan Chatterji — for Appellant.

Abinashchandra Ghosh — for Deputy Registrar.

Judgment.—In this case, the District Judge, while finding on all points in plaintiff's favour as regards a right of way which he claimed as an easement in a suit for declaration of such right and for an injunction restraining the defendants from putting up an obstruction on it and also for other consequential reliefs by demolition of a structure which he had already put upon it, has dismissed the suit on the ground that the defendant's landlord had not been made a party to the suit. The District Judge has relied upon the decision of this Court in the case of *Haran v. Ramesh Chandra* (1). The question to be considered in this case is the scope, authority and applicability of that decision.

The learned advocate for the respondent in this appeal has placed before me a decision of this Court in the case of *Madon Mohan v. Akshoy Kumar* (2), in support of his contention that as a general proposition no suit for declaration of an easement and for other consequential reliefs can proceed unless all persons interested in the land over which such easement is claimed are parties to the suit. It is this general proposition, and not any particular situation created by the absence of a party in any particular case, that has to be considered in the first instance. The decision, in my opinion, is no authority for such a broad proposition. It is clear that the infirmity of the appeal under the Letters Patent, that arose in that case, was due to some casualty that had happened since the decision of Brett, J., from which that appeal was preferred. The parties were all there, when the appeal was dealt with by Brett, J., but some of

1. *AIR 1921 Cal 622=63 I C 426.*

2. (1910) 5 I C 28.

them were not before the Court when the appeal under the Letters Patent was heard. All the parties, against whom a declaration of easement was asked for and against whom an injunction was also asked for, were not before the Court and it is obvious that under such circumstances, the appeal was incompetent. The case of *Haran v. Ramesh Chandra* (1), upon which the District Judge has relied, laid down a proposition that :

"Where the decree is to be made for declaration of a right of way as a village road over the disputed land and for removal of an obstruction thereon, if it is discovered that a person interested in the servient tenement has not been made a party to the suit, the Court will not proceed to make a decree. The decree, if made, must be infructuous; if a suit is instituted by the absent person for an injunction to restrain the successful plaintiff from executing the decree, there will be no possible answer to the prayer."

The case had been considered in several later decisions, to some of which reference will presently be made. The case of *Madon Mohan v. Akshoy Kumar* (2) was explained by N. R. Chatterjee, J., in the case of *Madon Mohan v. Sashi Bhusan* (3). It was pointed out that "all the servient owners" in the case of *Madon Mohan Chattopadhyaya* (2) "mean all the servient owners who had raised objections to the plaintiff's right of way and against whom there was a cause of action, and do not refer to the owners of all the tenements over which the way passed."

In *Madon Mohan v. Akshoy Kumar* (2) an owner of a portion of the pathway, who had never disputed the right of the plaintiff and caused no obstruction thereto, had been left out of the suit. The decision in the case was upheld in Letters Patent Appeal (3). The decision is of very great weight as Jenkins, C. J., who was a party to the decision in *Madon Mohan Chattopadhyaya's* case (2), presided over the Letters Patent Appeal Bench in *Madon Mohan v. Sashi Bhusan* (3). In *Rajnarayan Chandradhwaja v. Benimadhab Tewari* (4) the question was a right to take water from a tank through a drain, and one of the persons, through whose land the drain was alleged to have passed, was not made a party. It was held that, as there was nothing to show that that person had at any time raised any objection to the exercise of the plaintiff's right, the suit was not defective. The decision in *Madon Mohan Chakra-*

varty's case (3) was followed, and *Haran v. Ramesh Chandra* (1) was distinguished on the ground that, in that case, one of the joint owners of the servient tenement was left out. *Surjit Nandan v. Chandra Bera* (5) need not be considered, as it was a case of a very different nature. *Haran v. Ramesh Chandra* (1) was followed in *Sadhu Charan Pal v. Indra Mohan Mistari* (6), in which a joint owner, who was a minor, of the servient tenement was not represented in the appeal in this Court, it being said that no effective decree could in the circumstances be made. In the case of *Amritanath Biswas v. Jogendra Chandra* (7), some cosharers owners of the servient tenement were not impleaded and B. B. Ghosh, J., said:

"It cannot be disputed that, as a general rule, where a person claims a right of easement on a servient tenement, all the owners of the servient tenement ought to be made parties, as any decree in the absence of a necessary party declaring a right of easement would be infructuous. But I think there are cases which may well be taken as exceptions to the general rule and, as an instance, the case of *Madon Mohan v. Sashi Bhusan* (3) may be cited. * * * It is not stated that any of their cosharers took any part in obstructing the plaintiffs' right. Had they been impleaded they would have objected that there was no cause against them."

In *Durga Ram v. Bharat Ram* (8), the servient owners, who were left out, were owners of a portion of the alleged pathway, on which portion there was no obstruction and it was held that the omission was not material. Similar were the facts of the case of *Bhola Nath v. Mohesh Chandra Bera* (9) and the decision therein was similar. I do not think there is any authority for the view that, where an easement is claimed, all persons interested in the servient tenement, no matter what the character of their respective interests may be, are always to be regarded as necessary parties. The general rule undoubtedly is that all owners of the servient tenement, as regards which there is a cause of action and over which the easement is claimed, should be made parties. For instance, if a co-owner is left out, the decree would be infructuous, as, on his application, an injunction might issue restraining the plaintiff from exercising his right of

5. AIR 1924 Cal 1050=34 I O 467.

6. (1921) 84 I O 90.

7. AIR 1924 Cal 369=69 I O 183.

8. AIR 1923 Cal 92=85 I O 739.

9. AIR 1925 Cal 1188=98 I O 684.

8. (1915) 81 J O 549.

4. Second Appeal No. 1690 of 1919, decided on 20th December 1921 by Chatterjee and Pantod, JJ.

easement notwithstanding the decree that he obtains.

And I would also put into the same category persons who have an interest entitling them to present possession of the servient tenement, for they would have similar rights as co-owners, as against the plaintiff, if they are left out of the suit. But, I am clearly of opinion that there is no justification for the view that all persons interested, no matter what the nature or character of their respective interests may be, are necessary parties. For instance, with regard to a servient tenement in the district of Bakarganj, it is not that all the holders of the dozens of grades of interest that are common in that district, on account of feudation and sub-in-feudation, of which there is no end there, are to be made parties; or, for instance, with regard to the servient tenement belonging to an occupancy raiyat, that all the holders of superior interests up to the revenue-paying zemindar on the one hand, and all the holders of subordinate interests, down to a labourer or bargadar on the other, are to be regarded as necessary parties. For such a view there is no authority nor principle in support, and the observations in *Haran Sheikh's* case (1), widely though they may have been expressed, could never have been intended to be understood in that sense.

As regards the present case, the defendant never disclosed what kind of present right to possession the landlord has in the servient tenement, and, on the other hand, alleged that he himself and his predecessors had been on the land for several generations. In my judgment, it was not necessary for the plaintiff to make such a landlord a party. The appeal is allowed. The decision of the District Judge is set aside and that of Munsif is restored with costs in this Court and in the Court of appeal below.

R.K.

Appeal allowed.

A. I. R/1933 Calcutta 884

MALLIK AND JACK, JJ.

Mandakinee Debes—Appellant.

v.

Basantakumaree Debes—Respondent.

Second Appeal No. 2244 of 1930. Decided on 7th March 1933.

Highway—Obstruction—Individual can sue for removal of obstruction without special damage.

A member of the public can maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proof of special damage: *A I R 1925 P C 86, Rel on*; *A I R 1931 Pat 418, Diss from*; *2 Bom 457, Held overruled by A I R 1925 P C 86*.

Held: that in this case no special damage was required further than the plaintiff's inability to carry large articles into her house owing to the obstruction created by the defendant on the public pathway. [P 885 C 1]

Rupendrakumar Mitra and Dheeren-dranath Ghosh—for Appellant.

Jogeshchandra Ray and Haradhan Chatterji—for Respondent.

Jack, J.—This appeal has arisen out of a suit for the removal of an alleged encroachment made by defendant 1 and defendant 2 on a passage leading to the plaintiff's house. The suit was decreed by the Munsif against defendant 1 and dismissed against defendant 2. The Court of appeal below dismissed the suit. The learned District Judge found, first, that defendant 1 had reduced the passage in question by encroachment from 3 feet 6 inches to 2 feet 8 inches in width by the erection of a wall and privy; second, that the passage is a public way which had vested in the Howrah Municipality; third, that the encroachment of 10 inches does not interfere with the plaintiff's right of way.

On the facts, as he has found them, the learned Judge states that the suit must fail as the Municipality has not complained and no right of the plaintiff has been violated, inasmuch as sufficient roadway, i. e., 2 feet 8 inches has been left to pass to and from her house, and this is the only right she had over the road. That this is the only right she had over the road is not however correct. The plaintiff complains that she has actually been put to much inconvenience, as no large article can be brought into her house, now that the passage has been narrowed by 10 inches. The plaintiff was certainly entitled to bring such articles into her house along this public roadway which is the only means of entry into the house. The Court of first instance rightly found that the plaintiff's right had been affected by the encroachment, as a member of the public she is entitled to the use of the full width of the passage way; and owing to the situation of her house she is peculiarly affected by the encroachment. Therefore though this is not a case in which O. 1, R. 8 is applicable, the plain-

tiff has every right to claim relief, even if it be held (and this has been strenuously urged for the respondent) that no action can be maintained by a member of the public for obstruction of a highway without proof of special damage. That no proof of special damage is necessary appears to be established on the authority of the case of *Manzur Hasan v. Muhammad Zaman* (1), in which their Lordships of the Privy Council overruled the contrary view held in the case of *Satku Kadir v. Ibrahim Aga* (2). The Bombay case was followed later in the case of *Muhammad Din Mian v. Atirajo Kuer* (3), in which no reference is made to the Privy Council case. In the latter (1), Lord Dunedin says:

"The judgment [*Satku Kadir v. Ibrahim Aga* (2)] really proceeds entirely on English authorities, which lay down the difference between proceedings by indictment and by civil action. In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on the highway is a distinction peculiar to English law and ought not to be applied in India."

His Lordship then referred to the case of *Baslingappa v. Dharmappa* (4), of which he says that the learned Judges without saying so overruled *Satku Kadir v. Ibrahim Aga* (2). Their Lordships were dealing with a suit for damages for preventing the plaintiffs from conducting a religious procession along a highway and for a permanent injunction against the defendants, but it seems clear that the same rule is applicable to all cases of obstruction of a highway and, just as in that case and certain Madras cases referred to by their Lordships, *Parthasaradi Ayyangar v. Chinnakrishna Ayyangar* (5), *Sundram Chetti v. the Queen* (6) and *Sadagopachariar v. A. Rama Rao* (7), it was held that no special damage, other than the obstruction of the procession, was needed, so here I would hold that no special damage is required further than the plaintiff's inability to carry large articles into her house owing to the obstruction. It is however urged for the respondent, that

the learned Judge's finding that this is a public passage is contrary to the pleadings, inasmuch as though, at the end of her plaint, the plaintiff prays to be allowed to conduct the suit on behalf of the public, she says the public have no right of egress and ingress over this passage. According to the learned Judge, the plaintiff has all along alleged that it is a public road and the case has proceeded throughout on this basis. It seems that the plaintiff was not sure whether it could be called a public road and pleaded alternatively that, whether it was public or private, her rights had been infringed. The learned Judge definitely finds that it has been claimed by the plaintiff to be and is part of a public road. In these circumstances, I think the finding that it is a public road should be accepted.

On the findings of the Courts below, it is clear that the rights of the plaintiff as a member of the public have been infringed and that she is entitled to the relief granted by the Court of first instance, viz., that the wall and privy of the respondent should be removed to the extent they have encroached on the 3 feet 6 inches wide passage as shown by the commissioner's map, the red line in which is the boundary of the passage and the respondents' holding on the north. An injunction appears to be justified in the circumstances of the case, as held by the Court of first instance and I do not think it necessary to send back the case to the appellate Court for a decision of this point, the facts found by the Munsif not having been seriously disputed. It seems clear that the plaintiff had no opportunity of preventing the construction of the wall and privy to which the respondents must have known she would object. The Howrah Municipality was not a necessary party and it has been found that their sanction to the erection of the wall and privy on this encroachment on the public way has not been established. The appeal is therefore allowed and the decree of the Munsif is restored. Defendant 1 must pay half the costs of the plaintiff throughout.

Mallik, J. — I agree with my learned brother in the order that he has made in this case. The finding was that the passage was a public pathway and that, the obstruction resulted in plaintiff's

1. A I R 1928 P C 26 = 86 I C 238 = 52 T A 61 = 47 All 151 (PC).

2. (1877) 2 Bom 457.

3. A I R 1931 Pat 418 = 188 I C 433 = 10 Pat 538.

4. (1910) 84 Bom 571 = 7 I C 665.

5. (1892) 5 Mad 304.

6. (1888) 6 Mad 303 (FB).

7. (1902) 26 Mad 376.

inability to carry large articles into her house. Regard being had to the peculiar situation of her house, this inability to carry large articles into her house was "special damage"—damage beyond what is suffered by her in common with other persons affected by the nuisance, viz., inconvenience in passing along the path-way.

R.E.

Appeal allowed.

A. I. R. 1933 Calcutta 886

LORT-WILLIAMS, J.

Jnanendrakumar Ray Chaudhuri—Applicant.

v.

Amritakrishna Datta—Opposite Party.

Application No. 279 of 1929, Decided on 30th March 1933.

(a) Limitation Act (1908), Art. 166—Actual notice—Formal notice is no bar.

Where a person has actual notice of an application to set aside a sale, absence of formal notice is not a bar: *AIR 1925 Cal 157, Foll. [P 886 O 1]*

(b) Limitation Act (1908), Art. 166—Notice of motion filed within limitation—Application is then held to be in time.

Where an application is to be made to the Court within a limit of time, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court: *31 Cal 150, Diss from; 20 Cal 899, Expl and Dist; A I R 1924 Bom 36, Rel on, English cases followed. [P 886 C 2]*

Isaacs—for Applicant.

Sudhir Ray—for Opposite Party.

S. B. Sinha—for Purchaser Satis-chandra.

Order.—In this suit a sale was held by the Registrar on 10th February 1933. On 13th March, the defendant Amritakrishna Datta gave notice that, on Monday 20th March, an application would be made for an order that the sale be set aside. Art. 166, Lim. Act, provides that such an application must be made within thirty days of the sale. The thirtieth day fell on 12th March, which was a Sunday. Therefore the applicant had, until 13th March inclusive, to make his application. The first point taken by the plaintiff is that there were two purchasers at the sale, and that notice was given to one only. I am satisfied from the affidavits that the other purchaser had actual notice of the application, and that absence of formal notice is not a bar. This was decided by *Suhrawardy and Duval, JJ.*, in the case of *Charu Chandra Ghosh v. Behari Lal Mitra, A I R 1925 Cal 157*.

The next point taken by the plaintiff is more difficult to determine. It is clear that notice of the application was served on 13th March, but it is argued on his behalf that this is not sufficient, and that the serving of the notice is not the "application" which must be made within the thirty days. In *Khetter Mohun Sing v. Kassy Nath Sett (1)*, it was held, that the taking out of a summons calling upon another to attend a Judge in chambers on the hearing of an application is the act of the applicant, and not of the Court taking cognizance of the application, and is not sufficient to save the application from being barred, if the hearing of the application comes on after the time allowed by the Limitation Act for the application has expired. That is a decision of the Court sitting in appeal from the original side and is binding upon me. But it appears from the report that none of the English cases were cited to the learned Judges. In my opinion, the point decided requires further consideration by the Court sitting in appeal in the light of the English decisions.

In *Hinga Bibee v. Munna Bibee (2)*, Sale, J., held that the service of a notice that an application would be made to restore a suit does not prevent limitation from running. In that case also the English cases were not brought to the attention of the learned Judge, and he decided that the notice of motion was not sufficient to prevent the law of limitation from applying, "as was laid down in the case of *Khetter Mohun Sing v. Kassy Nath Sett (1)*". In fact, as I have already remarked, the decision in that case turned upon the question whether the issue of a summons prevented time from running, and therefore is distinguishable. In *Venkapaiya v. Nazerally Tyabally (3)*, which was a decision on appeal, it was held that, where an application is to be made to the Court within a limit of time, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court.

The learned Judge relied upon *In re Gallop and Central Queensland Meat*

1. (1893) 20 Cal 899.
2. (1903) 31 Cal 150=3 C W N 97.
3. AIR 1924 Bom 36=86 I C 440=47 Bom 764.

Export Co. (4). That was a decision of Denman, J., in which he held that the period of limitation ceased to run from the time when a notice of motion was served upon the other side, applying the ratio decidendi of *Smith v. Parkside Mining Co.* (5) and *In re Corporation of Huddersfield and Jasomb* (6). In *Atarmoni Dasi v. Bepin Behari* (7) Costello, J., held that the filing of a tabular statement is an application to the Court, and is distinguishable from a notice of motion so far as it affects the question of limitation. The learned Judge reviewed the cases to which I have referred, and agreed with the Bombay decision, and the English cases upon which that decision was founded, but remarked that if he had been concerned with a notice of motion he would have felt himself bound by the decision in *Khetter Mohun Sing v. Kassy Nath Sett* (1) to hold that the mere giving of a notice of motion is not sufficient to prevent the period of limitation from running, but he ventured to express the opinion that the decision did not seem to be in accordance with the English cases. In my opinion, the law is correctly stated by Denman, J., and as the present case turns upon the question whether the service of a notice of motion is sufficient, it is distinguishable from the decision in *Khetter Mohun Sing v. Kassy Nath Sett* (1). Consequently I hold that the present application is not barred. Upon the merits, there is no ground for setting aside the sale. Therefore the application is dismissed with costs.

R.K. *Application dismissed.*

4. (1890) 25 Q B D 230=59 L J Q B 460=38 W R 621=62 L T 834.
5. (1890) 6 Q B D 67=50 L J Q B 144.
6. (1874) 17 Eq 476.
7. AIR 1929 Cal 193=115 I C 83=55 Cal 1841.

A. I. R. 1933 Calcutta 887

MALLIK AND JACK, JJ.

Kalipada Banerji — Plaintiff—Petitioner.

v.

Charubala Dasee—Defendant—Opposite Party.

Civil Revn. Petn. No. 124 of 1933, Decided on 29th March 1933, against order of President of Calcutta Improvement Tribunal, D/- 16th January 1933.

(a) Civil P. C. (1908), S. 10—Scope—Three essential conditions stated.

The three essential conditions that are neces-

sary for bringing into operation S. 10 are: (1) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit; (2) that the parties in the two suits are the same, and, (3) that the Court, in which the first suit is instituted, is a Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit.

[P 888 Q 1]

(b) Civil P. C. (1908), S. 10—Proceedings before Calcutta Improvement Tribunal under S. 18, Land Acquisition Act, instituted subsequent to title suit—Whether Civil Court can invoke S. 10.

Per Mallik, J.—The Calcutta Improvement Tribunal, sitting to consider a reference under S. 18, Land Acquisition Act, regarding valuation of land acquired and the apportionment of the compensation awarded, is a Court of special and exclusive jurisdiction, and a Court of ordinary civil jurisdiction trying an earlier title suit has no jurisdiction to stay a subsequently instituted reference before the tribunal. This is especially so when both parties seek the Tribunal as the forum for the determination of the question of valuation and apportionment: *A I R 1922 Cal 4, Foll.*; *7 Cal 888, Ref.*; *10 C W N 991* and *A I R 1924 Cal 757, Dist.* [P 889 Q 1]

Per Jack, J.—Even though the Court may not be competent to stay the reference inasmuch as the subject-matter of the civil suit and the proceedings before the Tribunal is not the same, the civil Court has inherent jurisdiction to postpone the hearing of the proceedings before the Tribunal till the disposal of the title suit: *A I R 1924 Cal 757, Foll.* [P 889 Q 2]

Sharatchandra Ray Chaudhuri, B. K. Chaudhuri, Bijaykumar Bhattacharjya and Nagendrakumar Datta — for Petitioner.

S. N. Banerji, Atulchandra Gupta and Phaneendramohan Sanyal—for Opposite Party.

Mallik, J. — This Rule is directed against an order of the President of the Calcutta Improvement Tribunal, by which he rejected an application of the petitioner, Kalipada Banerji, for stay of hearing of a reference made to him under S. 18, Land Acquisition Act. The principal facts, which led up to this application, were these: On 17th February 1930, the petitioner, Kalipada, instituted a suit in the Court of the Subordinate Judge at Alipore, being Title Suit No. 39 of 1930, for a declaration of title to and recovery of possession of some lands, among which there was a property, item 5 (1) with an area of one bigha and seven cottas odd. There were as many as 108 defendants in the suit at that time. Shortly after the institution of this suit, proceedings were taken for acquisition of an area of land measuring 4 bighas and 18 cottas odd

and the land was ultimately acquired under the Land Acquisition Act. The opposite party before us, Charubala Dasee, on 8th December 1930, filed her claim to the compensation money before the Land Acquisition Collector as the sole owner of the property acquired and, about ten months later, the petitioner, Kalipada, also filed before the said Collector his claim to the compensation money, claiming it as the owner of the land acquired. On 23rd February 1932, the Collector made an award in favour of Charubala and, about a month later, namely, on 24th March 1932, Kalipada applied to the Court at Alipore to have Charubala made a defendant in his Suit No. 39 of 1930 and Charubala was added as a defendant accordingly. On 1st April 1932, at the instance of Kalipada, a reference was made to the President of the Calcutta Improvement Tribunal under S. 18, Land Acquisition Act, for valuation as well as for apportionment and, on 4th April 1932, a similar reference was made under S. 18, Land Acquisition Act, at the instance of Charubala Dasee. On these facts, on 23rd November 1932, Kalipada applied to the President of the Calcutta Improvement Tribunal under S. 10, Civil P. C., for stay of hearing of the reference case until the disposal of the civil suit at Alipore and it was the refusal of this application on 16th January 1933, that has given rise to the present Rule.

I am of opinion that the President of the Improvement Tribunal was right in refusing the application for stay of hearing, though all the grounds on which he passed that order are not, in my opinion, correct. The three essential conditions, that are necessary for bringing in the operation of S. 10, Civil P. C., are: (1) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit, (2) that the parties in the two suits are the same, and (3) that the Court, in which the first suit is instituted, is a Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit. More than one of those essentials however were wanting in the present matter before us. In the first place, the parties in the two suits were not the same. It is true that both Charubala and Kalipada are parties in both the civil suit and the reference

case. But, in the civil suit, there are, as observed before, as many as 108 defendants other than Charubala, who have nothing to do with the reference case, and, in the reference case, the tenants, who had been on the land acquired, are parties, though they were not impleaded in the civil suit at Alipore.

Then the matters in issue in the second suit are valuation of the land acquired and apportionment of the compensation awarded, not only as between Kalipada and Charubala, but also as between Charubala and the tenants and Kalipada and the tenants. But no relief under either of these two heads could possibly be given by the Court at Alipore. The Alipore Court could not go into the question of valuation, nor could it, on the basis of the plaint as it stands now, give any decree as to the payment of the compensation money. Kalipada's case in the Alipore Court is for a declaration of title to and recovery of possession and not for obtaining any money, being the price of the land acquired. It is significant that, although Kalipada applied for the amendment of his plaint on 14th September 1932, he did not ask for any additional relief for payment of any money to him.

The grounds indicated above would be sufficient for holding that Kalipada's application under S. 10, Civil P. C., was fit to be rejected. But there were, in the present case, some further reasons for doing so. The property in the second suit was not exactly the same as in the first. The area of the property acquired is four bighas odd, whereas the property No. 5 (1) of schedule ka to, the plaint in the Alipore suit, which according to the plaintiff, was the property in which Charubala was interested, measured only one bigha odd. The application made by Kalipada to amend his plaint, apparently with the intention of showing that the land acquired was included in item 5 (1), was rejected by the Subordinate Judge.

As I have said before, one of the essential conditions necessary before the hearing of a suit can be stayed under S. 10, Civil P. C., is that the first Court must be a Court competent to grant the relief asked for in the second suit. But, according to a decision of this Court in the case of *Saibesh Chandra v. Bejoy*

Chand (1)—a decision which we are bound to follow—the Calcutta Improvement Tribunal is a Court of special and exclusive jurisdiction. That being so and especially when both parties sought the Tribunal as the forum for the determination of the question of value and apportionment, the civil Court, in my opinion, ceased to have any jurisdiction in the matter.

On behalf of the opposite party, our attention was drawn to two other decisions of this Court: *Bhandi Singh v. Ramadhin Roy* (2) and *Abdul Alim v. Badaruddin Ahmad* (3). In *Abdul Alim Abed's* case (3), the validity of a will was in question and the proceedings in the Tribunal were stayed because it was thought that a more comprehensive investigation on the point would be made in the High Court in its testamentary jurisdiction than in the Improvement Tribunal. Then, as regards the case of *Bhandi Singh* (2), the observation of Mookerjee, J., in that case that the question as to the persons to whom compensation is payable or its apportionment among persons interested may be determined either under a reference as contemplated under S. 18, Cl. (1), Land Acquisition Act, or by a suit at the instance of a person lawfully entitled to it as against another who has drawn the compensation money, is, as observed by the learned Judges in the case of *Saibesh Chandra Sarkar* (1), only an obiter, and an observation made without any consideration of what their Lordships of the Judicial Committee of the Privy Council had observed in *Nilmoni Singh Deo v. Ram Bandhu Rai* (4). Then, it is to be observed that Mookerjee, J., in the same case also observed that an objection as to the measurement of the land or the amount of compensation payable therefor must be determined exclusively by a reference to the civil Court under S. 18, Cl. (1), Land Acquisition Act. In the present case, as I have said before, the question for determination before the President of the Improvement Tribunal was not only a question of apportionment, but a question of valuation of the land as well.

S. 10, Civil P. C., was therefore in my judgment, of no help to the petitioner.

On the ground of convenience also, the petitioner, in my opinion, had no case. If the reference case is heard and disposed of first, the petitioner, no doubt, will, at the time of the hearing of the civil suit at Alipore, have to adduce some evidence over again. But that is no reason why other people should be kept away almost indefinitely from the money which may legitimately be theirs within a short time, only to save the petitioner from some trouble and inconvenience.

Having regard to the valuation of the suit at Alipore and the number of persons involved in it, it cannot reasonably be expected that that suit will be finally disposed of in anything less than eight or ten years. The order refusing to stay the hearing of the reference case was, in my judgment, a right order and I would accordingly, discharge the Rule with costs, hearing fee two gold mohurs.

Jack, J.—I agree. I would rest my decision mainly on the ground that S. 10, Civil P. C., is not applicable, inasmuch as the subject-matter of the civil suit and the proceedings before the Tribunal is not the same. The learned Subordinate Judge, in rejecting the petition for the amendment of the plaint, found that only a small portion on the north-west of the plot of the land included in the Tribunal proceedings was included in the plaint originally filed. In the argument before us, it has not been made clear (although this is alleged) that the subject-matter of the original plaint in the civil suit is identical with the subject-matter of the Tribunal proceedings and therefore S. 10 having no application, the learned President was not bound to stay the proceedings before the Tribunal.

It must be remembered that the civil suit as against Charubala was instituted before the proceedings under S. 18, Land Acquisition Act, and this is a case, in which I hold, following the authority of *Abdul Alim v. Badaruddin Ahmed* (3), the Court has inherent power to postpone the hearing of the proceedings before the Tribunal. There would be much to be said in favour of the prior disposal of the civil suit, if it could be disposed of finally, within a short time, but in all the circumstances the argu-

1. A I R 1922 Cal 4=85 I O 711.

2. (1906) 10 C W N 991=2 C L J 859.

3. A I R 1924 Cal 757=86 I O 1023.

4. (1881) 7 Cal 888=8 I A 90 (P C).

ment on the ground of convenience is not so strong as to justify an interference with the order passed by the learned President of the Improvement Tribunal.

V.B./R.K.

Rule discharged.

A. I. R. 1933 Calcutta 890

MUKERJI, J.

Nripendra Bhooshan Ray—Appellant.

v.

Jogendra Nath Ray—Respondent.

Appeal No. 512 of 1931. Decided on 4th April 1933, from appellate decree of Dist. Judge, Jessore, D/- 26th July 1930.

(a) Bengal Tenancy Act (1885), S. 155 (1), Cl. 1 (a)—Decree under—Not prospective but actual injurious results must be proved.

It is not enough for a decree under S. 155, sub-S. (1), Cl. (a) to find that a continuance of the alleged abuse for a sufficient length of time would produce injurious results. It will have to be found as a fact that the abuse has in fact resulted in rendering the land unfit for the purpose of the tenancy. [P 891 C 2]

(b) Landlord and Tenant—Proposed user likely to render land temporarily unfit—Injunction may be issued.

If the proposed or prospective user of land is likely to render it temporarily and not permanently unfit for the purposes of the tenancy, an injunction might issue restraining such user: 87 I C 249, *Rel on*. [P 891 C 1]

(c) Deed—Construction.

Covenants, the breach of which entails a forfeiture, must always be strictly construed.

[P 891 C 1]

*Jaygopal Ghosh—*for Appellant.

*Krishnakamal Mitra and Rabindra Nath Chaudhuri—*for Respondent.

Judgment.—This appeal arises out of a suit for ejectment under S. 155, Ben. Ten. Act. The suit was based upon the allegation that the defendant took settlement of two plots of land as an agricultural holding and has used the land in a manner which renders it unfit for the purposes of the tenancy and has also broken a condition of the lease which has made him liable to ejectment. The lease contained the following stipulation: "On the lands of the aforesaid jama, I shall not be able, without your permission, to set up any hat, bazar, gola or ganja or to erect a building or to manufacture bricks or to excavate a tank or pond; nor shall I be able to do anything, which renders the land unfit for agricultural purpose, that is, anything that impairs the value of the lands; but, if I do so, you shall be entitled to eject me from the jote with damages."

The plaintiff's case was that the defendant, in contravention of the stipulation aforesaid, has used the lands as a hat for molasses. The defence was that the lands do not constitute an agricultural holding and were not taken for

agricultural purposes, that no hat was established on the lands and that the lands were not rendered unfit for cultivation. Other defences, e. g., as to non-service of notice, non-liability for compensation and non-maintainability of the suit were also taken. The Munsif made a decree, ordering that, within a month from the date of the decree, the defendant should make the lands fit for cultivation and for growing agricultural crops and should pay Rs. 25 as compensation to the plaintiff, and that, in default, the plaintiff should get khas possession of the lands and also recover the said amount as compensation from the defendant.

There was an appeal and a cross-appeal from the Munsif's decision, which were both dismissed, with the modification that the amount of compensation was fixed at Rs. 5. The defendant has appealed. The question involved in the appeal is no longer a question of substance, but one of sentiment only, for the stipulation, to which reference has been made, was inserted with the real object of preventing the defendant from using the two plots of land as an adjunct to or a place which could be used for any purpose which would afford facilities for a hat, which the defendant has got on the other side of a channel and just opposite thereto, and that object has been gained by an injunction which, I am told, has been issued in plaintiff's favour and against the defendant and which will now subsist. As however the parties are very keen about the contest that they raised in this case, the appeal would necessarily have to be dealt with on its merits. To determine the controversy between the parties, it has to be seen, in the first place, as to what exactly is the use that the defendant has made of the lands. On this point, the finding of the District Judge, which is very lucidly expressed, is as follows:

"It appears that, on Sundays and Thursdays a large number of carts laden with gurrh dealers and other men assembled on plot No. 549. These carts carried gurrh, evidently for the purpose of being sold. The men, who brought them or the other men, who assembled on the plot, evidently were the buyers or the sellers of the commodity, but the exact evidence is wanting whether the purchase and the sale took place on plot No. 549 or whether the gurrh was carried across the river to Chaprauli. My conclusion is, upon reading the evidence and considering the probabilities of the case, that plot No. 549 was

meant to be used as a landing stage for the carts and boats and a temporary dumping place for the commodity arrived from the west of the river and meant to be taken over to the eastern side."

Now, on this finding, it will have to be considered firstly, whether there has been a breach of a term in the contract, and secondly, whether the land has been used in a manner which renders it unfit for the purpose of the tenancy. Covenants, the breach of which entails a forfeiture, must always be strictly construed. On the finding, it cannot, in my opinion, be held that the defendant has set up a "hat, bazar, gola or ganja." It has not been established that any sale or purchase takes place on the land, or that the goods are stored there in expectation of such a transaction. If the land is used as a landing stage for the goods to remain there only for a temporary period and pending arrangements for their conveyance to the other side of the river, there has been, in my judgment, no breach of the covenant. The first question therefore must be answered in the negative. So far as the second question is concerned, the lease, in view of the terms used therein, must be regarded as one for agricultural purposes; and, indeed, it has not been disputed that the tenancy created by it is one governed by the Bengal Tenancy Act. That being the position, what has to be determined is whether the user of the land has been such as renders it unfit for agricultural purposes. The effect of the user as found by the Munsif, to quote his words, has been that "the soil of the land has hardened and become salty by the congregation of men and cattle and by the action of cattle-urine and to that extent has been rendered unfit for the purposes of the tenancy."

The learned District Judge has observed that, on the evidence, he was not satisfied that such abuse has rendered the land unfit for cultivation, but he was of opinion that if the defendant went on for years using the land in this way, injurious results might ensue. Now, it cannot be denied that, even if the proposed or prospective user of land is likely to render it temporarily and not permanently unfit for the purposes of the tenancy, an injunction might issue restraining such user: see *Rajkishore Mondal v. Rajoni Kant* (1). But when it comes to a question of ejectment under

1. (1916) 87 I C 249.

S. 155 of the Act, it will have to be found as a fact that the abuse has in fact resulted in rendering the land unfit for the purpose of the tenancy. That this is the interpretation of Cl. (1), S. 155 is, in my opinion, plain from the provision for compensation which is contained in sub-S. (2) of the section and which is compulsory. If the finding of the Munsif could be relied on, there cannot be any doubt that the requirements of Cl. (1) would have been satisfied. But that finding has been upset by the District Judge and upset on grounds which I am unable to say are insufficient. He has said:

"The evidence led by the plaintiff to support this view is that the surface of the land had become hardened; to render it fit for cultivation it has got to be dug up with the spade and that will mean extra cost, but the evidence that the surface of the land had become hardened comes not from any expert, but from certain witnesses, whom I should hold as incompetent to give the opinion. All these witnesses have spoken from cursory inspection. There is no doubt that if a number of carts and men congregate on a plot, the surface should become hard, but to what depth the hardness will extend and whether this hardness is injurious for agricultural purposes I am not convinced and, on this point, the majority of the witnesses examined are not competent to speak and none of them have spoken. It was argued again by the plaintiff that if a number of cattle are unyoked and rest on the plot, their excreta will impair the fertility of the plot. But the qualities of the cow-dung and urine have been differently explained by the parties and on this point too we have no expert opinion whether cattle excreta add to or take away the productive power of the soil. I find again that this plot adjoins the river; a portion of it periodically is flooded by river-water. Then again there is no satisfactory evidence that at any time it was cultivated and yielded agricultural produce. Some of the plaintiff's witnesses will have it, paddy, jute were grown on the plot; others maintain pulses, peas were grown and they strenuously denied the cultivation of jute or paddy. It would appear that the plot was possessed by a ferryman and there was and is a ferry near the plot. So I cannot rely upon the unsatisfactory evidence adduced by the plaintiff and I cannot find that actually any crops are grown on the plot or that, by the use, the defendant put the land to it has deteriorated in fertility. It would again appear that it was only for a few months of two years that this abuse had taken place. Then again it was not every day, but only two days in a week that the land was so used. Further, it would appear that, even on those two days in the week, the land was so used, say for 12 hours a day."

In my judgment, it is not enough for a decree under S. 155, Ben. Ten. Act, when it is founded upon Cl. (a), sub-S. (1) of that section, to find that a continuance of the alleged abuse for a suffi-

cient length of time would produce injurious results. And that is all that the learned Judge has found in this case. I am of opinion therefore that the decree which the plaintiff has obtained is not sustainable. The appeal is allowed and, the decisions of the Courts below being set aside, the plaintiff's suit is ordered to be dismissed with costs in all the Courts.

R.K.

*Appeal allowed.***A. I. R. 1933 Calcutta 892****MALLIK AND JACK, JJ.**

Jyotishchandranarayan Ray and others
—Appellants.

v.

Radhikachandranarayan Ray and others—Respondents.

Second Appeal No. 2943 of 1930, Decided on 16th March 1933, from decree of Addl. Dist. Judge, Noakhali, D/- 25th August 1930.

Hindu Law — Partition — Agreement to keep some properties joint—Whole partition depending upon common use of such property — Parties are estopped from suing again for partition of properties kept joint—Rule of perpetuity is not offended.

Where, in a previous partition among members of a Hindu joint family, some properties are kept joint by agreement of parties and compromise decree, and the whole partition depends upon the common use by all the parties of the said joint properties, the parties to the agreement are estopped from suing subsequently for partition of the properties which were so kept joint. Such an agreement does not offend against the rule of perpetuity so far as the actual parties to it are concerned: 6 Cal 106 and 7 Bom 588, *Dis.* [P 893 O 1]

Amarendranath Basu, Bijankumar Mukherji and Radhikaranjan Guha—for Appellants.

Sharatchandra Ray Chaudhuri, Mahendra Kumar Ghosh and Ramendramohan Majumdar—for Respondents.

Jack, J.—This appeal has arisen out of a suit for partition. The property in question consists of the bahir barhi of the parties, including certain tanks. There were three parties, having ejmali properties, which were originally partitioned in 1269. The plaintiffs have a raiyati right in the one-third share of the original joint property. At the partition in 1269, the properties now in suit were kept joint. Subsequently, in 1918, the plaintiffs brought a title suit in respect of five plots of land which they claimed on the basis of a chita of 1267 and the bantaknama of 1269, by

which the original partition was made. That suit of 1918 was compromised in 1920 and a decree was passed under the terms of which the plaintiffs and the defendants down to their heirs and representatives in interest should for ever observe and carry out the covenants contained in the deed of compromise, Ex. 3, in which it was noted that, subject to the modifications made therein, the terms of the bantaknama of 1269 would be fixed and inviolable for ever. The present suit for partition of the bahir barhi and of the properties which were left joint in the original partition and by the decree of 1920 was decreed in the Court of first instance, but was dismissed in the lower appellate Court on the ground that the suit was barred by estoppel and *res judicata*. The question raised in this appeal is whether, in fact, this suit for partition is so barred.

For the appellants, it is contended that the suit is not barred by the decree of 1920 or by the compromise arrived at at that time, because that compromise is void as transgressing the rule of perpetuity. The terms of the decree also, which go beyond the scope of the suit, are not valid without registration. Moreover, it is said that the decree is defective, in that all the parties to the suit did not join in the compromise. In support of the contention that the decree of 1920 was void, as transgressing the rule of perpetuity, the appellants relied on the case of *Ramlinga v. Viru Pakshi* (1), in which it was held that an agreement between co-parceners never to divide certain property is invalid under the Hindu law as tending to create a perpetuity. In the judgment of this case the case of *Rajender Dutt v. Sham Chund Mitter* (2) was referred to with approval. In *Rajender's* case (2) it was held that where, by an agreement entered into between five brothers, who formed a joint Hindu family, it was provided that none of the parties, nor their representatives, nor any person, should be able to divide the real and personal property, belonging to the family, into shares, the general scheme of the arrangement between the brothers was such as could only be binding upon the actual parties to it, not

1. (1888) 7 Bom 588.

2. (1880) 6 Cal 106.

upon a purchaser from one of the parties. It was not therefore held that the whole of the agreement was void, but that it was only binding on the actual parties thereto and not on their representatives or descendants. In the present case it is admitted that, in 1920, there was an agreement between the parties and that, under the terms of that agreement, the bahir barhi was to be kept joint. Detailed arrangements were made, according to which it was to be jointly enjoyed by the parties, and it is clear, as the lower appellate Court points out, that the whole partition, which was made at that time depended upon the common use by all the parties of the bahir barhi.

There was a clear contract entered into between the parties at that time that the bahir barhi should remain joint. It would be entirely unjust to the defendants if the plaintiffs are now allowed to turn round and to go back upon the original arrangement, upon which that partition was founded. This is a case to which the doctrine of changed circumstances is applicable. At that time, according to the terms of the agreement then entered into, the defendants were induced to agree to a compromise of the suit on the condition that the bahir barhi should remain joint and it would not be right to allow the plaintiffs now to appropriate to themselves a separate portion of this property, which they contracted to keep joint. It is true that this joint property was not included in the suit of 1918 and therefore there is no question of *res judicata*. But the Court below was right in holding that the plaintiffs by their agreement at that time and the contract which was then entered into with the defendants were estopped from suing for partition of the properties now in suit which it was then agreed should be kept joint. The fact that the decree of 1920 went beyond the scope of the suit seems to make no difference, because there is no doubt that this agreement that the bahir barhi, etc., should remain joint, was a part of the consideration of that compromise and, as such, it formed an essential part of the decree against these defendants.

As regards the fact that some of the parties did not join in the compromise and the suit was decreed against them

ex parte, the decree is still in force and, as far as the plaintiffs are concerned, it is certainly binding as against them. They cannot be allowed now to say that the compromise, which they then entered into with the defendants and the decree which was passed according to that compromise, have no binding effect on them. This appeal is, accordingly, dismissed with costs.

Mallik, J.—I agree.

R.K.

Appeal dismissed.

A. I. R. 1933 Calcutta 893

LORT-WILLIAMS AND MCNAIR, JJ.

Asgarali Pradhania—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 127 of 1933, Decided on 21st July 1933.

Penal Code (1860), Ss. 511 and 312—Intention to commit crime alone or intention followed by preparation is not sufficient to constitute attempt—Intention followed by preparation and any act towards commission of offence is sufficient to constitute attempt.

There are four stages in every crime: the intention to commit, the preparation to commit, the attempt to commit, and if the third stage is successful, the commission itself. Intention alone, or intention followed by preparation, is not sufficient to constitute an attempt. But intention followed by preparation followed by any "act done towards the commission of the offence" is sufficient. [P 896 C 1]

Accused, who caused pregnancy to a woman, suggested that she should take drugs to procure a miscarriage. One night he brought her a bottle half full of a red liquid, and a paper packet containing a powder. After he had gone, she tasted the powder, but, finding it salty and strong, spat it out. She did not try the liquid. The following night, accused came again, and finding that she had not taken either the powder or the liquid, he pressed her to take them, but she refused saying that she was afraid for her own life, and that the powder irritated her tongue. Thereupon he asked her to open her mouth, and approached her with the bottle, and took hold of her chin. But she snatched the bottle from him and cried out loudly, and her father and some neighbours came, and the accused fled. It was found that neither the powder nor the liquid was harmful:

Held: that accused could not in law be convicted of an attempt to cause miscarriage, as what he did was not an act done towards the commission of the offence of causing a miscarriage: *Case law discussed.* [P 896 C 2]

Sudhansu Sekhar Mukherji and *Ajit Kumar Dutt*—for Appellant.

Harideb Chatterji—for the Crown.

Lort-Williams, J.—The appellant was convicted under S. 312/511, I. P. C., of an attempt to cause a miscarriage. The complainant was 20 years of age, and

had been married but divorced by consent. She was living in her father's house, where she used to sleep in the cookshed. The appellant was a neighbour who had lent money to her father, and was on good terms with him. He was a married man with children. According to the complainant he gave her presents, and promised to marry her. As a result sexual intercourse took place and she became pregnant. She asked him to fulfil his promise, but he demurred and suggested that she should take drugs to procure a miscarriage. One night he brought her a bottle half full of a red liquid, and a paper packet containing a powder. After he had gone she tasted the powder, but finding it salty and strong, spat it out. She did not try the liquid. The following night the appellant came again and finding that she had not taken either the powder or the liquid, he pressed her to take them, but she refused saying that she was afraid for her own life, and that the powder irritated her tongue. Thereupon he asked her to open her mouth, and approached her with the bottle, and took hold of her chin. But she snatched the bottle from him and cried out loudly, and her father and some neighbours came, and the appellant fled. The police were informed, and upon analysis, sulphate of copper was detected in the powder, but the amount was not ascertained. No poison was detected in the liquid. According to the medical evidence, copper sulphate has no direct action on the uterus, and is not harmful unless taken in sufficiently large quantities, when it may induce abortion. One to three grains may be used as an astringent, two to ten grains as an emetic, one ounce would be fatal. According to Taylor's Medical Jurisprudence (Edn. 5), p. 166,

"there is no drug or combination of drugs which will, when taken by the mouth, cause a healthy uterus to empty itself, unless it be given in doses sufficiently large to seriously endanger, by poisoning, the life of the woman who takes it or them."

The defence was a denial of all the facts, some suggestion that the complainant was of loose character, and a statement that the prosecution was due to enmity. Two points have been raised on behalf of the appellant, one being that the complainant was an accomplice and that her evidence was

not corroborated, that she was willing to destroy the foetus but was afraid of the consequences to herself. On the facts stated I am satisfied that the complainant cannot be regarded as an accomplice, and in any case there is some corroboration of her evidence, in the discovery of the drugs and the appellant's flight, which was observed by several witnesses. The other is a point of some importance, namely, that the facts proved do not constitute an attempt to cause miscarriage. This depends upon what constitutes an attempt to commit an offence, within the meaning of S. 511, I. P. C., which provides as follows:

"Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence shall be punished etc."

Illustrations: (A) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section. (B) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section."

It is argued that as there was no evidence to show that either the liquid or the powder was capable of causing a miscarriage, the appellant cannot be convicted of an attempt to do so. This contention depends upon a correct definition of the word "attempt" within the meaning of the section. In *R. v. McPherson* (1), the prisoner was charged with breaking and entering the prosecutor's house and stealing therein certain specified chattels, and was convicted of attempting to steal those chattels. Unknown to him those chattels had been stolen already. Cockburn, C. J., held that the conviction was wrong because

"the word 'attempt' clearly conveys with it the idea that if the attempt had succeeded the offence charged would have been committed. An attempt must be to do that, which if successful, would amount to the felony charged, but here the attempt never could have succeeded."

In *R. v. Cheeseman* (2) Lord Blackburn said:

"There is no doubt a difference between the preparation antecedent to an offence and the actual attempt. But if the actual transaction

1. (1857) D & B 202.

2. (1862) L & C 140=31 L J M C 89=8 Jur (ns) 148=5 L T 717=10 W R 255=9 Cox C C 100.

had commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

In *R. v. Collins* (3) Cockburn, C. J., following *McPherson's* case (1) held that if a person puts his hand into the pocket of another, with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. Because an attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit. It is clear however from the illustrations to S. 511, that Lord Macaulay and his colleagues who drafted the Indian Penal Code, which was enacted in 1860, did not intend to follow these decisions, and I agree with the remarks upon this point made in *Mac Crea's* case (4). The Calcutta High Court in *Empress v. Riasat Ali* (5) held that the definitions in *McPherson's* case (1) and *Cheeseman's* case (2) were sound. In England the decisions were reconsidered in *R. v. Brown* (6) and *R. v. Ring* (7). The Judges expressed dissatisfaction with the decisions in *R. v. Collins* (3) and with that in *R. v. Dodd* (8) which proceeded upon the view that a person could not be convicted of an attempt to commit an offence which he could not actually commit, and expressly overruled them saying that they were no longer law. The judgment in *Brown's* case (6) however has been criticised as unsatisfactory, and it has been contended that *R. v. Brown* (6) and *R. v. Ring* (7) have not completely overruled *R. v. Collins* (3): Pritchard's Quarter Sessions (*Edn. 2*). In *Amrita Bazar Patrika Press, Ltd.* (9) the decision in *R. v. Collins* (3) was again quoted with approval, apparently in ignorance of the fact that it had been expressly overruled in the English Courts. Mookerjee, J., held that in the language of Stephen (*Digest of Criminal Law, Art. 50*):

"An attempt to commit a crime is an act done

3. (1864) 38 L J M C 177=10 Jur (n s) 686=10 L T 581=12 W R 886=9 Cox C C 497.

4. (1898) 15 All 173=(1898) A W N 71.

5. (1881) 7 Cal 852=8 C L R 572.

6. (1889) 24 Q B D 857.

7. (1892) 17 Cox 491=61 L J (n s) M C 116=66 L T 800.

8. (1877) Unreported.

9. AIR 1920 Cal 478=54 I C 578=21 Cr L J 98=47 Cal 190 (SB).

with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. To put the matter differently, attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing except for failure to consummate, all the elements of a substantive crime; in other words an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to but falling short of its actual commission; it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted."

The decision in *McPherson's* (1) and *Collin's* cases (3) are clearly incompatible with illustrations to S. 511, and in my opinion are not law either in India or in England. Nevertheless, the statements of law to which I have referred are correct, so far as they go, and were not intended to be exhaustive or comprehensive definitions applicable to every set of facts which might arise. So far as the law in England is concerned, in the draft Criminal Code prepared by Lord Blackburn, and Barry, Lush, and Stephen, J.J., the following definition appears (Art. 74):

"An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause. *Everyone who believing that a certain state of facts exists does or omits an act the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible."*

To this definition the Commissioners appended a note to the effect that the passage between the asterisks "declares the law differently from *R. v. Collins* (3)" which at the date of the drafting of the Code had not been overruled. The first part of this definition was accepted in *R. v. Laitwood* (10) at 252, and purporting to be in accordance with the latter part, it was held by Darling, J., that if a pregnant woman, believing that she is taking a "noxious thing" within the meaning of the offences against the Poison Act, 1861, S. 58, does with intent to procure her own abortion take a thing in fact harmless, she is guilty of attempting to commit an offence against the first part of that sec-

10. (1910) 4 Cr App Rep 248.

tion: *R. v. Brown* (11). In Russell on Crimes (Edn. 8), Vol. 1 at p. 145, two American definitions are quoted from Bishop:

"Where the non-consummation of the intended criminal result is caused by an obstruction in the way, or by the want of the thing to be operated upon, if such an impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the punishable attempt is committed. Whenever the laws make criminal one step towards the accomplishment of an unlawful object done with the intent or purpose of accomplishing it; a person taking that step with that intent or purpose and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt it could be fully carried into effect in the particular instance."

So far as the law in India is concerned, it is beyond dispute that there are four stages in every crime, the intention to commit, the preparation to commit, the attempt to commit, and if the third stage is successful, the commission itself. Intention alone, or intention followed by preparation are not sufficient to constitute an attempt. But intention followed by preparation, followed by any "act done towards the commission of the offence" is sufficient. "Act done towards the commission of the offence" are the vital words in this connexion.

Thus, if a man thrusts his hand into the pocket of another with intent to steal, he does an act towards the commission of the offence of stealing, though unknown to him the pocket is empty. He tries to steal, but is frustrated by a fact, namely the emptiness of the pocket, which is not in any way due to any act or omission on his part. He does an act towards the commission of the offence of pocket picking, by thrusting his hand into the pocket of another with intent to steal. Similarly, he may fail to steal the watch of another because the latter is too strong for him, or because the watch is securely fastened by a guard. Nevertheless he may be convicted of an attempt to steal. Blackburn, and Mellor, JJ.: *R. v. Henle* (12), at p. 573.

But if one who believes in witchcraft puts a spell on another, or burns him in effigy, or curses him with the intention of causing him hurt, and believing that

his actions will have that result, he cannot in my opinion be convicted of an attempt to cause hurt. Because what he does is not an act towards the commission of that offence, but an act towards the commission of something which cannot, according to ordinary human experience result in hurt to another, within the meaning of the Penal Code. His failure to cause hurt is due to his own act or omission, that is to say, his act was intrinsically useless, or defective, or inappropriate for the purpose he had in mind, owing to the undeveloped state of his intelligence, or to ignorance of modern science. His failure was due, broadly speaking, to his own volition. Similarly, if a man with intent to hurt another by administering poison prepares and administers some harmless substance, believing it to be poisonous, he cannot in my opinion, be convicted of an attempt to do so. And this was decided in *Empress v. Mt. Bupsir Panku* (13), with which I agree. The learned Judicial Commissioner says:

"In each of the illustrations to S. 511, there is not merely an act done with the intention to commit an offence which is unsuccessful because it could not possibly result in the completion of the offence, but an act is done 'towards the commission of the offence,' that is to say the offence remains incomplete only because something yet remains to be done, which the person intending to commit the offence is unable to do, by reason of circumstances independent of his own volition. It cannot be said that in the present case the prisoner did an act 'towards the commission of the offence.' The offence which she intended to commit was the administration of poison to her husband. The act which she committed was the 'administration of a harmless substance'."

This reasoning is applicable to the case now under consideration. The appellant intended to administer something capable of causing a miscarriage. As the evidence stands, he administered a harmless substance. This cannot amount to an "act towards the commission of the offence" of causing a miscarriage. But if A, with intent to hurt B by administering poison, prepares a glass for him and fills it with poison, but while A's back is turned, C who has observed A's act, pours away the poison and fills the glass with water, which A in ignorance of what C has done, administers to B, in my opinion A is guilty, and can be convicted of an at-

tempt to cause hurt by administering poison. His failure was not due to any act or omission of his own, but to the intervention of a factor independent of his own volition. This important distinction is correctly stated by Turner, J., in *Ramsaran's case* (14), at pp. 47 and 48, where he observes that

"to constitute an attempt there must be an act done with the intention of committing an offence and in attempting the commission. In each of the illustrations to S. 511 we find an act done with the intention of committing an offence, and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence, and in each we find the intention of the person making the attempt was frustrated by circumstances independent of his own volition."

In *Queen-Empress v. Luxman Narayan Joshi* (15) Sir Lawrence Jenkins, C. J., defined "attempt" as :

"An intentional preparatory action which failed in object through circumstances independent of the person who seeks its accomplishment. And in *Queen-Empress v. Vinayak Narayan* (16) the same learned Judge defined "attempt" as when a man does an intentional act with a view to attain a certain end, and fails in his object through some circumstance independent of his own will."

These also are good definitions so far as they go, but they fail to make clear that there must be something more than intention coupled with mere preparation. As was said in *Raman Chettiar v. Emperor* (17), at p. 96 (of 28 Cr. L. J.) :

"The actual transaction must have begun and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt." Here it is necessary to observe the distinction that 'an act to bear' is not the same thing as 'an act which has borne'."

In *Empress v. Ganesh Balvant* (18), it was said that :

"some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence"

is necessary to constitute an offence. "It does not matter that the progress was interrupted."

In *Queen-Empress v. Gopala* (19), Parsons and Ranade, JJ., stated that, in their opinion, a person physically incapable of committing rape cannot be found guilty of an attempt to commit

rape, because his acts would not be acts "towards the commission of the offence." In the American and English Encyclopaedia of Law Vol. 3, p. 250, (Edn. 2) "attempt" is defined as "an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime."

In Russell on Crimes, (Edn. 8), Vol. 1, pp. 145 and 148, the following definitions are given :

"No act is indictable as an attempt to commit felony or misdemeanour, unless it is a step towards the execution of the criminal purpose, and is an act directly approximating to, or immediately connected with, the commission of the offence which the person doing it has in view. There must be an overt act intentionally done towards the commission of some offence, one or more of a series of acts which would constitute the crime if the accused were not prevented by interruption, or physical impossibility, or did not fail, for some other cause, in completing his criminal purpose."

"The question in each case is whether the acts relied on constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short of completion by the intervention of causes outside the volition of the accused, or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind."

I do not propose to embark upon the dangerous course of trying to state any general proposition, or to add to the somewhat confusing number of definitions of what amounts to an "attempt," within the meaning of S. 511, Penal Code. I will content myself with saying that, on the facts stated in this case, and for the reasons already given, the appellant cannot in law, be convicted of an attempt to cause a miscarriage. What he did was not an "act done towards the commission of the offence" of causing a miscarriage. Neither the liquid nor the powder being harmful, they could not have caused a miscarriage. The appellant's failure was not due to a factor independent of himself. Consequently, the conviction and sentence must be set aside and the appellant acquitted.

McNair, J.—I agree.

K.S.

Appellant acquitted.

14. (1872) 4 N W P 46.

15. (1900) 2 Bom L R 286.

16. (1900) 2 Bom L R 804.

17. A I R 1927 Mad 77=99 I O 127=23 Cr L J 95.

18. (1910) 34 Bom 878=11 Cr L J 180=5 I O 612.

19. (1898) Rat Un Cri Cases 865.

A. I. R. 1933 Calcutta 898

MUKERJI, J.

Abdul Latif and others — Plaintiffs—Appellants.

v.

Hamed Gazi and others — Defendants—Respondents.

Second Appeal No. 496 of 1931, Decided on 21st March 1933, from decree of Second Sub-Judge, Bakarganj, D/-24th June 1930.

(a) Landlord and Tenant—Third person in pursuance to settlement from landlord dispossessing tenant—Suit by tenant for recovery of possession is governed by Bengal Tenancy Act (1885), Sch. 3.

When a landlord grants a settlement, it may be presumed that he intends that the settlement would take effect and that he expects that the persons, with whom the settlement is made, would go upon the land and take possession of it; and if, in pursuance of such settlement, a third person dispossesses a tenant, it amounts to disposssession by the landlord, and a suit for recovery of possession by the tenant is governed by the special law of limitation in Sch. 3: *AIR 1921 Cal 249, Diss from;* 29 Cal 610, *Expl.*, 8 IC 815; 19 IC 545 and 39 IC 888, *Doubted*.

[P 899 C 1]

• (b) Bengal Tenancy Act (1885), Sch. 3—Raiyat's land in possession of trespasser—His dispossession by person under settlement from landlord is dispossession of raiyat.

When the land of the raiyat is in the actual possession of a trespasser and the landlord grants a settlement to a third party, who dispossesses the trespasser, the ouster amounts to dispossession of the raiyat.

[P 900 C 1]

Nasim Ali—for Appellants.

*Brajendra Nath Chatterji and Sate-
ndranath Ray Chaudhury*—for Respondents.

Judgment.—The suit, out of which this appeal has arisen, was instituted by the plaintiffs for a declaration of their karsha right in the lands in suit and for evicting defendant 1 therefrom. The plaintiffs case was as follows: They inherited the karsha from their predecessor Nawab Ali, who was a tenant under one Ambikacharan Bhattacharjya, and others and one Kanai Khan was an under-raiyat under Nawab Ali. The interest of Ambikacharan Bhattacharjya and others was subsequently purchased by defendant 2. On the death of Kanai Khan, they sued the heirs of Kanai Khan and certain mortgagees from Kanai Khan for khas possession and obtained a decree against the said heirs only, but not against the mortgagees who disclaimed all interest. They obtained khas possession in execution and settled the land with defendant 3. Then there

was a proceeding under S. 145, Criminal P. C., in which the possession of defendant 1, who was said to be a bargadar under the mortgagees, was maintained. The plaintiffs' case was that defendant 1 dispossessed them in Chaitra, 1334 B. S. The defence taken was that the suit was barred by limitation, as the plaintiffs' predecessor, Nawab Ali, as well as the under-raiyat, Kanai Khan, surrendered their respective interests in favour of defendant 2 in 1324 B. S. and that since then defendant 2 has been in possession through her bargadar, defendant 1.

The story of surrender has not been believed by either of the Courts below. The Munsif found the plaintiffs' title established. He held that defendant 1 has been in possession since 1326 B.S. and that the story of the plaintiffs' possession through defendant 3 was not true. On a consideration of the facts which he found, he came to the conclusion that the possession of defendant 1 was obtained by means of dispossession of Kanai Khan, who was in actual possession as an under-raiyat under the plaintiffs' predecessor Nawab Ali. He held that the possession of defendant 2 through defendant 1 would, at the most be tantamount to a dispossession of Kanai Khan and not of the plaintiffs. In this view, he held that the suit was not barred by limitation, either general or special.

The Subordinate Judge held that the story that defendant 1 came under a settlement from the mortgagees was not true. He held further that defendant 1 was in possession in 1327, 1328 and 1329 on the strength of a kabuliyat which defendant 1 executed in favour of defendant 2. On these findings he held that the suit was barred under the special limitation prescribed in Art. 3, Sch. 3, Ben. Ten. Act. The plaintiff, as appellant, contends that the article does not apply for two reasons, which perhaps it would be better to formulate definitely. They are firstly, because there is nothing to show that the dispossession was by the landlord or at his instance, as the taking of a kabuliyat would not necessarily indicate that it was so; and, secondly, that, when defendant 1 came into possession, the land was in the possession of the heirs of the under-raiyat Kanai Khan, who had no right to remain on the land and were consequently tres-

passers, and therefore the dispossession was of these trespassers and not of the plaintiffs.

As regards the first of these two grounds, it has no substance, because when the landlord grants a settlement it may well be presumed that he intends that the settlement would take effect; and the consequence of this presumption must be that he expects that the persons, with whom the settlement is made would go upon the land and take possession of it. I think the Subordinate Judge was right in holding that the reasonable conclusion upon the facts found is that it was a case of the landlord bringing the dispossessor on the land. The appellant's argument receives some support from what has been said in the case of *Harun Chandra v. Madan Mohan* (1), namely

"They have no doubt obtained a settlement from the landlord, but it is not found that they were authorized by the landlord to oust the plaintiffs."

I must confess that I am unable to follow all the reasons given for the decision in that case, though the decision itself is perfectly defensible on the ground that, in view of the fact that the defendants denied the plaintiffs' title to the lands as based upon a settlement from the landlords, it was not open to the defendants to plead in the same breath that the article applied—a position which can only be maintained on the footing that there was such a settlement. Having regard to the cases, upon which the decision purported to rely and the facts found, the dispossession in that case, as far as I can make out was clearly referable to the action of the landlords and so was one hit by the article. The decision of the Full Bench in the case of *Ranijulla v. Ishaq Dhal* (2), on which the learned Judges in that case relied, merely purported to settle a conflict as regards cases in which after the dispossession the dispossessor obtained a settlement from the landlord. So far as the second ground is concerned, it is based upon the finding of the Courts below that Kanai Khan, the under-raiyat, died in 1326 and defendant 1 dispossessed the heirs of Kanai Khan in 1327 on the strength of the settlement which defendant 2, the landlord, made in his favour in that year. The question

is whether, in such circumstances, the plaintiff can be said to have been dispossessed by defendant 2.

The period of one year allowed under S. 32 of Act 10 of 1859 was extended by Bengal Act 8 of 1869 to two years, and up to 1885 the law was understood to be that, for action in the nature of possessory suits, the period of limitation was two years, but that when the title of one party or the other was denied, then the period was twelve years under the general law. By reason of the provision contained in S. 184 of Act 8 of 1885 it was held that that Act intended to exclude all other statutes of limitation wherever it was possible to apply the provision of the special limitation provided in its Sch. 3 [*Saraswati Dasi v. Horitarun Chuckerbutti* (3), *Ramdhan Bhadra v. Ram Kumar Dey* (4)]. In 1907, the article was amended by substituting for the words "occupancy raiyat" the words "raiyat or under-raiyat." It has been held that the word "dispossession" appearing in this article implies the coming in of a person and the driving out of another from possession [*Brojendra Kishore Roy v. Sarojini Ray* (5)]. It has also been held that it was intended by this article to deal with such rights as existed between landlord and tenant and that to deprive a tenant of his right of suit under the general rule of limitation there must be a plain dispossession within the meaning of Art. 3. [*Krishna Chandra v. Satischandra* (6)] It has also been laid down that an extended meaning should not be given to the article by resorting to the theory of constructive dispossession. So in cases in which the defendant came into possession by the permission of the plaintiff, the landlord then refused to vacate [*Sonatan Sheikh v. Chaku Sheikh* (7)], or where the landlord has simply favoured a dispossession by a third party [*Basanta Kumary v. Nanda Ram* (8)], or the landlord dispossessed the tenant by obtaining a decree for rent [*Durgapada Panja v. Bhusan Chandra Ghosh* (9), *Kamal-dhari Thakur v. Rameshwar Singh* (10)],

3. (1889) 16 Cal 741.

4. (1890) 17 Cal 926.

5. (1916) 31 I C 242.

6. (1916) 35 I C 365.

7. (1909) 8 I C 398.

8. (1913) 20 I C 350.

9. (1917) 39 I C 388.

10. (1918) 19 I C 645.

1. AIR 1921 Cal 249=61 I C 899.

2. (1902) 29 Cal 610=6 O W N 702 (F B).

Rudra Narain v. Natobar Jana (11), or where the landlord refused to put the defendant in possession [*Panchoo Kapali v. Jagneswar Majhi* (12); *Rajani Kanta v. Panchanon Mondal* (13)], it has been held that the act amounts to dispossession only constructively. There are other decisions of doubtful authority in support of the view that a dispossession by selling up the holding in execution of a rent decree, so that a purchaser comes into possession of it, is within the meaning of the article, e.g., *Aminuddin v. Ulfatunnissa* (14). See *Kamaldhari v. Rameshur* (10) and *Durgapada Panja v. Bhusan Chandra Ghosh* (9). A restricted view that the dispossession must be by the landlord as such, has now been completely overthrown: *Satish Chandra v. Hasemali* (15).

The question whether a dispossession by a landlord of a raiyat when the land of the raiyat is in the actual possession of a trespasser does not appear to have been considered in any case. It is true that the plaintiff or his father Nawab Ali was in possession of the land through his under-raiyat, Kanai Khan, so long as the latter was alive. It is also true that when Kanai Khan died his heirs were but trespassers. But if defendant 2 granted a settlement to defendant 1, on the strength of which the latter dispossessed the trespassers and came into possession, then, although it was the trespassers who were dispossessed in the first instance, the effect of this dispossession, in my judgment, was nothing else than the driving out of the plaintiff and the getting into possession of defendant 1 at the instance of defendant 2. This, in my opinion, follows from the principle that one trespasser cannot tack on his possession with that of another, who preceded him, and that between the departure of the first trespasser and the advent of the second the law will assume an interval during which the plaintiff was in possession. I am of opinion that Art. 3 applies to this case. The appeal therefore should be dismissed with costs.

R.K.

Appeal dismissed.

11. AIR 1914 Cal 60=21 I O 481=41 Cal 62.

12. AIR 1920 Cal 848=58 I O 244.

13. AIR 1926 Cal 380=90 I O 793.

14. (1908) 8 I O 815.

15. AIR 1927 Cal 488=108 I O 124=54 Cal 450.

A. I. R. 1933 Calcutta 900

GUHA AND BARTLEY, JJ.

Debendranath Sharma—Defendant
Appellant.

Nagendranath Datta—Plaintiff—Respondent.

Appeal No. 2198 of 1930, Decided on 24th April 1933, from appellate decree of Dist. Judge, Sylhet, D/- 15th April 1930.

(a) Civil P. C. (1908), S. 11, Expl. 4—Constructive res judicata—Purchase from limited owner—Suit for possession on basis of kabuliyat in which reversioners impleaded—Reversioners are not bound to raise question of legal necessity for sale in that suit—Subsequently suit by reversioners for declaration of title and possession questioning legal necessity for sale is not barred.

A matter directly and substantially in issue may be in issue constructively. The question whether a matter ought to have been made a ground of defence must depend on the particular facts of each case. As a rule of general application, it may be said, that, if the introduction of a matter into a suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it must be deemed to be a matter which ought to have been made a ground of attack or defence in that suit, unless the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion.

In a suit by a purchaser from a limited owner for possession of the property on the basis of the kabuliyat, the reversioners were impleaded as defendants. The reversioners did not attack the sale as being one not for legal necessity and a decree was passed. Subsequently the reversioners sued for declaration of their title and for possession on the ground that the sale was not for legal necessity. It was contended that their suit was barred by doctrine of constructive res judicata:

Held: that the introduction of the question of legal necessity was not necessary in the previous suit, even though the reversioners could have raised the question, and that the subsequent suit was not barred by res judicata: 20 Cal 79 (P O), *Ref.*; 31 Cal 79, *Dist.* [P 908 C 2]

(b) Hindu Law — Alienation by widow for legal necessity—Reversioner cannot recover property by offering to pay purchaser amount raised.

Reversioner cannot recover property sold by widow for legal necessity, even by offering to pay to the purchaser the amount raised. [P 904 O 1, 2]

(c) Hindu Law — Widow — Alienation — Onus is on alienee to prove necessity—Alienee must act honestly and make due inquiries.

Onus lies on him who wants to take benefit under a transaction by a limited owner, to prove justifying necessity. It is incumbent upon the alienee to prove that he has acted honestly and made due inquiry as to existence of necessity. Even when an alienation may be partially justifiable or a portion of the consideration may be

valid, the whole alienation has to be set aside : 21 All 71 (P C) and 29 All 381 (P C), *Ref.*

[P 901 C 2]

(d) **Hindu Law — Alienation by limited owner—Recitals cannot solely be relied on for proving necessity—Deed—Recitals.**

The recitals in a document evidencing alienation may raise a presumption, and sometimes a very strong presumption of necessity in favour of a purchaser in the circumstances of a particular case, specially when evidence of a transaction is not available. As a general rule however the recital, in the deed by which the property is alienated by a limited owner, cannot be relied upon solely for the purpose of proving existence of necessity, though it may be of some evidence. It may be an admission, and it may amount to a representation of necessity, in cases where a transaction, perfectly honest and legitimate when it took place, would ultimately be incapable of justification, merely owing to the passage of time: A I R 1916 P C 110, *Ref.*

[P 904 C 2]

Debendranath Bagchi and Jyotish-chandra Guha—for Appellant.

Brajul Chakrabarti and Priyanath Datta—for Respondent.

Judgment.—The plaintiffs in the suit out of which this appeal has arisen prayed for possession of the properties described in three different schedules of the plaint filed by them in Court on declaration of their title, as the reversionary heirs of one Jugalkishore Datta, of which the contesting defendants were in possession on the allegation that the defendants were in possession by virtue of sales which were inoperative and which did not in any way affect the rights of the plaintiffs as reversioners. The plaintiffs also prayed for a decree for mesne profits arising out of the properties of which the defendants were in unlawful possession. Without traversing the long history of devolution of interest as set out in the plaint, it is sufficient to state that the sales impeached by the plaintiffs in the suit were effected by Golakeshwari, a daughter of Jugalkishore Datta named above, who was admittedly the last male owner of the properties in question, and Kunjakishore, the son of Golakeshwari, the then reversionary heir of Jugalkishore, as also a sale by Tarini Dasee, the widow of Jugalkishore. The first of these two sales related to the properties described in Schs. 1 and 2 of the plaint, while the second sale by Tarini Dasee was in respect of the properties mentioned in Sch. 3 of the plaint. The sales, according to the plaintiffs, did not represent bona fide transactions, were alleged to be without consideration, and it was asserted that the

Hindu widows by whom the sales were effected, who were limited owners under the law, had no legal necessity for the sales, and that the estates in the possession of these limited owners were not benefited by the sales.

The claim made by the plaintiffs in the suit was resisted by the contesting defendants. The allegations made by the plaintiffs as to the nature of the transactions evidenced by the sales were denied: it was pleaded that the questions raised in the suit by the plaintiffs could not be reagitated, in view of the decision in a previous litigation in which the parties litigating in the present suit were represented. The defendants further pleaded that the sales represented bona fide transaction for good consideration, and there was legal necessity for them, so as to make the sales binding on the reversionary heirs of Jugalkishore Datta, the plaintiff in the suit. It may be mentioned that, so far as the properties described in plot 3, Sch. 3 of the plaint were concerned, the controversy between the parties related to a question of title of the plaintiffs in the same, depending upon the admission of a heba, and not merely on the question whether there was legal necessity for the sale of the properties, as it was the case in regard to the properties mentioned in Schs. 1 and 2 of the plaint. Apparently there was no contest between the parties in regard to plots 2 and 3, Sch. 3.

The material issues raised for trial in the suit were whether the sale deed, under which the answering defendants claim title to the lands in suit, confer any absolute interest in the purchaser, whether the sale of the year 1299 B. S. was for legal necessity, and, as such, binding on the reversioner, and whether the plaintiffs had "any right to and interest in the lands in suit." The trial Court gave its decision in favour of the plaintiffs, holding that the sale deed of 1299 B. S. was not for legal necessity and did not confer absolute interest, and that the plaintiffs had their right, title and interest in the lands in the suit. Apparently no distinction was made by the learned Subordinate Judge in the Court of first instance, as between the properties mentioned in the different schedules to which reference has been made already. On appeal by the defendants, the decision of the trial Court

was affirmed by the learned District Judge, with the modification that the claim of plaintiffs 2, 3 and 5 was dismissed as regards a ten annas share of plot 3, Sch. 3 of the plaint. Defendant 1 in the suit has appealed to this Court, and the plaintiffs-respondents have preferred cross-objection directed against the decision of the Court of appeal below dismissing the claim of plaintiffs 2, 3 and 5 to a ten annas share for the property described as plot 3, Sch. 3.

The question of the applicability of the rule of *res judicata* arises for consideration first, so far as the case of the appellants before the Court is concerned. Brajanath Sharma, predecessor of defendants 1 and 2, and Hridaynath Sharma, predecessor of defendant 3, instituted Suit No. 44 of 1907, in the first Court of the Subordinate Judge, Sylhet, against Golakeshwari, the sons of Kunjakishore (the son of Golakeshwari) the plaintiffs in the present suit, and other persons, for recovery of possession of the lands in suit on declaration of their title, on the allegation that they acquired title thereto by purchase from defendant 1 and the father of defendants 2 and 3 by a kabala executed in the year 1299 B. S., that they let out the lands to the father of defendants 2 and 3 on obtaining kabuliyats from him; that on the expiry of the leases the plaintiffs attempted to obtain khas possession of the lands in suit, but they were opposed by the defendants, and that the plaintiffs were kept out of possession. Golakeshwari, defendant 1 in the suit of 1907, did not contest the suit. Defendants 4 to 8, the plaintiffs in the present suit, contested the suit on the ground that the plaintiffs had no cause of action, that the suit was barred by limitation, and that it was bad for multifariousness and defect of party.

On the merits, these defendants contended that plots 6 and 10 in suit appertained to *Maluk* No. 39, two-thirds of plots 3 and 14 and half of plot 9 belonged to them, and that the remaining shares of the said three plots belonged to defendant 1 in the suit. It is to be noticed that the judgment only in the Suit No. 44 of 1907 was filed in the present case, and no other materials on which the plea of *res judicata* could be founded was before the Court. It appears from the judgment in the previous litigation that an

issue was raised as to whether the kabala set up by the plaintiffs was a bona fide transaction; and the finding recorded by the Court on that issue was that the kabala was executed by defendant 1 and father of defendants 2 and 3, and that "it was a bona fide true deed." There was an *ex parte* decree passed against defendants 1, 2 and 3, amongst others, and the plaintiffs' claim to plot 6, 10, two-thirds of plots 3 and 14 and half of plot 9 was dismissed, defendants 4 to 8, the plaintiffs in the present suit, were to bear their own costs. It is difficult to make out, from the judgment in Suit No. 44 of 1907, the exact position taken up by the parties then before the Court, in the absence of the pleadings; and it is impossible to say in what precise manner the question of the bona fides of the kabala of 1299 B. S. was raised before the Court.

It does not appear that the question, whether Golakeshwari had any legal necessity for executing the kabala, was raised in the Suit No. 44 of 1907. The arguments in support of the appeal, so far as they relate to the plea of *res judicata*, are that the decision of the suit in Suit No. 44 of 1907, on the question of bona fide of the kabala of 1299 B. S., on which the defendants' case in the present litigation is based, has to be treated as conclusive between the plaintiffs and the defendants; and the question of legal necessity as raised in the present case could not be allowed to be agitated again; further that, even if it be considered that the question of legal necessity was not raised in the previous litigation by defendants 4 to 8, the plaintiffs in the present litigation, the question was one which might and ought to have been made a ground of defence, as contemplated by Expl. 4, S. 11, Civil P. C., and as such should be deemed to have been a matter directly and substantially in issue in the previous litigation, so as to invoke the principles of *res judicata* in aid of the defendants in the present case.

In support of the latter argument, reliance was placed on behalf of the appellant on the decision of this Court in the case of *Shyama Charan Banerjee v. Mrinmayi Debi* (1), in which case a previous suit brought by the defendant's

husband against the plaintiff for declaration of title to the property in suit was not defended, and an ex parte decree was passed in a subsequent suit by the plaintiff to have his title to the property declared, to have the sale to the defendant's husband set aside, as having been made without legal necessity, and to recover possession; the defence was that the suit was barred by the operation of the rule of res judicata; and it was held that the question of validity of the sale to the defendant's husband ought to have been raised by way of defence to the previous suit, and it was therefore to be treated as having been directly and substantially in issue in that suit, and was consequently res judicata. It may be mentioned here that the importance the learned District Judge in the Court below has attached to the fact that the decree in Suit No. 44 of 1907 was passed against Golakeshwari ex parte, without any contest on her part, does not commend itself to us.

The decree which was passed ex parte against the holder of a woman's estate under the Hindu law, may be binding on the reversioner, unless the decree could be impeached on some special ground unless it could be shown that it was not obtained fairly and properly. The decree in the previous litigation against Golakeshwari has not been proved to be one unfairly or improperly obtained. The question however remained whether the decree against Golakeshwari passed ex parte incorporated a decision on the question of legal necessity as raised by the plaintiffs in the present litigation. We have no means of ascertaining what the exact significance of impeaching the sale of 1299 B. S. by Golakeshwari on the ground of bona fides as mentioned in the judgment in Suit No. 44 of 1907 was: and we are unable to hold on the materials before us that the plea of res judicata arising for consideration in this case could be substantiated and has been substantiated in any way, by the defendants, on the ground that there was an express decision in the previous litigation bearing upon the question of legal necessity for the sale of 1299 B. S. It is not possible for us to say that the conclusion arrived at by the Court in the suit of 1907 that the kabala of 1299 was a "bona fide true deed," was sufficient for the purpose of disposing of

the question of legal necessity raised by the parties in the present litigation. The application of what is sometimes called "constructive" res judicata founded upon Expl. 4, S. 11, Civil P.O., has to be taken into consideration next. A matter directly and substantially in issue may be in issue constructively. The question whether a matter ought to have been made a ground of defence must depend on the particular facts of each case. As a rule of general application, it may be said that if the introduction of a matter into a suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it must be deemed to be a matter which ought to have been made a ground of attack or defence in that suit, unless the matters in that suit and the subsequent suit are so dissimilar that their union might lead to confusion: see *Kameswar Pershad v. Rattan Koer* (2). Judged in the light of the above principles the previous suit of 1907, to which Golakeshwari was a party, and to which the sons of Kunjabihari were also parties, could not be held to be one in which it was incumbent upon defendants 4 to 8 in that suit the plaintiffs in the present litigation, to raise the question of legal necessity as they have done in this case.

The suit of 1907 was one for possession on the expiry of a lease; Golakeshwari had no valid defence to the suit, and she did not contest the same; defendants 4 to 8, the plaintiffs in the present suit, had no present right in them to claim possession in derogation of the rights of the plaintiffs in that suit conferred on them by Golakeshwari as the holder of a woman's estate during her lifetime, and the introduction of the question of legal necessity was not necessary in the previous suit, regard being had to its scope, for a complete and final decision of the same, plaintiffs seeking to recover possession on the expiry of a lease. It cannot therefore be said that the principle on which the decision of this Court in *Shyama Charan Banerji's* case (1), on which the appellant before us seeks to rely, has any application to the case before us. In the circumstances of the case before us, we have no hesitation in holding that the

decision in Suit No. 44 of 1907 in the lifetime of Golakeshwari did not operate as res judicata in the defendants' favour. As has been observed by their Lordships of the Judicial Committee of the Privy Council in the case of *Deputy Commissioner, Kheri v. Khanjan Singh* (3), no question as to the effect of the widow's conveyance on the reversion could have been raised in the previous suit. The introduction of any question as to the effect of the conveyance of 1299 upon the reversion, would have been, to use the words Sir Arthur Wilson in the case mentioned above, incongruous to the matter of the suit of 1907. In our judgment therefore the arguments advanced in support of the appeal, bearing on the question of res judicata, cannot upon principle and authority be accepted as sound, and given effect to. The question of legal necessity might perhaps have been raised in the previous litigation of 1907, but it could not possibly be said that it ought to have been raised as a defence to the same.

The plea of res judicata not being sustainable as a defence in the suit, the merits of the case have now to be considered. In regard to the properties mentioned in Schs. 1 and 2, the decision of the Courts below turned entirely upon the conclusions arrived at by them as to whether there was legal necessity for the sale evidenced by the kabala of 1299 B. S., Ex. F in the case, on which the title of the defendants was based. The kabala recited that, at the time when the document was executed Golakeshwari and Kunjakishore had no means of paying their debts or maintaining themselves, and that they owed the sum of Rs. 730 to the purchaser on bonds, the sum of Rs. 250 without bonds, and the sum of Rs. 20 was paid to Golakeshwari and Kunjakishore in cash. On the face of the conveyance, it was apparent that the property covered by the document was sold by Golakeshwari with the consent of Kunjakishore, who was the only immediate reversioner at the time. There can be no doubt that the widow alone was entitled to absolutely alienate property for necessity, and the reversioner in the position of the plaintiffs in the present suit cannot recover property sold for

legal necessity, even by offering to pay to the purchaser the amount raised. What is taken to be legal necessity justifying alienation by the holder of a woman's estate may be enumerated under these heads: debts of the last male owner; his exequial rites; religious or charitable purposes; maintenance charges for the family; marriage expenses; preservation of the estate; and costs of litigation.

For our present purpose, it may be mentioned that, so far as Golakeshwari was concerned, the alienation by her purported to have been for the purpose of maintenance of the family and for expenses in connexion with the preservation of the estate, and for payment of debts incurred by her for those purposes. It is well established that onus lies on him who wants to take benefits under transaction by a limited owner, to prove justifying necessity. The question was: Did the purchaser act honestly and had he made due inquiry as to the existence of necessity. It was incumbent upon the alienee to prove the same: even when an alienation may be partially justifiable or a portion of the consideration may be valid, the whole alienation has to be set aside: see *Sham Sundar Lal v. Achhan Kunwar* (4) and *Deputy Commissioner, Kheri v. Khanjan Singh* (3). The recitals in the document evidencing alienation may raise a presumption, and sometimes a very strong presumption of necessity in favour of a purchaser in the circumstances of a particular case, specially when evidence of a transaction is not available. As a general rule however the recital in the deed by which the property is alienated by a limited owner cannot be relied upon solely for the purpose of proving existence of necessity, though it may be of some evidence. It may be an admission, and it may amount to a representation of necessity, in cases where a transaction, perfectly honest and legitimate when it took place, would ultimately be incapable of justification, merely owing to the passage of time: see *Banga Chandra Dhur v. Jagat Kishore* (5). In the case before us, evidence was forthcoming as to the nature of the alienation in 1299 B. S. by Gola-

4. (1899) 21 All 71=25 I A 188 (P C).

5. A I R 1916 P C 110=26 I G 420=43 I A 249=44 Cal 186 (P C).

keshwari, and the recitals therefore contained in the kabala, rightly characterised, by the learned Judge in the Court below as vague, are by themselves of no real assistance to the defendants in the suit. It may also be noticed in this connexion that the learned Judge in the Court below directed himself rightly in stating that the onus was on the defendants to prove legal necessity although it appears to be clear that the plaintiffs themselves had brought ample evidence in support of their case before the Court, that there was no legal necessity for the alienation upon which the defendants rested their title and claim to possession of the properties in suit.

It is further to be observed that the question of onus was not one of substance, and was not pertinent when the trial Court had taken all the evidence : when all the relevant evidence was before the Court below, and all that remained was decision as to what conclusion was to be drawn from the evidence. When the entire evidence is once before the Court, the debate as to onus of proof is purely academical, and this is more so, at the appellate stage. On the entire evidence, the Courts below have concurrently held, taking into their consideration the whole history of the transaction evidenced by the kabala of 1299 B. S., that the recitals in the document did not contain a true and sufficient representation of legal necessity, that the vendee himself was acquainted with all the facts and circumstances leading up to the conveyance by Golakeshwari. It has been found as a fact that Jugalkishore left considerable property; and that it was not necessary to incur any debt for the maintenance of the family or for other legitimate purposes. The income of the estate left by Jugalkishore was quite sufficient for the purpose of maintaining Golakeshwari and the other members of the family, even if the gharjamai Ramakanta was considered to be a dependent member of the family even before his marriage to Golakeshwari. The debts incurred, which lead up to the kabala of 1299 B.S., have been considered by the Courts below in great detail; and they have concurrently found that there was no such debt or pressure on the estate as could justify an alienation by Golakeshwari.

According to the Court of appeal below, it was clear that the plaintiffs had shown that the property left by Jugalkishore yielded a sufficient income to maintain Golakeshwari and the other persons whom Jugalkishore was legally bound to maintain and there was no necessity for incurring any debt so far as Jugalkishore's estate was concerned and for the alienation of the property in 1299 B. S. These are findings of fact binding on this Court in second appeal, and must conclude the case for the defendants, so far as it is based on the assertion by them that the transfer on which their claim rests in regard to properties mentioned in Schs. 1 and 2 was for legal necessity. The case for the defendants, upon the findings arrived at by the Courts below, must be taken to have been disproved or, strictly speaking, not established by them. In addition to that, the Court of appeal below has come to the definite finding that the consideration for the kabala of 1299 B. S. was very inadequate. The question of title to the properties mentioned in plot 3, Sch. 3 of the plaint remains to be considered. In our judgment, the statements contained in the kabalas Exs. A (1) and B in the case as to a heba cannot bind the plaintiffs 2, 3 and 15; and the admission as to a heba cannot operate against these three plaintiffs for the reason that their claim in the present litigation is not as the representatives of the persons by whom an admission as to a heba was said to have been made in the documents referred to above. Plaintiffs 2, 3 and 5 claim the properties in Sch. 3 of the plaint as the reversionary heirs of Jugalkishore Dutta and as such any statement or admission made by the fathers of the different plaintiffs, even if it could be taken to be an admission, would not prejudice their rights as such reversioners. There is no evidence as to the heba mentioned in the documents Exs. A (1) and B; and as the Court of first instance observed, in the absence of any deed of gift or other satisfactory evidence, the mere recital of heba in those documents, which were unregistered kabalas, did not conclusively prove that Ramkanta got the property by heba. This disposes of the decision of the learned District Judge in the Court of appeal below, dismissing the claim of plaintiffs 2,

3 and 5 to a ten annas share of plot 3, Sch. 3 of the plaint, with which we are unable to agree.

We have come to the definite conclusion, for the reason stated above, that the three plaintiffs are entitled to have their entire claim allowed in regard to plot 3, Sch. 3. As has been indicated already, so far as the other two plots, plots 1 and 2, Sch. 3 of the plaint were concerned, the defendants did not, it appears lay any claim to these plots; and the plaintiffs were entitled to get a decree for those two plots irrespective of our decision in regard to plot 3, Sch. 3 as mentioned above, reversing that of the learned Judge in the Court of appeal below. In the result, the appeal is dismissed, the defendant-appellant's contentions in support of the appeal being disallowed. The cross-objections preferred by the plaintiffs respondents are allowed, in respect of the ten annas share of plot 3, Sch. 3 of the plaint in the suit out of which this appeal has arisen. The plaintiffs' suit being decreed in the manner indicated in the judgment of the Court of first instance is restored in its entirety. The plaintiffs are entitled to get their costs in the litigation throughout, including the costs in this appeal. There is no separate order as to costs in the cross-objections preferred by the plaintiffs respondents in this appeal.

K.S.

Appeal dismissed.

*** A. I. R. 1933 Calcutta 906**

MITTER AND M. C. GHOSE, JJ.
Jatendrakumar Das—Appellant.

v.

Mahendrachandra Banikya—Respondent.

Appeal No. 201 of 1932, Decided on 28th April 1933, from appellate order of Dist. Judge, Mymensingh, D/- 22nd February 1932.

* Limitation Act (1908), Art. 182 (5)—Decree transferred to another Court for execution—Execution application dismissed—Subsequent application in original Court before return of decree with certificate of non-satisfaction by Court to which it had been transferred does not save limitation—Decree, execution.

The appellant obtained a decree against the respondent in the Munsif's Court at Dacca on 2nd August 1926. That decree was transferred to the Munsif's Court at Tangail for execution. Execution proceedings were started and, on 29th August 1927, they were eventually dismissed by the Tangail Court. On 25th January 1929,

the appellant filed another application for execution in the Court of the Munsif at Dacca. The application remained pending in that Court for some time. On 2nd March 1929, the decree, together with the certificate of non-satisfaction, was returned by the Tangail Court to the Dacca Court. The appellant's application for execution, dated 25th January 1929, was registered and an order for issue of notice was passed. Notice was however not issued and the execution proceedings were dismissed.

Held: that a subsequent application filed on 1st June 1931 was time barred as the application of 25th January 1929, was not made to the proper Court and did not save limitation: *A I R 1916 P C 16; Foll.; A I R 1931 Cal 312, Dist.*

Held further: that the transferring Court retains jurisdiction only for limited purposes, e. g., for dealing with applications for reording assignment of decrees under O. 21, R. 16 and applications against the legal representatives of judgment-debtor. [P 908 C 1]

Rameshchandra Sen for *Rajendrachandra Guha*—for Appellant.

Tarapada Mukherji for *Radhabinode Pal* and *Holiramdeka*—for Respondent.

Mitter, J.—This is an appeal by the decree-holder from the order of the District Judge of Mymensingh, dated 22nd February 1932, reversing the order of the Munsif of Tangail, dated 2nd October 1931. The question of law which falls for determination in this appeal is whether the application of the decree-holder, now appellant, is barred by the statute of limitation. The learned District Judge has answered, the question in the affirmative. The Munsif has taken the contrary view. The question in this appeal is which view is right. The relevant facts are not in dispute and may be briefly stated. It appears that the appellant obtained a decree against the respondent in the Munsif's Court at Dacca on 2nd August 1926. That decree was transferred to the Munsif's Court at Tangail for execution. Execution proceedings were started and, on 29th August 1927, they were eventually dismissed by the Tangail Court. On 25th January 1929, the appellant filed another application for execution in the Court of the Munsif at Dacca. The application remained pending in that Court for some time. On 2nd March 1929, the decree, together with the certificate of non-satisfaction, was returned by the Tangail Court to the Dacca Court. The appellant's application for execution, dated 25th January 1929, was registered and an order for issue of notice was passed.

Notice was, however, not issued and the execution proceedings were dismissed. The execution proceedings which have led to the present appeal were started on 1st June 1931.

The learned District Judge has held that, as the appellant's application, dated 25th January 1929, was not made to the proper Court, as the Dacca Court had no jurisdiction on that date to entertain the application, the application could not be regarded as an application made in accordance with law within the meaning of Art. 182 (5), Limitation Act, and he relies on a decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Maharaja of Bobilli v. Narasimharaju Peda Simhulu* (1) in support of his view. The fact, on which the present case has been sought to be distinguished from the facts of the case before the Judicial Committee referred to, is that on the date, when the Dacca Court dealt with the application, made on 25th January, it had acquired jurisdiction, as the decree together with the certificate of non-satisfaction had been returned to the Dacca Court by that date. It is said that it is true that the application was made at an earlier date when the Court had no jurisdiction to entertain it, but as it remained on the file of the Dacca Court and no orders were passed on it, there is no reason why it should not be regarded as an application which was presented to the proper Court on that date when it was registered. If it is so regarded, the present application for execution, made on 1st June 1931, was within three years from the date of the final order on the application registered after 2nd March 1929, and would be in time. It becomes necessary to examine with care the facts of *Maharaja Bobilli's* case (1).

There, the decree was passed by the District Judge in 1904, and the first application for execution of December 1907 was not made to the proper Court which was the Court of the Munsif of Parbatipur, to whom the decree had been transferred, and it was held that that could not save limitation, the decree being of 1904, and a second application for execution was made on 27th April 1910, to the Court of the District

Judge (which passed the decree), which had already transferred the decree for execution to another Court before the return to the said Court of the copy of the decree and the certificate of non-satisfaction according to the provisions of S. 41, Civil P. O. It was in August 1910, that the copy of the decree and the certificate of non-satisfaction were sent to the District Judge, and it was held in such circumstances that the application of 27th April 1910 was not made to the proper Court. Proper Court means the Court whose duty it is to execute the decree: see Expl. 2, Art. 182. It would thus appear that in *Maharaja of Bobilli's* case (1) the application of December 1907, which was made before the District Judge was held not to have been presented to the proper Court, as the decree had been transferred to the Munsif's Court at Parbatipur and as the decree and certificate of non-satisfaction were not sent to the Court of the District Judge till August 1910, and on the further ground that the Court of the District Judge of Vizagapatam was not the Court which could execute the decree by sale of immovable property outside its jurisdiction. It would seem that the application of 27th April 1910 was held not to be made to the proper Court on the same ground. In the present case, it is true that the application of 25th January 1929 was presented to a Court which had no jurisdiction and it remained pending on the file of the Court of the District Judge till it acquired jurisdiction. But that was the case also in *Maharaja of Bobilli's* case (1), and it was held that the application of 27th April 1910 was not made to a proper Court, although the application remained pending in the file of the District Judge, till it acquired jurisdiction by the return of the decree and the certificate of non-satisfaction from the transferee Court and yet the District Judge held that the application was not made to the proper Court, and the Judicial Committee agreed in this view. Their Lordships said:

"Further their Lordships agree with the District Judge that the application of 27th April 1910 was not made to the proper Court."

The learned District Judge, in the present case, has pointed out that there was no subsequent application for execution, when the Court at Dacca

acquired jurisdiction to execute the decree after 2nd March 1929, and it was the Munsif's Court which suo motu proceeded to deal with the application which was not made to a proper Court and which was ultimately dismissed. It is difficult to distinguish the case in any material respect from the decision in *Maharaja of Bobilli's case* (1) and we are compelled to come to the conclusion that the decree is barred by limitation, as the application of 25th January 1929, was not made to the proper Court. The Munsif has relied on a decision of this Court in the case of *Sreenath Chakravarti v. Priyanath Bandopadhyay* (2), to which I was a party, as supporting the view that the transferring Court retains jurisdiction for certain purposes. It does so only for limited purposes, e. g., for dealing with applications for recording assignment of decrees under O. 21, R. 16, Civil P. C. and applications against the legal representatives of the judgment-debtor; See O. 21, R. 22. But that is not the case here. For the reasons given above, this appeal must be dismissed, but there will be no order as to costs.

M. C. Ghose, J.—I agree.

K.S. *Appeal dismissed.*

2. A I R 1931 Cal 312=182 I C 149=58 Cal 882.

A. I. R. 1933 Calcutta 908

JACK AND NAG, JJ.

Shreehari Das—Appellant.

v.

Adwaitachandra Mandal—Respdt.

Second Appeal No. 2866 of 1930, Decided on 4th April 1933, from appellate decree of Dist. Judge, Pabna, D/- 30th August 1930.

Occupancy holding—Occupancy right is right of property in land and is devisable by will—Absence of provision in Tenancy Act does not prohibit right of bequest—Bengal Tenancy Act (8 of 1885), Ss. 11 and 18.

An occupancy right is a right of property in the land, and is subject to bequest like any other right in immovable property. From the mere fact that Ss. 11 and 18 provide for transfers of tenures and rights of mukarrari raiyats by bequest and succession and there is no similar provision in the case of occupancy rights, it cannot necessarily be inferred that the Tenancy Act prohibits the ordinary right of bequest in the case of immovable property as applied to occupancy rights. The Bengal Tenancy Act is not exhaustive and the ordinary law as to powers of bequest becomes applicable: *Case law referred*, [P 909 C 1, 2]

Panchanan Ghosh and Nirmalkumar Sen—for Appellant.

Subodhchandra Sen—for Respondent.

Jack, J.—This appeal has arisen out of a suit for recovery of possession after declaration of plaintiffs' title to the lands in suit. The lands originally belonged to Amarchand Mandal, who died leaving a widow and two daughters. After the death of the widow and the two daughters, the plaintiffs and the father of the pro forma defendants 30 and 33 became the reversionary heirs of Amarchand. Defendant 1 is Amarchand's sister's son. Defendant 2 is the husband of the daughter of Amarchand. Defendant 4 was substituted in place of the original defendant 3, who was the husband of the daughter's daughter of Amarchand. After the death of the widow of Amarchand, defendant 1 applied for probate of a will left by Amarchand. The plaintiffs entered a caveat and subsequently a compromise was entered into between the plaintiffs and defendant 1, by which it was agreed that each party would take a moiety of the estate. It is alleged that defendant 1 did not comply with the terms of the compromise and kept the plaintiffs out of possession of the whole of the properties and that in subsequent litigations he renounced his rights based on the compromise. It is further alleged that the properties in suit, being non-transferable occupancy holdings, could not be validly devised by Amarchand. The main contention of the defendants is that the properties in suit are mukarrari jotes and as such devisable. Both the Courts below decided that the occupancy right of Amarchand was not devisable and the suit was accordingly decreed against all the defendants except No. 9, against whom there was no cause of action. The defendants have appealed to this Court.

The only point raised in this appeal is whether an occupancy right is devisable by a will or not. It is contended on behalf of the appellants, following the decisions in *Dakshabala Dasi v. Raja Mandal* (1) and *Dhanapati Daw v. Ballav Daw* (2), that an occupancy right is devisable by will and therefore the plaintiffs are not entitled to a decree.

On the other hand, the respondents rely upon the decisions in *Amulya Ratan*

1. AIR 1929 Cal 127=115 I C 364=56 Cal 680.

2. AIR 1931 Cal 244=181 I C 25.

Sircar v. Tarini Nath Dey (3); *Nunja Lal Roy v. Umesh Chandra Roy* (4), *Umesh Chandra Dutta v. Jop Nath Das* (5) and *Mohesh Chandra v. Mathura Chandra* (6). This question has been amply discussed in the two recent authorities, which were relied upon by the appellants. It is pointed out that the authority, on which the respondents mainly rely, namely, the decision in *Amulya Ratan Sircar* (3), proceeded on the ground that an occupancy right being a personal right, there was a difference between bequest and other transfers, inasmuch as the principle of estoppel or acquiescence could not be made applicable to a case of devise. But in the Special Bench case of *Chandra Binode Kundu v. Ala Bux Dewan* (7), it was decided that an occupancy right is a right of property in the land. This can now be regarded as settled law, so that it is no longer necessary to refer to the principle of estoppel or acquiescence, where it is question of the transfer of an occupancy right. The decisions relied upon by the respondents are all previous to the decision in the Special Bench case with the exception of the decision in the case of *Mohesh Chandra Deb Nath* (6). In that case the question was not very fully discussed. The learned Judges merely say :

"There is no provision in the Bengal Tenancy Act on the question whether a raiyat having a non-transferable right of occupancy can bequeath that right. S. 26 of that Act alludes to what happens when the raiyat dies intestate, but that is all. Consequently, the matter is one which has to be determined according to custom and usage."

On the other hand, we must hold, since the decision in the Special Bench case, that an occupancy right is a right of property in the land, and is subject to bequest like any other right in immovable property. From the mere fact that Ss. 11 and 18 provides for transfers of tenures and rights of mukarrari raiyats by bequest and succession and there is no similar provision in the case of occupancy rights, it can not necessarily be inferred that the Tenancy Act prohibits the ordinary right of bequest in the case of immovable property as applied to oc-

cupancy rights. The learned District Judge is not right in saying that the effect of Ss. 11 and 18 was not considered in the case of *Dakshabala Dasi* (1). Further, the learned Judge refers to S. 178 of the Act, as showing that the legislature looked upon transfer and bequest as different acts carrying different results. But S. 178, Cl. (3) (d), merely says that nothing in any contract between a landlord and a tenant after the passing of this Act shall take away the right of an occupancy raiyat to transfer of bequeath in accordance with local custom and usage. It cannot be inferred from this that, apart from local custom, a raiyat has no right to bequeath his property just as a raiyat may have a right to transfer his property apart from any local custom. The law on the subject has been fully discussed in the two authorities relied upon by the appellants and there is no need to discuss the previous rulings in detail.

The lower appellate Court relies upon the principle *expressio unius est exclusio alterius* but the Bengal Tenancy Act is not exhaustive. Once it is held that the right of occupancy is a right of property in the land, the ordinary law as to powers of bequest becomes applicable. The plaintiffs' suit must therefore fail, as the defendants are entitled to the land by bequest. The result is that the decree of the Court below is set aside and the plaintiffs' suit dismissed with costs throughout.

Nag, J.—I agree.

K.S.

Appeal allowed.

* A. I. R. 1933 Calcutta 909

AMEER ALI, J.

Nagarmull Chaudhuri—Plaintiff.

v.

Jhabarmull Sureka—Defendant.

Original Suit No. 1932 of 1930, Decided on 9th March 1938.

* (a) Malicious Prosecution—Proceedings under S. 476, Criminal P. C., although in civil Court, are criminal proceedings.

For purposes of an action for malicious prosecution, proceedings under S. 476, Criminal P. C., are criminal proceedings notwithstanding that they were in a civil Court: 18 I C 737; A I R 1922 Cal 145 and A I R 1928 Cal 691, *Bel on*; A I R 1930 Cal 392, *not foll.*

[P 911 C-1; 2]

3. AIR 1915 Cal 48=27 I O 285=42 Cal 254.

4. AIR 1915 Cal 820=27 I O 852.

5. AIR 1918 Cal 812=48 I O 779.

6. AIR 1928 Cal 860=112 I O 123.

7. AIR 1931 Cal 15=60 I C 325=22 Cr L J 212=49 Cal 522 (SB).

(b) **Malicious Prosecution—Warrant issued and executed—Proceeding constitutes prosecution.**

After the Magistrate has issued the warrant and the warrant is executed, there is no doubt that the proceedings in the Police Court started on complaint by the Judge constitutes a prosecution such as to found an action for malicious prosecution. [P 911 C 2]

(c) **Malicious Prosecution: Quære.**

Quære.—Whether proceedings might not be considered a prosecution before the issue or execution of the warrant. [P 911 C 2]

(d) **Malicious Prosecution—Sanction obtained by individual without reasonable cause and by false evidence—Prosecution is by individual though Judge has granted sanction and filed complaint.**

In a proper case proceedings under S. 476, Criminal P. C., can be regarded as a prosecution by the individual, notwithstanding that the Judge has granted sanction and signed the complaint. Where sanction has been obtained by a person maliciously and without reasonable and proper cause and by false evidence, the prosecution which ensues is to be regarded as a prosecution by that person: *Fitzjohn v. Mackinder*, (1861) 9 C B (n s) 505, *Foll.* [P 912 C 1]

(e) **Malicious Prosecution—Orders granting sanction set aside on appeal—Proceedings terminate in favour of plaintiff as required by law.**

Where the order granting sanction to prosecute is set aside on appeal and the Magistrate could not proceed further, it is a termination of the proceedings in favour of the plaintiff as is required by law. [P 912 C 2]

Khaitan—for Plaintiff.

N. N. Bose—for Defendant.

Judgment.—In this case there must be a decree for the plaintiff, and I assess the damages at Rs. 3,000. Para. (1) of the plaint reads as follows:

The defendant, on 3rd January 1930, maliciously and without reasonable or probable cause, preferred a charge of perjury against the plaintiff before this Honourable Court and made the application—copy whereof is filed herewith and obtained a Rule, copy whereof is filed herewith, and, on 13th March 1930, obtained the order, copy of which is filed herewith, and caused the plaintiff to be sent for trial on the charge referred to in the said order of 13th March 1930, above-mentioned, in the Court of the Chief Presidency Magistrate, Calcutta, and to be arrested and imprisoned, and caused wide publicity to be given to the same in order to cause loss and damage to the plaintiff. The plaintiff was kept in custody until the plaintiff was released on bail and furnishing security to the extent of Rs. 500 on 7th April 1930.

Paragraph (2) refers to the appeal from the order of 18th March 1930. Para. (3) mentions the discharge of the plaintiff as the result of the decision of this Court on appeal.

The short facts are as follows: The plaintiff gave certain evidence on 2nd December 1929, in an examination under

S 36, Presidency-towns Insolvency Act, the insolvency being that of one Khemkarandas Khemka. The plaintiff had previously, as the gomasta of Kandayalal Sureka, the grand-father of the present defendant, verified the plaint in a suit in the High Court upon certain bundis. The evidence in the proceedings in insolvency was connected, in a manner which need not be discussed, with the facts mentioned in the plaint. The defendant applied before this Court, on the Original Side, on 3rd January 1930, setting out some of the answers given by the plaintiff in the examination under S. 36, Insolvency Act, and setting out para. 5 of the plaint, to which I have referred, and prayed for a rule under S. 476, Criminal P. C., calling upon the plaintiff to show cause why a complaint should not issue against him for perjury. A rule was issued and the plaintiff filed an affidavit in opposition, in which, among other things, he set out various incidents from which the hostility of the present defendant to the plaintiff might be gathered and contended, that no prima facie, or any case of perjury could be founded upon the materials placed before the Court. The Court, on 18th March 1930, made an order, the formal part of which was, according to the form now in use, to the following effect:

That the Court being of the opinion that it is expedient in the interests of justice that an enquiry should be made upon the offences, etc., which appear to have been committed by the said Nagarmull Chaudhuri, etc., this Court doth hereby record a finding to that effect and doth hereby order that a complaint in respect thereof be made in writing signed by the Hon'ble Lord-Williams, J.

I imagine that a complaint was drawn up and signed by the Judge and forwarded to the police Court. In some cases, I believe, that the original order is used as a complaint. In my view, it makes no difference. The police Magistrate, on receipt of the order or a complaint in pursuance of the order, took action and issued a warrant for the arrest of the plaintiff. This appears from the written statement. How a warrant came to be issued in this case does not appear, but it is in evidence that the defendant accompanied the police officers and, in fact, identified the plaintiff and gave him in charge. In this connection, I enquired whether Mr. Khaitan, who ap-

appears for the plaintiff, desired to take the alternative line of "false imprisonment" and pointed out that, although the fact was stated, such a cause of action should be separately pleaded. Moreover, the concise statement describes the suit as one for "wrongful and malicious prosecution." In the result, Mr. Khaitan, although he desired not specifically to abandon any cause of action which might appear in this plaint, proceeded before me on the basis of malicious prosecution.

The issues which normally arise in a case of malicious prosecution are as follows: 1. Was the plaintiff prosecuted? 2. Was the plaintiff prosecuted by the defendant? 3. Did the proceedings come to a conclusion and to a conclusion in favour of the plaintiff? 4. Had the defendant reasonable and probable cause? 5. Was the defendant actuated by malice? If any of these elements are absent, the suit fails. Mr. N. N. Bose, who appeared for the defendant, raised one issue only and that by way of demurrer, namely, "Does the plaint disclose a cause of action?" He did not desire to contest the case on the other issues. It soon became apparent that Mr. Bose, under the one issue raised by him, really desired to argue the first three issues above indicated, i. e., 1. that the plaintiff was not prosecuted; 2. that the defendant was not the prosecutor; 3. that the proceedings did not terminate in an acquittal. I allowed this course.

(1) Was the plaintiff prosecuted? On the first point, Mr. Khaitan contended that there was a prosecution in two places, first in the High Court and secondly in the police Court. With regard to the High Court, it is clear that there were proceedings under S. 476, Criminal P. C. It is true that these proceedings were in a civil Court. Mr. Khaitan contended that, notwithstanding this, they are criminal proceedings, and, though not a prosecution within the strict language of the Criminal Procedure Code, they can yet constitute a prosecution for the purpose of founding an action "for malicious prosecution." He has referred me to the following cases, which I give in order of date. The old English cases *Quartz Hill Gold Min-*

ing Co. v. Tyre (1), *J. I. Crowdy v. L. O. Reilly* (2), *Bishun Persad Narain Singh v. Phulman Singh* (3), *Narendra Nath De v. Jyotish Chandra Pal* (4) and *Rabindra Nath Das v. Jogendra Chandra* (5). I notice that in *Nagendra Nath v. Basanta Das* (6), Mukerji, J., without differing from the earlier decisions, was not prepared, without further consideration, to endorse the view therein expressed, namely, that proceedings of the nature in question can found an action. I propose to follow them and to hold that the proceedings before Lord Williams, J., in this Court constitute a "prosecution" in the sense indicated.

As to the proceedings in the police Court, Mr. Bose was inclined to contend that, until further steps were taken, they could not be considered to be a prosecution, but in point of fact his argument on this point became lost in his argument on the next issue, i. e., that the defendant was not the prosecutor. Mr. Khaitan cited *Bishun Persad v. Phulman Singh* (3) and *Musa Yakub Mody v. Manilal Ajitrai* (7). In my view, after the Magistrate issued the warrant and the warrant was executed, there is no doubt that the proceedings in the police Court constituted a prosecution such as to found an action for malicious prosecution: see Clerk & Lindsell on Torts, 582 and 583, etc. I must not be taken to hold that these proceedings might not equally be considered a prosecution before the issue or execution of the warrant. It is not in this case necessary to decide.

(2) Was the defendant the prosecutor? As regards the High Court proceedings, there is no question. As regards the police Court proceedings, the matter is more difficult. In this connexion, Mr. Khaitan has cited the rulings of the Judicial Committee in *Gaya Prasad v. Bhagat Singh* (8) and in *Bal-bhaddar Singh v. Badri Sah* (9) also in *Venkatappayya v. Ramkrishnamma* (10).

1. (1888) 11 Q B D 674=52 L J Q B 488=31 W R 668=49 L T 249.
2. (1913) 18 I O 737.
3. (1915) 27 I C 449.
4. AIR 1922 Cal 146=67 I C 705=49 Cal 1035.
5. AIR 1928 Cal 691=114 I C 796=56 Cal 432.
6. AIR 1930 Cal 392=125 I C 667=57 Cal 25.
7. (1902) 29 Bom 868=7 Bom L R 20.
8. (1908) 30 All 525=85 I A 189 (P O).
9. AIR 1926 P C 46=95 I O 329=1 Luck 215 (P O).
10. AIR 1932 Mad 53=135 I C 619.

Mr. Bose relies upon *De Rozario v. Gulab Chund* (17) and *Golap Jan v. Bholanath* (12), both on the first issue that there was no prosecution and also read with S. 476 for the argument that at any rate since the change in procedure which took place in 1923, the proceedings after the civil Court has sanctioned the prosecution cannot be regarded as a prosecution by a private individual.

In my opinion, so far as proceedings for malicious prosecution are concerned, in a proper case such proceedings can be regarded as a prosecution by the individual, notwithstanding that the Judge has granted sanction and notwithstanding that the Judge has signed the complaint. I hold that, in case where sanction has been obtained by the defendant maliciously and without reasonable and proper cause and by false evidence, the prosecution which ensues is to be regarded as a prosecution by the individual. In this connexion I consider portions of the judgment in *Fitzjohn v. Mackinder* (13) to be very much in point. There A, a party to a suit in a civil Court, gave evidence, suggesting that his opponent B had committed perjury. The Judge believed A and ordered A to enter into a recognizance to prosecute B for perjury (this being the practice obtaining under the relevant statute). B was tried and acquitted. B brought an action for malicious prosecution against A. A's defence was based upon the contention that the prosecution was not the prosecution of the party but that of the Judge. On this point there was some difference of opinion, but all agreed that, if the original order for prosecution is obtained by the false evidence or fraud of the party, with the intention that a prosecution should follow, then the prosecution is to be regarded as that of the party. I find therefore that the prosecution not only in the High Court, but in the police Court, was by the defendant.

(3) Did the proceedings come to a conclusion in the plaintiff's favour? The plaintiff was arrested and kept in custody for 24 hours and then released on bail. After his release, the Court on

appeal, set aside the order of the Court on the original side. Therefore there was no complaint upon which the Magistrate could proceed, and the plaintiff was discharged. It was contended that this is not a termination of the proceedings in favour of the plaintiff such as is required by law. I am not of that view. In my opinion, the situation is analogous to that arising where the complaint fails by reason of some technical defect, or where the Magistrate himself refuses to proceed with the prosecution. These findings dispose of the issue raised on behalf of the defendant in its widest possible form.

The plaintiff has given evidence, which roughly corresponds with the statements contained in the original affidavit before this Court. I accept it. I find that the defendant in this case acted both maliciously and without justification or reasonable and probable cause. I have already mentioned the damages which I am prepared to allow. The suit will be decreed for that sum with costs.

R.K.

Suit decreed.

A. I. R. 1933 Calcutta 912

MALLIK AND JACK, JJ.

Surentralal Kundu—Plaintiffs—Appellants.

v.

Ahmmad Ali—Defendant—Respondents.

Appeal No. 2858 of 1930, Decided on 3rd May 1933, from appellate decree of Addl. Sub-Judge, Bakarganj, D/- 10th June 1930.

Limitation Act (1908), Art. 132—Mortgagee aware of purchase of equity of redemption but not impleading purchaser in mortgage suit brought more than twelve years after due date—Equity of redemption wholly unrepresented in suit—Purchaser in execution of mortgage decree gets no title to property and has no remedy against purchaser of equity of redemption.

Where a mortgagee in his suit on the mortgage brought more than twelve years after due date in mortgage, does not implead a purchaser of the equity of redemption even though he is aware of such purchase and the equity of redemption is wholly unrepresented the mortgage decree so far as the property is concerned is a nullity and a purchaser of the property in execution of such decree does not acquire any title to the property and has no remedy against the purchaser of the equity of redemption: A I R 1929 Cal 288, *Rel on*. [P 918 C 2]

Gopendranath Das and *Bijanbihari Mitra*—for Appellants.

Atulchandra Gupta and *Bhagirath-chandra Das*—Respondents.

11. (1910) 37 Cal 388=6 I O 877.

12. (1911) 38 Cal 880=11 I O 311.

13. (1861) 9 O B N S 505=30 L J O P 257=7 Jur N S 1288=9 W R 477=4 L T 149.

Mallik, J.—This appeal arises out of a suit for recovery of possession of three plots of land on a declaration of plaintiffs' title thereto and also for mesne-profits. The allegations on which the plaintiffs brought the suit were briefly these: In April 1911, defendant 1 mortgaged three plots of land to the plaintiffs. A mortgage suit was instituted against defendant 1 and a mortgage decree was obtained in April 1923. In execution of that mortgage decree, the property was sold and formal delivery of possession was obtained on 4th May 1925, corresponding to 21st Baisakh, 1332. But when the plaintiffs' men went to take actual possession by the end of Baisakh 1332, they were opposed by defendants 2 to 4, defendants 5 to 7 and other persons. The defence of defendants 2 to 4 and defendants 5 to 7 inter alia was that the plaintiffs' suit was barred by limitation and the plaintiffs could have no remedy against them inasmuch as they had purchased from defendant 1 the equity of redemption before the institution of the suit and although the plaintiffs were aware of their purchase they had left the defendants out in their mortgage suit. Both the Courts below dismissed the plaintiffs' suit. The plaintiffs have appealed to this Court.

The main question that would arise for consideration in this case is whether the plaintiffs, having left out the purchasers of the equity of redemption in their mortgage suit, would have any remedy in the present case as against those purchasers. On the abstract question whether the purchaser at a mortgage sale has any remedy against the purchaser of the equity of redemption who was left out in the mortgage suit, and if so what that remedy is, the decisions of this Court have not been very consistent and the decisions of some of the other High Courts also on the point have not been far from conflicting. On one side may be ranged the decisions in the cases of *Grish Chunder Mondul v. Iwar Chunder Rai* (1), *Habibullah v. Jugdeo Singh* (2), *Aghor Nath Banerji v. Deb Narain Guin* (3), *Krishtopada Roy v. Chaitanya Charan* (4), *Hargu Lal v. Gobind Rai* (5) and *Madan Lal v. Bhag-*

van Das (6), while on the other the decisions in the case of *Protap Chandra v. Ishan Chandra* (7), *Jugdeo Singh v. Habibulla* (8), *Gangadas Bhattar v. Jogendra Nath* (9), *Kalu Sharip v. Abhoy Charan Karmokar* (10), *Bhagaban Chandra v. Tarak Chandra* (11) and *Bhodai Sheikh v. Barada Kanta* (12). But the present case has its exceptional features which would make it distinguishable from almost all the cases mentioned above. In the present case, in the mortgage suit brought by the plaintiffs the equity of redemption was wholly unrepresented and moreover although the plaintiffs, when they brought the suit, were aware of the purchase made by the defendants 2 to 4 and 5 to 7, they left them out in their suit brought on the mortgage. There was moreover the fact that the present suit was instituted on 19th September 1927, more than twelve years after the due date in the mortgage bond. The present case seems to be on all fours with the case in *Digambar Suthar v. Suajan* (13) and as in that case it must be held in the case before us that the equity of redemption, having been wholly unrepresented in the plaintiffs' mortgage suit, the mortgage decree obtained by them so far as the property in suit is concerned, was nothing better than a nullity and the plaintiffs on the basis of that mortgage decree had no title to the property. They were no doubt the mortgagees of defendant 1, the original owner, and as such mortgagees could enforce their right as against the purchasers of the equity of redemption if there was no bar against them either on ground of limitation or any other grounds. But, as observed before, the plaintiffs' suit in the present case was instituted long after the expiration of twelve years from the due date and that being so, their remedy against defendants 2 to 7 was clearly barred by limitation. The plaintiffs' suit, in my judgment, was rightly dismissed and the appeal must therefore be dismissed with costs.

6. (1899) 21 All 235 (F B).

7. (1893) 4 O W N 266.

8. (1907) 12 O W N 107=6 C L J 612.

9. (1907) 11 C W N 403=5 O L J 315.

10. A I R 1921 Cal 157=62 I C 445.

11. A I R 1927 Cal 259=100 I C 120.

12. A I R 1928 Cal 116=107 I C 355=55 Cal 602.

13. A I R 1929 Cal 233=120 I C 97.

1. (1898) 4 O W N 452.

2. (1901) 6 O L J 609.

3. (1906) 11 O W N 314.

4. A I R 1928 Cal 274=69 I C 530=49 Cal 1048.

5. (1897) 19 All 541=(1897) A W N 154.

Jack, J.—I agree that this appeal should be dismissed, since, under Article 132, Lim. Act, as against the purchasers of the equity of redemption the rights of the mortgagees have become time-barred, and therefore the purchasers at the sale in execution of the mortgage decree (obtained in a suit to which they were not parties) are not entitled to any relief against them.

K.S.

Appeal dismissed.

**** A. I. R. 1933 Calcutta 914**

MUKERJI AND GUHA, JJ.

Neerendrabhooshan Lahiri — Appellant.

v.

Berhampur Oil Mills, Ltd. — Respondents.

Appeal No. 98 of 1929, Decided on 11th April 1933, from original decree, of Fourth Addl. Sub-Judge, 24-Parganas, D/- 30th January 1929.

**** Limitation Act (1908), S. 14, Expl. 1—**Plaint ordered to be returned to be filed in proper Court—Time between date of order and date when plaint is ready for return should be excluded—Civil P. C. (1908), O. 7, R. 10.

Where a plaint is ordered to be returned to be presented in the proper Court, the return of the plaint with an endorsement on it is a part of the Court's duty, and until at all events, an endorsement is made and the plaint is ready for return, the proceedings cannot be considered to be at an end. Hence the time between the date of the order and the date when the plaint is ready for return should be deducted in computing limitation. When that point of time is reached, the question whether the plaintiff would not be entitled to a further deduction of time thereafter would depend upon various factors. Ordinarily no further time would be excluded. But it is not inconceivable that in exceptional circumstances, even subsequent to such point of time, the proceedings may have to be regarded as still continuing. And, in determining whether they should be so regarded or not, the question of the plaintiff's diligence or otherwise may have to be considered: *Case law discussed.* [P 918 C 1]

Atulchandra Gupta and Jogeshchandra Singha—for Appellant.

J. N. Sen, Kalikinkar Chakraborti, Jahnavaicharan Das Gupta, Gopendrakrishna Banerji, Bijalibhooshan Sanyal and Jyotishchandra Banerji—for Respondents.

Mukerji, J.—This is an appeal by defendants 2 and 3 from a decision of the Fourth Additional Subordinate Judge of 24-Parganas, by which the plaintiffs' suit was decreed against them on contest and ex parte against defendants 1 and 4. The suit was for recovery of

money due as balance of the price of two waggon loads of mustard oil alleged to have been supplied by the plaintiffs, a joint stock company with limited liability, from their place of business at Berhampur (District Murshidabad) to a firm styled S. B. Lahiri and Company carrying on business at Maniktala (District 24-Parganas), of which latter firm the four defendants were said to be the proprietors. The two grounds, on which the decree of the Court below is assailed, are firstly that the suit was instituted beyond time; and, secondly, that defendant 2 is not a partner of the firm, but that the firm belongs to defendant 3 alone. So far as the first ground is concerned, the relevant facts are the following: The two consignments were delivered respectively on 20th December 1920, and 24th December 1920. The suit was instituted in the Court of the Subordinate Judge at Berhampur on 14th December 1923. On 19th April 1926, the Berhampur Court held that it had no jurisdiction to entertain the suit and returned the plaint for presentation to the proper Court. From this order the plaintiffs took an appeal to this Court and with the memorandum of appeal they filed the plaint as an annexure. This Court dismissed the appeal on 26th May 1927, and the judgment that was given on that day concluded with the order: "Let the plaint be returned to the plaintiffs forthwith." On 13th June 1927, the Deputy Registrar of this Court made an order in accordance with which an officer of the Court returned the plaint to the plaintiffs' advocate on that day with the following endorsement:

"This plaint was filed along with the memorandum of the appeal in Appeal from Order No. 193 1926, on 27th April 1926. It is returned to the vakil for the plaintiff-appellant today in terms of the Court's order, dated 26th May 1927, passed in the abovementioned appeal."

The plaint was thus taken back. It was refiled in the Alipore Court on the next day, i. e., 14th June 1927. If no other consideration applies to the case, and the suit is governed by Art. 52 of the Schedule to the Limitation Act, the suit, when refiled, was within time, if, under S. 14 of the Act, time is taken to have run against the plaintiffs as 'from 13th June 1927, when the plaint was returned to their advocate, but not if it began to do so from 26th May 1927, on

which date their appeal was dismissed and the order for the return of the plaint was pronounced. On the question of the applicability of S. 14 of the Act and the extent of such application, if any, the appellants' arguments resolve themselves into three heads. Firstly, it has been urged that good faith is an essential characteristic of the prosecution of the proceeding, though such prosecution may be in a wrong Court, in order to bring a case within the terms of the section and that in this case there was, in fact, no good faith, so that the case is at once taken out of the purview of the section. Secondly, it has been contended that with the pronouncement of its judgment by this Court, on 26th May 1927, the proceedings "ended" within the meaning of Expl. 1 to the section, and therefore the plaintiffs were not entitled to exclusion of any time that elapsed since then. And, thirdly, it has been complained that the appellants were not allowed an opportunity which they were, in the circumstances of the case, entitled to, to rebut the evidence which the plaintiffs called without giving any previous notice or indication in any shape or form for explaining the period from 26th May 1927, the date on which the appeal was dismissed, and up to 13th June 1927, on which date the plaint was returned to them.

So far as the first of these contentions is concerned, we think it is sufficient for us to say that we are not satisfied that the institution of the suit in the Berhampur Court or the prosecution of the proceedings in that Court or in this Court was not bona fide made. The cause of action was sought to be made out, as having arisen in Berhampur upon an allegation—which, though it finds no place in the plaint, was nevertheless attempted to be proved in evidence—that the defendants would send the price of the consignments to the plaintiffs' registered office in Berhampur. The proof offered in support of the allegation was not considered satisfactory and so the attempt failed. But it would be far from reasonable to infer want of bona fides from such failure or to attribute any bad faith to them for that reason. As an answer to the second contention, and for the purpose of establishing that a consideration of it is unnecessary, it

has been urged on behalf of the respondents, i. e., the plaintiffs, that they hold in their hands an acknowledgment which in any case would save limitation. It is a letter, Ex. 2 (1), bearing the signature of "Sudhir Bhusan Lahiri & Co." and dated 10th January 1921. If this letter as construed as an acknowledgment, as it may well be construed if it is read along with the letter of the plaintiffs (Ex. D) of 8th January 1921, to which it is the reply, no question of limitation would arise. We are not however of opinion that the said letter Ex. 2 (1) has been proved to have been signed by defendant 2 because we do not consider the evidence of P. W. 4, Jyotirmay Ray Chaudhuri, to be sufficient for that purpose. That witness, upon his own evidence, has seen defendant 2 sign "Sudhir Bhusan Lahiri & Co." in letters four or five times only, and that is all the opportunity he has had of knowing about the writing of defendant 2.

The second contention of the appellants therefore would turn upon the meaning of the expression "the day on which the proceedings therein ended," that is to be found in Expl. 1 to S. 14. In the case of *Abhoya Churn Chuckerbutty v. Gour Mohun Dutt* (1), a bond suit was filed in a Munsif's Court on the day on which the Court reopened after the "Dusserah" vacation, during which the period of limitation expired as regards the payment of the debt for which the suit was brought. The Munsif decreed the suit, but the Subordinate Judge on appeal found that the Munsif had no jurisdiction to entertain the suit and he ordered the return of the plaint. This was done on a subsequent date and the plaint was filed in the proper Court on the same day. One of the questions that arose in that case was whether the plaintiff was entitled to a deduction of the interval between the date of the order of the Subordinate Judge and, the date on which the plaint was actually returned by the Munsif. The High Court observed:

"Here the proceedings ended with the judgment of the Subordinate Judge in appeal. The plaintiff might have then and there asked to have his plaint returned to him, or he might and apparently ought to have had a fresh plaint engrossed."

These observations obviously give rise to a difficulty, because they may be read as suggesting that when the order of return is made, the law does not contemplate that the plaintiff should wait for the return of the plaint and that, on the other hand, a more proper course for the plaintiff is to file a fresh plaint. This difficulty does not appear to have been noticed in any of the decisions in which the case itself has been noticed, but the fact that, if the observations are literally accepted as correct, an amount of hardship may be caused which the law never intended, seems to have been fully appreciated. For, in the case of *Mohendra Prosad Singh v. Nanda Prosad Singh* (2) where a plaint which was filed in a wrong Court on the last day of limitation, was subsequently ordered to be returned for presentation to the proper Court, but was not actually returned till three days later and was filed in the proper Court the day following, it was held that the suit was not barred by limitation, the plaintiff being entitled to a deduction of the three days during which the plaint had not been returned. In this case the learned Judges distinguished *Abhoya Churn Chuckerbutty's case* (1) upon a reason which I confess I do not exactly appreciate, namely, that in that case a strong presumption arose that the order for the return of the plaint, which was the judgment of an appellate Court, was "made known to the plaintiff on the date the judgment was signed," whereas in *Mohendra Prosad Singh's case* (2) "no such presumption could be made as the order was probably passed in chambers and may have been promulgated later."

The learned Judges preferred to follow the decision in the case of *Bisheshar Singh v. Ram Daur Singh* (3), in which it was held that in such circumstance the proceeding did not terminate until the plaint was returned. In the case of *Krishna Variar v. Kunji Taravanar* (4), which was the case of a dismissal of an appeal from an order returning a plaint for presentation to the proper Court, the actual return of the plaint taking place some days later than the dismissal of the appeal, it was held, following *Abhoya Churn Chuckerbutty's case* (1), that the time contemplated by

S. 14, Lim. Act, ended on the day the order of the appellate Court was pronounced. It seems to me that the observations in *Abhoya Churn Chuckerbutty's case* (1), to which reference has been made above, were made upon the state of the law as it then was. The case was decided in 1875. The power to return a plaint on the ground of want of jurisdiction on the part of the Court in which it had been presented was contained in S. 33, Act 7 of 1859 and thereafter in S. 3, Act 23 of 1861, by which the Code of 1859 was amended. It was a limited power, which could be exercised in respect of suits for land or other immovable property; whereas the suit in *Abhoya Churn Chuckerbutty's case* (1) was a suit on bond. The case therefore was one in which no return of the plaint was obligatory, and this circumstance accounts for the observations to which a reference has been made above. In S. 57 of the Code of 1882, also the exercise of the power was restricted to certain classes of suits and also in certain specified circumstances. In Ss. 20 and 21 of the Code of 1882 there was a provision for stay of suits and return of plaints under certain specified conditions, and in a case coming within those provisions, *Gurappa Chetti v. Pullayya Chetty* (5) it was held, following *Abhoya Churn Chuckerbutty's case* (1), that the time between the date of the order staying the proceedings and the date of the return of the plaint cannot be deducted, and it was observed:

"The reason for not so including that interval is that under S. 21, Civil P. C., the plaintiff is not chargeable with any court-fee when the suit is re-instituted under an order under S. 20, Civil P. C. . . . It is argued by respondents' pleader that by S. 20, Civil P. C., a right to ask for a return of the plaint is conferred on the plaintiff. This is true, but the right so conferred is not intended to extend the period of limitation, for by S. 21, Civil P. C., liberty is reserved to him to re-institute the suit without producing the original plaint or paying any additional court-fee. There is nothing, I think, unreasonable in this. With reference to S. 57, Civil P. C., the same view was taken by this Court in *Krishna Variar v. Kunji Taravanar* (4) and by the Calcutta High Court in *Abhoya Churn Chuckerbutty v. Gour Mohan Dutt* (1)."

Sections 20 and 21 of the Code of 1882 have been omitted in the Code of 1908, and S. 57 of the Code of 1882 has been re-enacted in the Code of 1908 in per-

2. (1918) 20 I C 188.

3. (1897) A W N 802.

4. (1893) 8 M L J 190

5. (1893) 8 M L J 270.

fectly unrestricted terms. Under the Code of 1882, it used to be held that, even though a case might not come within the three clauses of S. 57, the proper procedure was to return the plaint: see *Ladhaji v. Hari* (6). This was made clear in 1908 by making the words of O. 7, R. 10, perfectly general. In such circumstances, it is not necessary, under the present Code, to feel pressed by the observations in *Abhoya Churn Chuckerbutty's* case (1). The words of the rule are imperative, and there is a point in making an endorsement of the dates of presentation and return and in returning the plaint to be presented to the Court in which the suit should have been instituted, because, unless the same plaint is refiled, it would not be possible to find out so easily whether it was the same suit that was being refiled, a matter which is pertinent for the application of S. 14, Lim. Act. It is possible that, if the loss of the original plaint is sufficiently explained, a fresh plaint, which is its duplicate, may be allowed to be filed; but that is not the question we are considering here. The return of the plaint with an endorsement on it is a part of the Court's duty, and until, at all events, an endorsement is made and the plaint is ready for return, the proceedings cannot be considered to be at an end.

Abhoya Churn Chuckerbutty's case (1) was distinguished in *Mira Mohidin Rowther v. Nallaperumal Pillai* (7) as having been a case in which there was negligence on the part of the plaintiff in not applying for the return of the plaint as soon as the appeal was decided. This last mentioned decision was followed in *Seshagiri Row v. Vajra Velayudam Pillai* (8). Time, up to date of return of the plaint, was allowed to be deducted in *Gopisetti Narainswami Naidu v. Venkatasubrayudu* (9). In *Basvanappa v. Krishnadas* (10) at p. 445 (of 45 Bom.), Macleod, C. J., (Fawcett, J., concurring) observed:

"Clearly when a party is ordered to take back his plaint and present it in the proper Court the proceedings do not end until the party gets back his plaint."

The same learned Chief Justice also

6. (1899) 28 Bom 679=1 Bom L R 176.
7. (1913) 80 Mad 181=12 I C 58.
8. (1912) 86 Mad 482=14 I C 157.
9. (1911) 9 I C 642.
10. AIR 1921 Bom 879=59 I O 743=45 Bom 448.

made similar observations (*Shah, J., concurring*) in a later case:

"In any circumstances a party cannot always get back his plaint on the same day as an order is made that the plaint has been filed in the wrong Court; and as long as the plaintiff has exercised ordinary diligence in pursuing his claim, there is no reason why the period up to the day when he gets back his plaint should not be taken into account: *Nagindas Kapurchand v. Mangalal Punachand* (11)."

In both the aforesaid cases, the original Court had made the order for return of the plaint, but the actual return did not take place till some days later. In the case of *Maneklal Mansukhbhai v. Suryapur Mills Co., Ltd.* (2) at pp. 490 and 494 (of 52 Bom.), the plaintiffs, after the order for return was made, allowed the plaint to remain in Court and delayed in taking it back and, in the meantime, was taking legal advice as to whether they should prefer an appeal from the order returning the plaint. In that case, Marten, C. J., referring to the said two last mentioned decisions, observed:

"There was no question of the defeated party having been guilty of any delay. He had come to the Court and had endeavoured to obtain the plaint, but the Court had declined to give it up as it was wanted for being copied, and for making certain entries in the Court Register. Under those circumstances it was very naturally held by this Court that the party in question was entitled to rely on Expl. 1 to S. 14, Lim. Act, and that within the meaning of that explanation the proceedings had not up to that time ended. On the other hand, I am not prepared to hold that in every suit the plaintiff, whose plaint has been directed to be returned to him, can allow the plaint to remain in Court and yet count all the subsequent period as being allowed to him under S. 14."

And Crump, J., referring to the said two decisions said:

"It may be that there were certain ministerial acts left to be performed after that order was made. That we do not know. All that we do know is that those acts might have required some time, and if that time was necessary for the purposes of the Court then I should be prepared to exclude that period also following the decision of Sir Norman Macleod in *Basvanappa v. Krishnadas* (10) and *Nagindas Kapurchand v. Mangalal Punachand* (11). But I do not think that those decisions lay down as a broad proposition that any time that elapses between the order directing the return of the plaint, and the actual withdrawal of the plaint from the Court should be excluded. To hold anything of that kind would be to allow a party to delay indefinitely and to take the advantage of his own delay."

In *Hamida Bibi v. Fatima Bili* (13), the plaintiff refused to take back the

11. AIR 1922 Bom 160=64 I C 160=46 Bom 211.
12. AIR 1928 Bom 252=110 I C 83=52 Bom 477.
13. AIR 1918 All 180=45 I O 991.

plaint for three months after the order for its return was made and then applied in revision for setting aside that order and it was held that these three months could not be excluded. In *Haridas Ray v. Sarat Chandra Dey* (14) and *Ganga Charan Das v. Akhil Chandra Shaha* (15) it has been held that an order made by a Court, which orders the return of a plaint, granting a specified time to the plaintiff to file the plaint in the proper Court is a nullity. This being the state of authorities on this subject, the correct view, in my judgment, to take of the matter is that the proceedings cannot be regarded as having ended until the Court, in whom the duty lies of conforming to the provisions of O. 7, R. 10, Civil P. C., is in a position to carry out the order of return of the plaint. Till that point of time, no question can possibly arise as regards the plaintiff not being entitled to exclusion of time under S. 14. When that point of time is reached, the question whether the plaintiff would or would not be entitled to a further deduction of time thereafter would depend upon various factors.

Ordinarily no further time would be excluded. But it is not inconceivable that in exceptional circumstances, even subsequent to such point of time, the proceedings may have to be regarded as still continuing. And, in determining whether they should be so regarded or not, the question of the plaintiff's diligence or otherwise may have to be considered. But with such exceptional circumstances we are not concerned in the present case. It is perfectly clear from the Deputy Registrar's endorsement, which bears date 13th June 1927, that the plaint was not ready to be returned before that date. Before that date, then, the proceedings can, in no conceivable view, be regarded as having ended. It is not possible to suggest that the delay between 26th May 1927, on which date the appeal was dismissed and 13th June 1927, on which date the plaint was actually returned, was due to any action or inaction on the part of the plaintiffs. Indeed it must be assumed, on the other hand, that enough circumstances must have been in existence which stood in the way of the High Court office complying, at any earlier

date, with the order for return which the Court had made while dismissing the plaintiff's appeal.

It has been argued on behalf of the appellants that, while this may not, having regard to the provisions of O. 7, R. 10, Civil P. C., be an unreasonable view to take in cases in which the order for return is made by the original Court or by an appellate Court in the first instance, such a view should not be taken in cases of the present nature, in which the appeal of the plaintiff, being dismissed, the order for return made by the original Court is merely upheld and no fresh order for return is called for, the provisions contained in O. 7, R. 10, Civil P. C., having already been exhausted and there being no room for its further application. The answer to this argument however is that, in practice, as the Deputy Registrar's endorsement itself shows, the provisions of O. 7, R. 10, Civil P. C., are applied even to cases of the present nature. And even if such a procedure be unnecessary, that cannot deprive the plaintiff of the benefit of the exclusion provided for in S. 14, Lim. Act. The test, as I have already said, is whether the Court is ready to part with the plaint; if not, the proceedings cannot possibly be regarded as ended. In the above view of the matter, it is not necessary for us to consider the third branch of the appellants' arguments on the question of exclusion of time under S. 14. We think the learned Judge should have allowed the defendants' prayer for time to produce such evidence as they wanted in order to rebut the evidence of the advocate, whom the plaintiffs examined all of a sudden. And if we had to rest our decision on the evidence of that witness we would have found it necessary to give defendants such an opportunity now, even though we ourselves can see nothing wrong or unreasonable in what the witness has said. But on the view we have already expressed, and quite independently of the evidence of the witness, we hold that time could not possibly run against the plaintiffs before 13th June 1927 on which date the endorsement of the Deputy Registrar was made. This was sufficient to save the suit from the bar of limitation.

As regards the second ground, namely, on the question of defendant 2's concern

14. (1918) 18 I C 121.

15. (1916) 85 I C 595.

with the firm, we consider the evidence to be overwhelming. The entries in the plaintiffs' credit bill book (Ex. 1/1) and ledger book (Ex. E), it is true, stand in the name of defendant 3; but we think they have been sufficiently explained, and that upon the evidence which the plaintiffs have adduced, it is quite clear that defendant 2, far from not having any concern with the business, was doing everything in connexion with it and was at its head. P. Ws. 3 and 4 have given very clear and detailed evidence as regards the complicity of defendant 2 in the transactions which form the subject-matter of this suit. P. W. 2 has proved that the defendants lived jointly in premises No. 25/1, Tarak Chatterji Lane, and that the arhat at Belgachia belongs jointly to all of them. The documentary evidence, scanty though it is, lends support to this conclusion. The evidence which defendants 2 and 3 themselves have given is very unconvincing. The account books of the business, which would have been the best evidence on the point, have been withheld, the explanation offered for their non-production not being worthy of acceptance. The alleged working partner of defendant 3, who is alleged to be the sole owner of the business has not been called. The story of the business having been started by defendant 3 alone with his own private funds, which it is alleged he had got from his father's life insurance money, is a story which is not corroborated by any reliable evidence. The signboard which is said to have borne the name of defendant 3 alone as its sole proprietor is not forthcoming. We think we should agree in the conclusion of the learned Judge that the business is the joint family business of all the three defendants and that all of them are liable for the plaintiffs' dues. The result is that, in our judgment, the appeal fails. It is, accordingly, dismissed with costs—hearing-fee being assessed at five gold mohurs.

Guha, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 919

MITTER AND M. C. GHOSE, JJ.
Gopendraprasad Shukut' and others—
Appellants.

v.

Ramkishore Shahu—Respondent.

Appeals Nos. 288 to 290 of 1932, Decided on 28th April 1933.

(a) Bengal Tenancy Act (8 of 1885), S. 148 (o)—Execution of decree for rent by assignee does not lie unless landlord's interest is vested in assignee.

No Court shall entertain an application for execution of a decree for rent at the instance of the assignee of such decree, where the decree is obtained by all landlords or by a cosharer landlord, unless the landlord's interest is vested in the assignee. The policy of the law seems to be that it would not encourage the sale of a decree for arrears of rent apart from the landlords' interest. *Case law discussed.* [P 921 C 2; P 922 C 2]

(b) Interpretation of Statutes—Plain and grammatical meaning should be given effect to.

Statutes should be construed by giving effect to their plain and grammatical meaning.

[P 922 C 1]

(c) Civil P. C. (1908), O. 21, R. 16—Application by assignee for substitution in place of decree-holder—Judgment-debtor not objecting to such application is not debarred from questioning assignee's right to execute decree by reason of bar imposed by law.

The omission of the judgment-debtor to oppose substitution of the assignee in place of the original decree-holder does not debar him from questioning the right of the assignee to proceed to execution by reason of any bar imposed by law : 8 Cal 51, *Ref.* [P 922 C 2]

(d) Interpretation of Statutes—Duty of Courts.

Courts have to administer law as they find it.

[P 922 C 2]

Krishnakamal Maitra — for Appellants.

Beereshwar Bagchi—for Respondent.

Mitter, J.—These three appeals arise from orders made in the course of execution of three decrees for rent. The judgment-debtors, who have been unsuccessful in the Courts below, are the appellants in each of three appeals, and their objections depend on similar state of facts. It appears that Shree Shree Ramchandra Deb Thakur, represented by the shebait Raja Bhupendranarayan Singha Bahadur, obtained three decrees for rent in respect of a patni tenure, standing in the name of Nilhanohand Ray, for three different periods respectively. The decrees were assigned over to the respondent Ramkishore Shaha, for consideration, by three different deeds of sale respectively. The main objection taken by the judgment-debtors in all three cases, is that S. 148 (o), Ben. Ten. Act

is a bar to the execution of the decrees. The objection has been overruled by both the Courts below. Hence the present appeals. There were minor objections to the execution, which will be noticed later.

The contention of the judgment-debtors in each of three cases is that S. 148 (o) is a bar to execution of a decree for rent, whether the decree, which has been assigned has been obtained by a sole landlord or by a fractional landlord and, in such circumstances, these decrees are incapable of execution. In reply, the respondent takes up two positions. In the first place, he contends that the cases, which have held that where a decree obtained by a sole landlord is assigned over to a third party in whom the landlord's interest has not vested cannot be executed even as a money decree, are not uniform and, in view of the conflict, an appeal has been made to us that we must refer the matter to a Full Bench. Secondly, it is said that, assuming that the preponderance of authority is in favour of the appellants' contention so far as decrees for rent in the true sense of the term are concerned, the decree obtained by a co-sharer landlord for his share of the rent in a suit not framed under S. 148-A, Ben. Ten. Act, cannot be regarded as a rent decree, but must be treated as a money decree, and to the execution of such a decree, S. 148 (o) cannot apply, as it is outside the purview of the Bengal Tenancy Act, and Mr. Bagchi, who appeared for the respondent, has put forward the somewhat bold contention that the decisions which take the contrary view, to one of which I was a party, are wrong and require re-examination. It becomes necessary, therefore, to examine the language of the statute and the interpretation put on the same by the judicial decisions. S. 148 (o) of the Act, which is in the same terms substantially as S. 148 (h) of the Act as it stood before its amendment by Bengal Act 4 of 1928, runs as follows:

"148 (o). Notwithstanding anything contained in R. 16, O. 21 in Sch. 1, Civil P. C., 1908, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in him."

•Now, looking to the plain language

of the statute, it would appear that the Court shall not entertain an application for execution of a decree for arrears obtained by a landlord at the instance of an assignee of such decree unless the landlord's interest is also vested in him. The words "a landlord" also leave no doubt that the decree for rent might have been obtained by a co-sharer landlord, for a co-sharer landlord is also a landlord. It would be doing violence to the language of the clause to say that the clause suggests that it should be restricted to the case of a co-sharer landlord, when he brings a suit for rent framed as under S. 148-A. That would be reading into the clause words which do not exist there. It is then argued, however, that S. 148 opens by enacting that: "The following rules shall apply to suits for the recovery of rent."

and it is said that the decrees obtained by a co-sharer landlord cannot have the effect of rent decree, but has the effect of a money decree, but that does not solve the difficulty, for, unless a suit brought by a co-sharer landlord for his share is not a suit for rent, S. 148 (o) will have application. For this extreme contention that a suit brought by a co-sharer landlord for his share of the rent is not suit for rent within the meaning of the Bengal Tenancy Act, reliance has been placed on the case cited by the respondent after the close of the argument: "*Kesho Prasad Singh v. Ramdeni Singh* (1). This case no doubt shows that such a suit is not a suit for rent and the decree is not a decree for rent and I find a recent case of this Court, not cited at the bar, which seems to follow the Patna case [see the observation of Greaves, J., in which Mukerji, J., concurred, *Sivdas Dutt v. Birendra Krishna Dutt* (2)] and to have laid down broadly that a suit brought by a co-sharer landlord for his share of the rent and not framed as under S. 148-A is outside the purview of the Bengal Tenancy Act. There is a conflict of authorities on this point even in this Court, but it seems to me that the better opinion is that indicated by Mookerjee and Vincent, JJ., in the case of *Thakamani Dasi v. Mohendra Nath Dey* (3). The learned Judges point out that

1. A I R 1923 Pat 397=74 I C 454=2 Pat 183.
2. A I R 1925 Cal 783=89 I C 654.
3. (1909) 3 I O 889.

a decree in a suit for rent by a co-sharer landlord for his share of the rent is a decree made under the Act, because it is made in a suit tried in accordance with the procedure prescribed in Ch. 13 of the Act. The test to be applied is whether it terminates a suit tried in accordance with the Act, and not whether it is capable of execution under Ch. 14 of the Act. The learned Judges notice that a different view was taken in *Kedarnath Banerjee v. Ardha Chunder Roy* (4) by Maclean, C. J., and Banerjee, J., but they point out that this case really took a view opposed to all the previous decisions. It is necessary to reproduce the reasons of the decision in *Thakamani Dasi's* case (3), as I entirely agree with them. The learned Judges say, after adverting to the true test for determining whether a suit for rent is a suit under the Act:

"Sufficient importance was not attached to this distinction in the case of *Kedarnath Banerjee v. Ardha Chunder Roy* (4), in which it was assumed that a suit for rent by the entire body of landlords is, by virtue of S. 183, instituted under the Act, whereas a suit by a co-sharer landlord for his share of the rent is instituted under the general law. This distinction however can no longer be maintained in view of the decision of the Judicial Committee in *Pramadanath Roy v. Ramani Kanta Roy* (5) * * * Both classes of suits are commenced under the general law, and they are both tried under the judicial procedure described in Chap. 13 of the Act. When we reach the stage of the enforcement of the decrees made in both classes of suits, we find however that Chap. 14 defines certain special consequences which follow from the execution of a decree for the entire rent, and also prescribed the mode of execution of such a decree. From this point of view, a decree obtained by a co-sharer landlord for his share of the rent would be appropriately described as a decree made under the Act, and this was unquestionably the view which was generally accepted before decision in *Kedarnath Banerjee v. Ardha Chunder Roy* (4)."

This decision was apparently not followed in the case of *K. B. Dutt v. Gostha Behary Bhuiya* (6) and it was held that a decree obtained by a co-sharer landlord for his share of the rent was not governed by Art. 6, Sch. 3 of the Act, for it was a suit not under this Act. But *K. B. Dutt's* case (6) has not been followed in subsequent cases: see *Mrityunjoy Bhattacharjee v. Bhola Nath Dutt* (7) where Mookerjee and Beauchroft, JJ., refused to follow;

K. B. Dutt's cases (6). (See also the decision in *Keshab Lal Mukherji v. Rasik-chandra Manna* (8). It seems to me that there is much good sense in the reasoning of Mookerjee, J., in *Thakamani's* case (3) and I am of opinion that view should be accepted. Considering therefore all the material parts of S. 148, it appears, on the plain and literal meaning of the statute, that no Court shall entertain an application for execution of a decree for rent at the instance of the assignee of such decree, where the decree is obtained by all landlords or by a co-sharer landlord, unless the landlord's interest is vested in the assignee. It may lead to the undesirable result of making a decree for rent inalienable except where the landlord's interest in the tenancy is also assigned, but, as has been pointed out in the case of *Manurattan Nath Das v. Hari Nath Das* (9), that the more liberal construction of the section has the two-fold disadvantage that it renders necessary a straining of the language of the clause and the adoption of a narrow and restricted view of the scope of the entire section itself.

On the larger question with regard to the bar of execution of rent decrees in the stricter sense, there is the decision of Richardson and Walmesley, JJ., in the case of *Sudhanya Kumar Poddar v. Gouranga Chandra* (10), and, so far as co-sharer landlords are concerned, there is the obiter of Mookerjee, J., in *Manurattan's* case (9) and there are two recent decisions of this Court to one of which I was a party. In the case of *Bijanbala Dutt v. Mathuranath Sikdar* (11) my learned brother Mukerji, J., took the view that the bar of S. 148 (c) applied to assignees of decrees for rent obtained by co-sharer landlords and I concurred in this view. In a later case, *Sir George Rankin, C. J., and Pearson, J.,* adopted the same view. See the case of *Rahimuddi Lupti v. Jogendru Kumar Singha* (12). In view of these decisions, I am not prepared to reconsider the decisions or to refer the matter to the Full Bench.

Mr. Bagchi for the respondent has analysed the conflict of view with meti-

4. (1901) 29 Cal 54=5 C W N 763.

5. (1903) 35 Cal 381=35 I A 73 (P C).

6. (1913) 17 I C 207.

7. (1913) 20 I C 883.

8. M. A. No. 562 of 1912 decided on 26th January 1914 by Fletcher and Chatterjee, JJ.

9. (1901) 1 C L J 500.

10. (1917) 41 I C 542.

11. AIR 1931 Cal 485=58 Cal 708=131 I C 701.

12. (1931) 54 C L J 596.

culous care and he points out that the position is this: in *Harinath Das v. Dengunath Chaudhuri* (13), *Nugendra Nath Bose v. Bhuban Mohan* (14) and *Karuna Moyi Banerjee v. Surendra Nath Mukerjee* (15), the view has been maintained that the assignee of a rent decree, in whom the landlord's interest has not vested, can execute it as a money decree under the Civil Procedure Code. It is also pointed out that the question was referred to a Full Bench, which proved abortive: see the case of *Uttam Chandra v. Raj Krishna Dalal* (16) and that the Judges in the cases of *Manmohan Nath v. Rakhal Chandra* (17) and *Rajani Kanta Ghosh v. Rama Nath Roy* (18) were for referring the matter to a Full Bench. He summarises this conflict by saying that eight Judges are in favour of his contention, six for referring the matter to a Full Bench and six Judges are against him. All this conflict of view was before the legislature when important changes were effected in the Bengal Tenancy Act by the legislation of 1928. The legislature however did not make any change in the language of Cl. 148 (o) and, in such circumstances, the plain meaning of the statute must be adhered to and the judicial decisions which follow the golden rule of construing statutes by giving effect to their plain and grammatical meaning should be followed. We do not therefore feel pressed to refer the matter to a Full Bench.

We are therefore of opinion that the Courts below were wrong and their decisions must be set aside and the execution applications to which these three appeals relate must be dismissed. It remains to notice a minor objection raised for the respondent in two of the appeals. It is argued that when the assignee wanted to be substituted in place of the original decree-holder and applied under O. 21, R. 16, Civil P. C. and when the order allowing substitution was made it is no longer open to the judgment-debtor to question the right of the assignee to proceed to execution by reason of any bar imposed by law, and this argument is based on the principle

analogous to *res judicata* and reliance is placed on the decision of the Privy Council in the case of *Mungul Pershad Dicit v. Grija Kant Lahiri* (19). The judgment-debtors did not appear when they were called on to show cause why the assignee should not be brought on the record and they submitted to the position that the assignee could be substituted in place of the original decree-holder. That does not mean that they were concluded from agitating the question whether the assignee could execute the decree as the landlord's interest had not vested in him.

The question as to whether S. 148 (o) was a bar to execution had not been raised at any stage before the present application for execution and could not have been decided even by implication before. The question really arises after the assignee is brought on the record. The validity of the assignment is one question and after the validity had been determined whether the assignee could proceed to execute when the landlord's interest had not vested in him by reason of S. 148 (o) is another and a different question. This latter question can only be determined after the validity of the assignment had been decided and the assignee is brought on the record and at no previous stage. It is clear therefore, the rule analogous to *res judicata* does not apply and consequently the judgment-debtor is not precluded from raising the objection to execution of the decree. The result is that all the three appeals are allowed and the execution applications are dismissed. Parties will bear their own costs throughout. The result however is regrettable, for the decree-holder is deprived of his just dues but for the bar imposed by law, but we have to administer the law as we find it. The policy of the law seems to be that it would not encourage the sale of a decree for arrears of rent apart from the landlord's interest.

M. C. Ghose, J.—I agree.

K.S. *Appeal allowed.*

19. (1881) 8 Cal 51=8 I A 123=4 Sar 218 (P.C.).

13. Second Appeal No. 2143 of 1899 decided on 25th May 1900 by Ameer Ali and Brett, JJ.

14. (1901) 6 C W N 91.

15. (1898) 25 Cal 176.

16. (1918) 28 C L J 31n.

17. (1909) 8 I C 324.

18. A I R 1915 Cal 310=27 I O 56.

A. I. R. 1933 Calcutta 923

JACK AND NAG, JJ.

Hridayanath Ray—Appellant.

v.

**Prabodhchandra Khan*—Respondent.

Second Appeal No. 1521 of 1930, Decided on 28th April 1933, from decree of Second Sub-Judge, Howrah, D/- 28th April 1930.

(a) Civil P. C. (1908), S. 11—Question directly and substantially in issue between same parties in prior suit—Decision operates as res judicata in subsequent suit.

Where the time at which the plaintiff was dispossessed was a matter directly and substantially in issue in connexion with the question of limitation, and that was also a question directly and substantially in issue in a case under S. 9, Specific Relief Act, between the same parties, litigating under the same title, in a Court competent to try the subsequent suit and a question, which was finally decided by that Court:

Held: that the decision in S. 9 case was res judicata on this issue: AIR 1928 Cal 758, *Rel on*; AIR 1925 Cal 1046 and 29 Cal 707 (P C), *Ref.* [P 928 C 2]

(b) Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 3—Applicability.

To make Sch. 3, Art. 3 applicable, it must be shown that the landlord had a hand in the dispossession. [P 924 C 1]

Itupendrakumar Mitra and Kshiteन्द्रakumar Mitra—for Appellants.

Jogeshchandra Ray, Herambachandra Guha, Narendranath Banerji and Biraj-mohan Majumdar—for Respondent.

Jack, J.—In this suit, the plaintiff wants a declaration of his title to and recovery of possession of land, which he claims to hold under defendants 3 and others. He had a lease from them, of which the time expired in 1322, after which he claims to have held over until he was dispossessed by the defendants on 22nd Chaitra 1323. The defence is that plaintiff gave up the land at the end of 1322, when his lease expired, after which the land was in khas possession of defendants 3 and others until defendants 1 and 2 took a lease from them on 25th Chaitra 1323, and have been in possession since that time. The plaintiff brought a suit under S. 9, Specific Relief Act, in 1329. In that suit it was found that he had not been in possession of the suit land within six months of the institution of the suit, which was, accordingly, dismissed.

In this appeal it is urged, first, that this suit is barred under the provisions of Art. 3, Sch. 3, Ben. Ten. Act, having been brought more than two years from the date of dispossession by defendants

1 and 2, which was by collusion with the landlord-defendant 3, and; second, that the point of time, at which the plaintiff was dispossessed being a necessary issue in this suit with regard to the question of limitation, the decision of that issue in the suit under S. 9, Specific Relief Act, is res judicata between the parties. In support of the latter proposition the appellants rely on the case of *Raj Gopal Bhattacharji v. Sarat Kumari Debi*. A. I. R. 1928 Cal. 758, which appears to be very much on all fours with the present case. The judgment of that S. 9 case has been exhibited. It is admissible in evidence under S. 40, Evidence Act, and shows that on the issue, as to whether the suit was within time, it was found on evidence that the plaintiff was not in possession within six months of the suit. In the present suit, the time at which the plaintiff was dispossessed is a matter directly and substantially in issue in connexion with the question of limitation, and that was also a question directly and substantially in issue in the S. 9 case between the same parties, litigating under the same title, in a Court competent to try the subsequent suit and a question, which was finally decided by that Court. The appellants therefore appear to be right in their contention that the decision in the S. 9 case was res judicata on this issue. For the respondents reliance is placed on the case of *Chhadek Karikar v. Sayad Ali Kaviraj* (1) at p. 981 (of 85 I C) in which the learned Judge stated as follows:

"Having regard to the summary character of the proceedings (under S. 9, Specific Relief Act) and the fact that in the very section itself it is stated that nothing stated therein should bar any person from suing to establish his title and recover possession, even if he fails to recover possession in the said proceedings, it is evident that the legislature did not intend to give the proceedings the character of finality which is essential to invest the decision with a character which will make it operative as res judicata."

Thus the learned Judge bases his decision on two grounds, first, the statement in S. 9, Specific Relief Act, that nothing stated therein should bar any person from suing to establish his title and to recover possession, and, second, that proceedings under S. 9 have not the character of finality necessary to operate as res judicata. As to the first ground, it is not sought to bar the pre-

sent suit through anything stated in S. 9, Specific Relief Act. It is sought to bar it on the grounds of *res judicata*: as to the second ground the answer is given by the learned Judge himself in an earlier portion of his judgment. He refers to the observations of the Judicial Committee in the case of *Gokul Mandar v. Pudmanund Singh* (2) in reference to the case of *Duchess of Kingston* (3), where they say:

"The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction,"

and goes on to say:

"As the contention in the present case is substantially to the effect that an issue should not be retried inasmuch as it was directly and substantially tried in a former suit between the same parties, the question has to be determined upon the provisions of S. 11, Civil P. C., and it is not open to rely on the principle of finality which forms the basis of the general law of *res judicata* apart from those provisions and this principle has been recognized by the Judicial Committee in a series of cases."

Now, whatever the character of the proceedings under S. 9, Specific Relief Act, they constituted a suit and the date up to which the plaintiff was in possession, was a necessary issue in that suit. It was found in evidence that he was not in possession within six months of that suit, or in other words he was not in possession on 19th November 1921, the suit having been instituted on 19th April 1922. He thus lost possession more than two years before the present suit which was instituted on 28th November 1923. This decision is *res judicata* on the issue in the present suit as to whether the suit is barred by special limitation under Art. 3, Sch. 3, Ben. Ten. Act, if that article is applicable to the present case. The next question we have to consider is whether, in the circumstances of the present case, that article is applicable. To make it applicable, it must be shown that the landlord had a hand in the dispossession. In the present case, although the plaintiff pleaded that defendants 1 and 2 dispossessed him in collusion with the landlord, the finding of the appellate Court is that the real dispossession was by defendants 1 and 2. It is suggested that learned Sub-Judge was under the impres-

sion that the landlord must physically take part in the dispossession on the spot, and that that is why he came to no definite finding as to whether the dispossession was as alleged by the plaintiff, in collusion with the landlord. The learned advocate therefore maintains that this case should be remanded to the appellate Court for a decision on that point. However, we have considered the evidence of the plaintiff, who merely says he was dispossessed with the help of the lathials of defendant 2, and the finding of the trial Court that the actual dispossession was by Sudarshan, defendant 2; we have also taken into consideration the fact that the defendants themselves maintain that there was no dispossession by the landlord but a surrender of the holding by the plaintiff. In these circumstances, there being no evidence that the landlord took part in the dispossession, we should not be justified in remanding the case. We find that Art. 3, Sch. 3, Ben. Ten. Act, has no application and therefore the suit is not barred by limitation. This appeal is accordingly dismissed with costs.

Nag, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1933 Calcutta 924

LORT-WILLIAMS, J.

Maurice Saleh Manasseh, In the goods of.

Petition Decided on 8th March 1933.

Court-fees Act (7 of 1870), Sch. 1, Art. 11—Property subject to general power of appointment—Probate duty is not payable on it.

Property, over which a person has general power of appointment, is not his "property" within the meaning of Art. 11 and such property is not liable to probate duty as such property does not belong to the deceased's estate: 25 *Mad* 515, *Diss from*; *Case law discussed*. [1925 C 2]

Westmacott and Sircar—for Applicant.

Isaacs and Pugh—for Opposite Parties.

Order.—This is a petition by Collector of Stamp Revenue of Calcutta, asking that an enquiry be held into the true value of the property of Maurice Saleh Manasseh, deceased. By an indenture made in 1869, the premises No. 55, Free School Street, were conveyed upon trust, inter alia, for Esther Saleh Manasseh for life, and, thereafter, for such of her children as she should appoint. In 1896 she executed a deed appointing the income thereof to her son Maurice for life, and thereafter for such persons as he

2. (1902) 29 Cal 707=29 I A 196=8 Sar 323 (P.C.).

*3. (1776) 2 Sm L C 18 Ed 644.

should appoint. By her will, made in 1909, she demised premises No. 7/1, Marquis Street upon trust for Maurice for life, and thereafter for such persons as he should appoint. By a deed, made in 1917, premises No. 2/1, Russel Street, were conveyed upon trust, inter alia, for Esther for life, and after the expiration of five years from her death, as to one-sixth for Maurice for life, and thereafter for such persons as he should appoint. Esther died in 1924. By his will, made in 1929, Maurice demised all these properties upon trust, inter alia, to pay the income to his daughter for life. Maurice died in 1930, and his will was proved. But these properties were not included in the affidavit of assets filed by the executor.

The questions to be decided are, whether these properties belonged to Maurice at the time of his death, and are properties belonging to his estate and liable to probate duty. It is undisputed that all the properties were at all material times held in trust, and that Maurice had only a life interest with a general power of appointment, and it is assumed, for the purpose of the present issue, that he validly exercised this power by his will. It is assumed also that the rule against perpetuities does not apply. The issues raised turn upon the meaning and effect of the Court-fees Act of 1870. Sch. 1, Art. 11, deals with probate, and directs the fees to be charged upon "the amount or value of the property in respect of which the grant of probate is made." By an amending Act, passed in 1899, Sch. 3 was added. This provides a "form of valuation" to be filed by the executor of

"all the property and credits of which the deceased died possessed, or was entitled to at the time of his death, and which have come or are likely to come to my hand."

Annexure A sets out a number of heads of property of the deceased, movable and immovable, the last one being "other property not comprised under the foregoing heads." None of the heads deals specifically with property over which the deceased had only a power of appointment. Annexure B, Schedule of debts, etc., deals with items which the executor is allowed to deduct, and includes "property held in trust, not beneficially or with general power to confer a beneficial interest," and "other pro-

perty not subject to duty." The meaning of the word "property" is not defined, either in the Court-fees Act or the General Clauses Act. S. 91, Succession Act, provides that :

"Unless a contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power."

I have no doubt that property, over which a person has a general power of appointment, is not property within the ordinary meaning of that word in law. As stated by Fry, L. J., in *Ex parte Gilchrist, In re Armstrong* (1) :

"No two ideas can well be more distinct the one from the other than those of 'property' and 'power'. . . . A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they 'property'."

Therefore the real question is, whether it is property within the meaning of the Court-fees Act, that is to say, property "in respect of which the grant of probate is made." In *Platt v. Routh* (2) it was decided that it was not property within the meaning of S. 38 of 55 Geo. 3, c. 184, namely, "the estate and effects of the deceased, for or in respect of which the probate is to be granted."

And Lord Abinger, C. B., gave very cogent reasons why this was so, at pages 790-93 of this report. This decision was affirmed on appeal, reported as *Drake v. The Attorney-General* (3). The material words of this section are almost exactly similar to those in Art. 11, Sch. 1, Court-fees Act. Probably in consequence of these decisions, the law in England was altered by statute in S. 4, Stamp Act of 1860, and in S. 2, Finance Act, 1894, and all such property was made liable to duty. In India, no similar provision has been made, as was pointed

1. (1886) 17 Q. B. D. 521=55 L. J. Q. B. 578=55 L. T. 598.

2. (1840) 6 M. L. W. 756=10 L. J. Ex. 105=3 Beav. 257=10 L. J. Ch. 181.

3. (1843) 10 Cl. & Fin. 257.

out by Sir Richard Couch in *In the Goods of Julia Orm* (4). In this case, as also in *In the goods of Olivia Houenden George* (5) the learned Chief Justice followed the decision in *Platt v. Routh* (2). But in *In re Lakshminarayana Ammal* (6), Sir Arnold White, J., refused to follow the decision in *George's case* (5); but *Oram's case* (4) was not brought to his notice, and his decision was based obviously on some confusion of thought, and an incorrect reference, and is otherwise unsatisfactory. It is true that the learned Chief Justice eventually decided the case on the short ground that, in his opinion, a general power of appointment is property within the meaning of that word in the Court-fees Act, and he based his opinion partly on the words of the valuation form in Sch. 3, which, as he points out, was first introduced in 1899.

The final question therefore which remains to be decided is whether the introduction of this schedule has altered the law in India, and made such property liable to probate duty. In my opinion, it has not. Mr. Westmacott has very properly drawn my attention to the remarks of Lord Lindley in *Commissioner of Stamp Duties v. Stephen* (7) wherein he decided that mere general language in a probate duty statute applicable to the property of deceased persons, and to property subject to their general power of appointment, does not extend to property subject to a special power to appoint amongst a limited class. The intention to include the latter must be clearly expressed. Analogous reasoning, in my judgment, applies to the present case. It is true that the property, over which a testator has a general power of appointment, passes to his executor and not to the appointee: *In re Hoskin's Trusts* (8), *In re Philbrick's Settlement* (9) and *In re Hadley Johnson v. Hadley* (10). But the words in Sch. 3 are conjunctive, namely,

"property of which the deceased died possessed or was entitled to at the time of his death, and

4. (1874) 21 W R 215=12 Beng L R App 21.
5. (1879) 15 W R 457n=6 Beng L R App 138.
6. (1902) 25 Mad 515.
7. (1904) A C 187=78 L J P C 9=20 T L R 68=89 L T 511
8. (1877) 6 Ch D 291=46 L J Ch 817=25 W R 779.
9. (1866) 84 L J Ch 368=11 Jur N S 553=72 L T 261=13 W R 570.
10. (1909) 1 Ch 20=78 L J Ch 254=25 T L R 44=100 L T 54.

which have come, or are likely to come, to my hands."

The latter part of the sentence therefore does not add anything to the former, but, on the contrary, rather limits it. The only evidence of any intention on the part of the legislature to include property subject to a general power of appointment is the negative evidence supplied by Annexure B. In my opinion, some plainer indication of intention is needed before the words of the Act can be so extended. The petition is dismissed with costs.

R.K.

Petition dismissed.

A. I. R. 1933 Calcutta 926

GUHA AND BARTLEY, JJ.

Sanatkumar Mukherji—Appellant.

v.

Narayanchandra Ghose—Respondent.

Appeals Nos. 1152 to 1167 of 1932, Decided on 28th April 1933, from appellate decrees of Special Judge, 24-Parganas, D/- 13th November 1930.

Bengal Tenancy Act (1885), S. 50—Presumption under S. 50 should not be restricted to tenancies forming part of estate permanently settled by permanent settlement of 1793.

The operation of S. 50 is not restricted to tenancies forming part of an estate permanently settled by the Permanent Settlement of the year 1793. The statutory presumption mentioned therein arises in favour of the tenant on proof of payment of rent at a uniform rate for 20 years before institution of suit irrespective of the year in which the lands are permanently settled: 4 C W N 513, *Rel on*; A I R 1923 Cal 298, *Expt.* [P 927 C 2]

Amarendranath Basu and Rupendrakumar Mitra—for Appellant.

Nasim Ali and Forhad Ali—for Respondent.

Judgment.—These appeals are by the defendant landlord in suits instituted by the plaintiffs tenants under the provisions of S. 106, Ben. Ten. Act, for correction of entries regarding the status of the tenants as finally published. These tenants had been recorded as raiyats with occupancy rights, and the case made before the settlement officer in their plaints, filed under S. 105, Ben. Ten. Act, was that they were raiyats at fixed rates. The claim so made in the suits by the plaintiffs tenants was resisted by the defendant landlord, and the question in controversy was whether

the plaintiffs tenants were raiyats at fixed rates or raiyats with occupancy rights. It may be stated, at the very outset, that, for the purpose of these appeals, regard being had to the judgments of the Courts below, it may be taken to be established that the jama-wasil-bakis, filed by the defendant landlord, in the suits on which he based his case that the tenants had merely rights of occupancy and that they were not raiyats at fixed rates, related to the mouza in which the tenancies forming the subject matter of the suits under S. 106, Bengal Tenancy Act, were situate, although it is apparent that the decision arrived at by the Courts below in this behalf is, to say the least, inconclusive in its nature. The Courts below found, on the materials placed before them by the tenants and by the landlord, that the defendant landlord had not succeeded in rebutting the presumption arising in favour of the plaintiffs tenants, under S. 50 (2), Bengal Tenancy Act. It was held that the tenancies in question were all raiyatis held at fixed rates. The Assistant Settlement Officer, who dealt with the cases in the first instance, came to the definite conclusion that the plaintiffs had succeeded in establishing their cases. Their status as recorded in the finally published record of rights seemed to be incorrect and that they should be recorded as raiyats at fixed rates. The plaintiffs' suits were, accordingly, decreed. The learned Special Judge, on appeal, has affirmed the decision arrived at by the Assistant Settlement Officer. He has come to the definite conclusion that the presumption, arising out of the 20 years' payment of the same rent, was entirely un rebutted and, in that view of the case held that the plaintiffs tenants, in the suits under S. 106, Bengal Tenancy Act, had made out their case before the Court, and, agreeing with the decision arrived at by the Assistant Settlement Officer, dismissed the appeals by the landlord defendant in the suits.

In this appeal by the landlord, the first point raised relates to this, that the Court of appeal below ought to have held that the term "Permanent Settlement" mentioned in S. 50, Ben. Ten. Act, meant the "Permanent Settlement of 1793." So far as the question is concerned, it is not very clear to us

that the Special Judge in the Court of appeal below, has held anything to the contrary. The learned Judge has referred to the definition of "Permanent Settlement" contained in the Bengal Tenancy Act, and has not said anything in his judgment, which can lead to the supposition that the Permanent Settlement, mentioned in S. 50, Ben. Ten. Act, was taken by him to be anything but the Permanent Settlement of the year 1793. In our judgment, there is no substance in the first contention urged in support of these appeals.

In the next place, it has been urged before us that the Court of appeal below, having found that the tenancies in question came into existence after 1210 B. S. (1805) and that none of them were in existence at the time of the Permanent Settlement of 1793, ought to have held that the presumption of fixity of rent under S. 50, Ben. Ten. Act, by reason of the payment of the same rent for the last 20 years, had in law been rebutted. The clear implication of the contention thus raised, in support of the appeals, is that S. 50 applied only to tenancies forming part of an estate permanently settled by the Permanent Settlement of the year 1793. As observed by Maclean, C. J., in the case of *Tamasha Bibi v. Ashutosh Dhur* (1), there is no reason for restricting the operation of the section: there are no words in the section which would justify such a restriction. Nor is there any reason for incorporating such words. As has further been observed by Banerjee, J., in the case referred to above, there is nothing in S. 50 to show that the tenancy in question must be situate within an estate which was permanently settled at the time of the Permanent Settlement as defined in S. 3, Ben. Ten. Act, that is, the Permanent Settlement of 1793. The fact of the estate within which the tenancies in question are situate having been permanently settled in 1805 and not in the year 1793, does not make any difference; and in our judgment, the tenants-respondents in these appeals were entitled to the benefit of the presumption under S. 50 (2), Ben. Ten. Act.

The statutory presumption, as mentioned there, arose in their favour on proof of payment of rent at a uniform rate for 20 years before the institution

of suits, and the presumption was of the same nature and character, as if the rent in respect of the tenancies had not been changed from the time of the Permanent Settlement of the year 1793. This presumption has not been rebutted, as found by the Court of appeal below. It may be mentioned that we find nothing in the decision of this Court in the case of *Osman Mendal v. Radhika Mohon Roy* (2), on which reliance was placed on behalf of the appellants, which expressly militates against the view expressed by Maclean, C. J., and Banerjee, J., in the case of *Tamasha Bibi v. Ashutosh Dhor* (1), referred to above, with which we are in entire agreement. It is to be further noticed that, from the judgments of the Courts below, it ap-

2 AIR 1922 Cal 238=67 I C 294=50 Cal 125.

pears to be clear that the defendant landlord, appellant in the appeals before us, failed to bring any materials before the Court which could disprove the fact that the tenants-respondents held the tenancies in question at a uniform rate from the time when they came into existence. In the above view of the case, the conclusion arrived at by the Courts below, holding that the tenancies in question were tenancies held at fixed rates by the tenants plaintiffs in the suits under S. 106, Ben. Ten. Act, must be affirmed. The appeals, accordingly, fail, and are dismissed with costs, on a set of hearing-fee being allowed in all these appeals. We assess the hearing-fee at three gold mohurs.

K.S.

Appeal dismissed.

E N D

